In the Court of Appeal of Alberta

Citation: H2S Solutions Ltd v Tourmaline Oil Corp, 2020 ABCA 201

Date: 20200514
Docket: 1803-0201-AC
Registry: Edmonton

Between:

H2S Solutions Ltd and Protect H2S Safety Ltd

Appellants

– and –

Tourmaline Oil Corp

Respondent

The Court:

The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Elizabeth Hughes
The Honourable Mr. Justice Kevin Feehan

Memorandum of Costs Reserved of The Honourable Madam Justice Schutz

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I. Introduction

[1] Shortly after the appellants served their Notice of Appeal, the respondent Tourmaline Oil Corp served its formal offer to forego appeal costs if the appellants discontinued their appeal. The appellants did not accept Tourmaline's offer and did not discontinue their appeal.

[2] In ***H2S Solutions Ltd v Tourmaline Oil Corp*****,** 2019 ABCA 373, this Court dismissed the appellants' appeal from summary dismissal of their claim against Tourmaline for interest on overdue accounts; in the result on appeal, Tourmaline was wholly successful.

[3] It contends, therefore, that rules 4.29 and 14.59 of the *Alberta Rules of Court,* Alta Reg 124/2010, ought to be applied. These rules provide:

> **Costs consequences of formal offer to settle**
>
> **4.29(1)** Subject to subrule (4), if a plaintiff makes a formal offer to settle that is not accepted and subsequently obtains a judgment or order in the action that is equal to or more favourable to the plaintiff than the offer, the plaintiff is entitled to double the costs to which the plaintiff would otherwise have been entitled under rule 10.31(1)(a) [Court-ordered costs award] or 10.32 [Costs in a class proceeding] for all steps taken in relation to the action or claim after service of the offer, excluding disbursements.
>
> **(2)** Subject to subrule (4), if a defendant makes a formal offer to settle that is not accepted and a judgment or order in the action is made that is equal to or more favourable to the defendant than the offer, the defendant is entitled to costs for all steps taken in the action in relation to the action or claim after service of the offer.
>
> **(3)** A defendant is entitled to double the costs provided for in subrule (2), excluding disbursements, if
>
> (a) subrule (2) applies, and
>
> (b) the action or claim that is the subject of the formal offer to settle is dismissed.
>
> **(4)** This rule does not apply
>
> (a) if costs are awarded under rule 10.31(1)(b) [Court-ordered costs award],

> (b) in the case of a formal offer to settle made with respect to an application for judgment after a summary trial, if the offer is made less than 10 days before the date scheduled to hear the application for judgment,
>
> (c) in the case of a formal offer to settle made with respect to any other matter, if the offer is made less than 10 days before the date scheduled for the trial to start,
>
> (d) in the case of a formal offer to settle that is withdrawn in accordance with rule 4.24(4) [Formal offers to settle], or
>
> (e) if in special circumstances the Court orders that this rule is not to apply.

[4] Rule 14.59 incorporates by reference into appeal proceedings several rules, in particular rule 4.29:

> **Formal offers to settle**
>
> **14.59(1)** No later than 10 days before an appeal is scheduled to be heard, a party may serve on the party to whom the offer is made a formal offer to settle the appeal or any part of the appeal in accordance with Part 4 [Managing Litigation], Division 5 [Settlement Using Court Process].
>
> **(2)** A valid formal offer to settle an appeal may be accepted in accordance with rule 4.25 [Acceptance of formal offer to settle].
>
> **(3)** Unless a valid formal offer to settle an appeal is withdrawn under rule 4.24(4) [Formal offers to settle], the valid formal offer to settle an appeal remains open for acceptance until the earlier of
>
> > (a) the expiry of 2 months after the date of the offer or any longer period specified in the offer, and
> >
> > (b) the start of the oral hearing of the appeal.
>
> **(4)** Where a formal offer to settle an appeal is made, costs of the appeal must be awarded in accordance with rule 4.29 [Costs consequences of formal offer to settle].

[5] The purpose of these rules is to encourage settlement.

[6] Despite the mandatory wording of sub-rule 14.59(4), we conclude that Tourmaline is only entitled to tariff costs under single Column 3. First, as will be seen by the following chronology, during the entire currency of its formal offer, Tourmaline incurred no costs claimable in respect of Items 18-22, Division 2 of Schedule C's tariff. Second, even assuming tariff costs had been incurred during the currency of its offer, nonetheless, Tourmaline's offer did not comprise an identifiable and sufficient compromise beyond *de minimus*. Accordingly, the double costs rules were not triggered because Tourmaline's offer was not a genuine offer as described by this judgment, at the time it was served and remained open for acceptance: ***Allen (Next Friend of) v University Hospitals Board***, 2006 ABCA 101 at para 13 [***Allen***].

II. Relevant Chronology

[7] For costs purposes, the relevant chronology is:

(a) July 20, 2018: appellants appeal summary disposition of their interest claim;

(b) August 9, 2018: Tourmaline serves new formal offer;

(c) October 9, 2018: Tourmaline's formal offer expires;

(d) January 15, 2019: appellants file factum and authorities;

(e) March 15, 2019: Tourmaline files response appeal materials;

(f) October 2, 2019: appeal heard;

(g) October 8, 2019: appeal dismissed.

[8] The content of Tourmaline's August 9, 2018 offer was as follows:

> What the offer is:
>
> 1. The appellants will discontinue Appeal No. 1803-0201-AC by filing a Discontinuance of Appeal with the Clerk of the Court of Appeal of Alberta.
>
> 2. The respondent will not seek its costs in relation to these appeal proceedings.
>
> Interest:
>
> 1. Interest is not applicable to this offer.
>
> Costs:

1. No costs will be sought on this offer.

[9] In support of Tourmaline's contention that it is entitled to "double costs", it says it recognized early that the appellants' appeal would likely be dismissed and, further, had the formal offer been accepted, significant costs necessarily incurred preparing and responding to the appeal would have been avoided. Tourmaline points to rule 14.88, which provides that a successful party is presumptively entitled to costs, and also to rules 4.29 and 14.59, set out above. It submits that since it received a judgment "equal to or more favourable" than its formal offer, this Court ought to apply the doubling effect to its costs which, based on the appellants' invoices, would be under column 3 of Schedule C. If doubled, fees would total approximately $16,000.

[10] As invited, Tourmaline provided written submissions on the double costs question. The appellants elected not to provide submissions, in respect of either entitlement or quantum.

III. Analysis

[11] As the successful party on appeal, Tourmaline is presumptively entitled to costs on Column 3, the same tariff column awarded following the judgment appealed from: see rule 14.88(3). The sole question for determination then, is whether Tourmaline is entitled to application of the double costs rules.

[12] On its face, rule 14.59 provides that when a party makes a formal offer to settle an appeal and obtains a judgment equal to or more favourable than the offer, appeal costs must be awarded on double the scale of fees under the applicable column of Schedule C (thus the expression "double costs"). The rule applies unless there are "special circumstances", and the court exercises its discretion not to award double costs: rule 4.29(4)(e). While earlier iterations of the applicable rules contained slightly different wording, the result was the same.

[13] This Court has mandated that an offer must be a "genuine offer" of a sufficient compromise *at the time it was served and remained open for acceptance*: ***Allen*** at para 13, citing ***Petro-Canada Products Inc v Dresser-Rand Canada, Inc***, 2004 ABCA 282 [***Petro-Canada***].

[14] In this case, Tourmaline's offer remained open for acceptance between August 9, 2018 (service) and October 9, 2018 (expiry, as stipulated in rule 14.59). The appellants did not file their factum until after Tourmaline's offer expired, and no interlocutory proceedings preceded the oral hearing. In the result, Tourmaline incurred no claimable tariff costs during the currency of its offer; therefore, during the time Tourmaline's offer remained open, it incurred no costs that could be doubled. Additionally, and in any event, Tourmaline's offer did not demonstrate an identifiable and sufficient compromise or, put another way, irrespective of how long it may have been held open for acceptance, it was an offer of nothing – a point that will be amplified below.

[15] Before we do so, however, it is helpful to briefly survey reported cases from this Court in which double costs have been awarded, and cases where double costs have not been awarded, in an attempt to identify what factors tend to drive the outcome. It must be said, however, that earlier cases reveal what seems to be a confounding divergence of opinion as to what constitutes a "genuine offer", that is, one "reasonable and realistic in all the circumstances", per ***Allen*** at para 14. We have taken this opportunity to clarify the law.

[16] This Court awarded double costs in the following cases: ***Impact Painting Ltd v Man-Shield (Alta) Construction Inc***, 2019 ABCA 213 [***Impact Painting***]; ***Carroll v ATCO Electric Ltd***, 2018 ABCA 186 [***Carroll***]; ***Baim v North Country Catering Ltd,*** 2017 ABCA 332 [***Baim***]; ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 141 [***Pillar Resource***]; ***RIC New Brunswick Inc v Telecommunications Research Laboratories***, 2011 ABCA 10 [***RIC New Brunswick***]; ***Conway v Zinkhofer***, 2006 ABCA 186 [***Conway***]; ***Fott v Fott***, 2003 ABCA 236 [***Fott***]; ***Budget Rent-A-Car of Edmonton Ltd v Security National Insurance Co***, 2001 ABCA 71 [***Budget Rent-A-Car***]; ***Jones v Trans America Life Insurance Co of Canada***, 1996 ABCA 165 [***Jones***].

[17] This Court declined to award double costs in the following cases: ***Terrigno Investments Inc v Farrell***, 2019 ABCA 426 [***Terrigno***]; ***Bruen v University of Calgary,*** 2019 ABCA 275 [***Bruen***]; ***Winners Equities Inc v Zaborski,*** 2009 ABCA 50 [***Winners***]; ***Allen***; ***Resortport Development Corporation Ltd v Bonnycastle***, 2005 ABCA 76 [***Resortport Development***]; ***Petro-Canada***; ***Enron Canada Corp v National-Oilwell Canada Ltd,*** 2001 ABCA 177 [***Enron***].

Cases awarding double costs

[18] Generally, these cases recognize that the desirability of consistent and predictable applications of the enhanced costs rules is important because these rules meaningfully reinforce the importance of encouraging settlement, prevent unnecessary litigation, and ensure a party accepts greater consequences if it gambles and loses: ***Jones*** at para 9.

[19] These cases also tend to afford considerable weight to the concern that offers to settle would be effectively neutralized if this Court declined to enforce costs consequences: ***Pillar Resource*** at para 15; ***Baim*** at para 12. For example, emphasizing the importance of formal offers as a litigation tool that affects choices, was a key factor in ***Pillar Resource*** and ***Baim***. In ***Pillar Resource***, at para 15, this Court expressed concern that offers to settle "would become meaningless if courts decline to apply the cost consequences intended to flow from successful offers". In ***Baim*** at para 12, the Court concluded that formal offers "would be effectively neutralized" if this Court did not apply the costs consequences.

[20] Further, in most cases where the double costs rule was applied, at least one of the following factors was present:

(a) The timing and circumstances of the offer suggested it was not made simply to trigger costs consequences: ***RIC New Brunswick***; ***Budget Rent-A-Car***; ***Baim***.

(b) The party making the offer had a relatively strong position on appeal: ***Budget Rent-A-Car***.

(c) The appeal required extensive preparation or a considerable amount was at stake: ***RIC New Brunswick***.

(d) The offer was to forego significant costs already incurred, or costs were accumulated *after* the notice of appeal was filed but before the offer expired. For example, although the offer was made early in ***Conway***, it was neither time-limited nor withdrawn before costs accumulated prior to the oral hearing. In ***Fott***, significant pre-hearing interlocutory proceedings could have been avoided if the offer had been accepted. In ***Baim***, the offer included, *inter alia*, a waiver of $11,000 in costs already awarded in the offeror's favour by the court below, and that matters not dealt with in the summary proceedings would remain triable issues.

(e) The party making the offer agreed to forego a cross-appeal: ***Baim***. In ***Budget Rent-A-Car,*** the respondent offered to discontinue the appeal in exchange for the sum of $1.00 and forego its cross-appeal; since the cross-appeal was "far from frivolous, an offer to abandon it was a valuable concession": at para 10.

[21] A unifying theme in each of these cases is that the Court was able to readily recognize the existence of an identifiable and sufficient compromise embedded in the offer, which compromise sometimes was contingent on what transpired during the time within which the offer actually remained open for acceptance, and sometimes was not.

Cases not awarding double costs

[22] Cases in which the Court did not apply the double costs rule, despite the existence of a formal offer, appear to have emphasized the following factors:

(a) The formalistic "think again" offer, where the *only* options were to continue with or abandon the appeal, will rarely be considered genuine: ***Terrigno; Bruen***;

(b) Parties with a *bona fide* perception of the law or facts contrary to that of the other party, should not be discouraged from pursuing the matter: ***Allen*** at para 16; and

(c) The offer was made before the parties incurred substantial costs: ***Winners; ResortPort.***

[23] In ***Terrigno***, for example, an offer to abandon an appeal without costs made after the respondent's factum was filed did not attract double costs because the Court concluded, "[f]ormalistic offers merely designed to double costs are discouraged. There is no real prospect of this type of 'think again' offer being accepted, and they would rarely result in double costs": at para 9. Similarly, in ***Bruen,*** the respondent made an informal offer on the eve of oral argument that the appellant discontinue the appeal in exchange for the sum of $1.00. The Court concluded the offer was "not sufficiently realistic and reasonable to have any impact on costs": at para 10. The Court distinguished ***Budget Rent-a-Car***, where there was "a substantial element of compromise" because the respondent offered to abandon a meritorious cross-appeal: at para 9. Similarly, in ***Enron,*** the Court noted that the only options extended to the appellants were to proceed with the appeal or not, and there was not even an offer to forego post-judgment interest: at para 13.

[24] The timing of the offer was an important factor in other cases that declined to award double costs. In ***Resortport Development***, double costs were not awarded because the offer was made shortly after the parties reached an agreement as to the content and timing of the appeal, and minimal costs had been incurred: at para 5. In ***Winners,*** the respondent's offer to discontinue the appeal without costs was made at the outset of the appeal before costs were incurred: at para 20. In ***Petro-Canada,*** the offer was made eight days after the notice of appeal was filed, before the parties agreed on the contents of the appeal books, and expired two days before the appeal books were served. The Court concluded the respondent was not entitled to any significant costs at the time of the offer, and that "[s]uch an offer, at the early stages of an appeal, does little to promote compromise or encourage settlement between the parties": at para 4.

[25] Discerning a unifying theme is difficult.

[26] This is the opportunity to simplify and clarify the factors relevant to this Court for a principled application of the double costs rules on appeal.

Factors relevant to the principled application of the double costs rules on appeal

[27] The double costs rules are aimed at encouraging timely and efficient resolution of disputes, and preventing needless appeals. The rules encourage parties to resolve matters by offering identifiable and sufficient compromises to settle litigation, and to subject litigants who reject identifiable and sufficient compromises to predictable, more severe costs consequences.

[28] The primary factors bearing upon the question whether the double costs rule (a) has been triggered and (b) if so, ought to be applied, are the following, recognizing they do not represent a closed list.

i) *timing of the offer*

[29] In some circumstances, the timing of the offer is an important consideration.

[30] Pursuant to Schedule C, item 19(1), typically a respondent does not incur tariff appeal costs until its factum preparation is underway. But, if an offer is made *before* a respondent incurs costs but does not expire until *after* costs have been incurred, there is no principled basis for this Court to refuse awarding double costs to the successful offeror for all claimable tariff items. The reason for this is that the offeree had the option of accepting the offer before any costs were incurred by the offeror, but did not. What began as an offer revealing no identifiable and sufficient compromise becomes, over the course of its currency, a genuine offer of compromise to forego costs accumulated.

[31] Further, the rules provide for acceptance of an offer "until the earlier of the expiry of 2 months after the date of the offer or any longer period specified in the offer, and the start of the oral hearing of the appeal"; accordingly, the discrete specifics of what costs accumulated during the currency of the unaccepted offer is often an important factor.

[32] Of course, in addition to timing, the content of the offer must be considered.

ii) *content of the offer*

[33] Presenting something that amounts to a no-risk, "think again" tactic where the offeror, in effect, is offering nothing does not trigger the double costs rules because it contains no identifiable and sufficient compromise. In essence, not qualifying as an offer, it does not trigger the mandatory doubling effect of the rules.

iii) *beyond de minimus*

[34] An identifiable offer is one that is beyond *de minimus*. For example, an offer to pay $1.00, without more, is *de minimus*. But, an offer to forego a previous award of costs, or to agree to settle part of the outstanding litigation, or to discount an extant judgment, would be identifiable and sufficient compromises. The content of offers that would trigger the double costs rules is limited only by the imagination of litigants.

[35] To be clear, however, nothing more will be required to trigger the double costs rules than that the Court is able to readily identify the element(s) of compromise contained in a pre-hearing offer, and nothing more will be needed for the double costs rules to be applied, subject only to "special circumstances", discussed below.

[36] This Court will not engage in a hindsight assessment of the relative merits of the live issues, as this type of exercise squanders finite judicial resources. This Court will not entertain protests that the double costs rules ought not to apply because the offer was only made for "tactical" advantage (whatever that actually means). Nor will this Court undertake a search for the elusive compromise that is not immediately obvious. It is up to the offeror, not the Court, to ensure that the offer it makes is plain on its face as to what the offeror is prepared to give up, in exchange for concluding the appeal by way of a discontinuance.

[37] To conclude, provided the offer is made no later than 10 days before the appeal is scheduled to be heard, and is not withdrawn, and provided it contains an identifiable and sufficient compromise, the double costs rule will apply to all tariff appeal steps claimable by the offeror.

[38] This conclusion is subject only to the operation of the rule relating to "special circumstances".

iv) *"special circumstances"*

[39] This Court possesses a residual and overarching discretion to disallow double costs in certain circumstances, even where the rules are triggered, by reason of "special circumstances": rule 4.29(4)(e). Rule 4.29(4)(e) is an exception, to be employed by the Court where double costs are not justified *despite* the offeror having made an offer that otherwise would trigger the rules; see, for example, see for example, Stevenson & Côté, *Alberta Civil Procedure Handbook*, vol 1 (Edmonton: Juriliber 2019) at 4-54 to 4-55.

Application to this case

[40] Tourmaline failed to establish that it incurred any tariff costs within the time period in which its offer remained open.

[41] Moreover, Tourmaline did not make an identifiable and sufficient compromise; in effect, Tourmaline offered nothing to the appellants but to "think again".

[42] For both reasons, the double costs rules were not triggered.

IV. Conclusion

[43] Tourmaline is entitled to one set of fees on single column 3 of Schedule C, plus reasonable disbursements and GST if applicable, to be assessed failing agreement.

Written submissions filed by the respondent November 19, 2019

Reasons filed at Edmonton Alberta
this 14th day of May, 2020

Schutz J.A.

I concur:

Authorized to sign for: Hughes, J.A.

I concur:

Feehan J.A.

Appearances:

S.M. Boulet
for the Appellants

M. Deyholos
J. Luu
for the Respondent