CITATION: Trillium Motor World Ltd. v. General Motors of Canada Limited, 2016 ONSC 1725
COURT FILE NO.: CV-10-397096CP
DATE: 20160322

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TRILLIUM MOTOR WORLD LTD., Plaintiff

AND:

GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP, Defendants

AND:

GENERAL MOTORS OF CANADA LIMITED, Defendant, Plaintiff by Counterclaim

AND:

TRILLIUM MOTOR WORLD LTD. and THOMAS L. HURDMAN, Plaintiff, Defendants to the Counterclaim

BEFORE: Mr. Justice T. McEwen

COUNSEL: *Alan D.J. Dick, Andy Seretis, Bryan Finlay, Q.C., Marie-Andrée Vermette,* for the Plaintiffs, Defendants to the Counterclaim

David S. Morritt, Kent E. Thomson, Sarah Weingarten, for the Defendant, Plaintiff by Counterclaim

Peter H. Griffin, Rebecca Jones, for the Defendant Cassels Brock & Blackwell LLP

HEARD: January 13, 2016

COSTS ENDORSEMENT

[1] On July 8, 2015, after a 41-day trial, I dismissed Trillium's claim against GMCL and GMCL's counterclaim. I awarded judgment to Trillium against Cassels for $45 million plus pre-judgment interest.

[2] The parties have been unable to agree on the issue of costs and I have now received

written and oral submissions from the parties.[1] I have also reviewed the relevant provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194; and the applicable case law.

[3] Section 131(1) of the *Courts of Justice Act* provides as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent costs shall be paid.

[4] Rule 57.01 of the *Rules of Civil Procedure* identifies the factors a court may consider when exercising its discretion to award costs:

> (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
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> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
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> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
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> (f) whether any step in the proceeding was,
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> (i) improper, vexatious or unnecessary, or
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> (ii) taken through negligence, mistake or excessive caution;
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> (g) a party's denial of or refusal to admit anything that should have been

[1] There was no mention of Offers to Settle by any of the parties.

admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

[5] As noted by the Divisional Court in *Anderson v. St. Jude Medical Inc.* (2006) 264 D.L.R. (4th) 557:

- The discretion of the Court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in Rule 57.01(1): see, for example, *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) ("*Boucher*"); *Moon v. Sher* (2004), 246 D.L.R. (4th) 440 (Ont. C.A.) ("*Moon*"); and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.).

- A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: see *Boucher*. The quantum should reflect an amount the Court considers to be fair and reasonable, rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (C.A.), at para. 4.

- The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: see Rule 57.01(1)(0.b).

- The Court should seek to avoid inconsistency with comparable awards in other cases. As noted in *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249: "Like cases, [if they can be found], should conclude with like substantive results."

- The Court should seek to balance the indemnity principle with the fundamental objective of access to justice: see *Boucher*.

- The Court of Appeal has identified the overriding principle to be that the amount of costs awarded be reasonable in the circumstances. In *Clarington (Municipality) v. Blue Circle Canada Inc.* (2009), 100 O.R. (3d) 66 (C.A.), Epstein J.A. stated at para. 52:

> As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then

> the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In Boucher, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

Trillium's Claim Against Cassels

[6] As noted above, Trillium was successful in its claim against Cassels and was awarded the amount of $45 million. Cassels does not dispute that Trillium was entitled to its partial indemnity costs but raises a number of concerns.

[7] Trillium pursues the costs of two motions only against Cassels, since those motions did not involve GMCL. With respect to the remainder of the action, Trillium submits that it should receive 50 percent of its partial indemnity costs from Cassels which reflects an even split between the costs incurred in pursuing its separate claims against Cassels and GMCL.

[8] With respect to the refusals and production motion, I would allow Trillium the amount claimed for the motion in the amount of $73,355.00.

[9] Cassels takes the position that since it only incurred partial indemnity costs in the amount of approximately $14,000.00, the amount claimed by Trillium is excessive.

[10] Trillium submits that it is reasonable for its costs to be much higher than Cassels, since, initially, the Notice of Motion raised several issues which sought much broader relief than the few issues that were eventually argued at the motion. Most of the relief sought was produced or settled prior to the motion being heard. As a result, it is not surprising that Trillium incurred greater legal expenses. Furthermore, Cassels had to retain another firm to represent it with respect to the Canada retainer, which would have lessened the amount that counsel in this action had to devote to the motion. Last, the motion involved important issues that were of significant importance to Trillium.

[11] In all of these circumstances, it is not surprising that the claimed legal expense was incurred and this could not have been unexpected by Cassels. It is reasonable that Trillium receive the amount sought: $73,355.00.

[12] Insofar as the second motion is concerned the amount sought of $10,255.00 is reasonable and was not opposed by Cassels.

[13] With respect to the remaining costs of the action, Trillium submits that, as noted, it should receive 50 percent of its costs from Cassels.

[14] Trillium submits that this is a fair and reasonable approach and accords with the reality that, while it pursued separate causes of action against Cassels and GMCL, significant aspects of the case – including the central issue as to whether GMCL would have negotiated with the dealers – were common to both actions.

[15] Trillium further submits that this type of analysis is in keeping with the spirit of Rule 57.01(7), as it represents "the simplest, least expensive and most expeditious process for fixing costs…"

[16] In keeping with this formula, Trillium seeks its costs of the action against Cassels be fixed on a partial indemnity scale in the amount of $3,062,194.64 ($1,997,336.25 for fees plus disbursements and HST), which represents 50 percent of the total costs incurred.

[17] Cassels submits that Trillium is entitled to $2 million in costs, inclusive of disbursements and HST, but did not provide any breakdown.

[18] I will begin with the issue of fees. Cassels does not take issue with the hourly rates claimed by Trillium but does take issue with a 50/50 apportionment.

[19] Cassels submits that the analysis is flawed and that less than 50 percent of the fees incurred ought to be allocated to Cassels for the following reasons:

a) the case against GMCL consumed more time and resources than the claim against Cassels;

b) the amount awarded, $45 million, was a fraction of the damages sought by Trillium;

c) Trillium's claim on behalf of the "call dealers" was unsuccessful; and,

d) Trillium retained two separate law firms, so there was overlap and the overall docketed time is simply too high.

[20] For the reasons below, I award Trillium 40 percent of its total fees.

[21] I agree with Trillium that a percentage split between the two actions is a reasonable approach. To do otherwise would involve a forensic type audit which would result in an assessment style exercise of assigning individual docket entries to each claim. Such a solution would be very difficult, if not impossible.

[22] On the other hand, I accept Cassels' submission that the claim against GMCL took more time at trial than the claim against Cassels. That being said, however, I do not accept that there was much of a difference in this regard given the factual overlap and similar consideration concerning the issues of damages.

[23] I do not accept Cassels' submissions that costs ought to be reduced since Trillium was awarded an amount that was much smaller than the $425 million claimed by Trillium in closing argument. The $45 million award is still a significant one. The case law relied upon by Cassels, particularly the Court of Appeal's decision in *Eastern Power Ltd. v. Ontario Electricity*

Financial Corp. [2012] O.J. No. 2414, is distinguishable. Specifically, in *Eastern Power*, the matter involved six discrete causes of action and only one was successful. In this case, essentially only one claim was advanced.

[24] Further, Cassels submits that since the call dealers' claim was unsuccessful there should be a reduction. I do not agree. As set out in my Reasons on the Motion to Settle the Terms of the Judgment, the claim of the call dealers took virtually no time at trial and the claim of the dealers that retained Cassels were successful.

[25] Lastly, Cassels submits that I should reduce Trillium's fees because it used two law firms. I disagree. Trillium advanced two distinct claims against GMCL and Cassels. Sotos LLP handled the GMCL claim while WeirFoulds LLP dealt with the Cassels claim. Even though the actions involved some common issues, I cannot conclude that there was any meaningful duplication. In my view, even if only one firm were used, there is little doubt that the work would have been divided up in essentially the same way it was when two firms are retained. The use of two firms, as opposed to more lawyers from one firm, matters little if at all.

[26] Based on the above, it is reasonable for Trillium to receive 40 percent of its partial indemnity fees from Cassels. Additionally, this amount compares favourably to Cassels' own partial indemnity fees in the amount of, roughly, $1,400,000.00. Furthermore, as is often the case for plaintiffs in civil litigation, it is not surprising that Trillium's account would be somewhat more than Cassels.

[27] With respect to the issue of disbursements, Cassels does not quarrel with the disbursements incurred by Trillium, with the exception of the experts' fees.

[28] This dispute involves the expert reports of Sandra Rosch, Margot Schonholtz and Gerald Kandestin.

[29] These experts submitted the following accounts:

Rosch - $273,318.05

Schonholtz - $806,952.16

Kandestin - $197,649.57

[30] Cassels submits that Trillium should not be paid any of these expert fees since I rejected the evidence of these experts. In this regard, Cassel relies upon the decision of Broad J. in *Rimmer v. Lahey*, [2013] O.J. No. 5712, wherein he held that he would not allow any amount for expert fees where the testimony of the plaintiffs' experts were not necessary or applicable to the issue upon which the plaintiffs were successful. Cassels relies upon two decisions from other provinces in which courts disallowed costs for experts that were not relied upon in the ultimate

decision.[2]

[31] I do not accept this submission. As can be seen from my Reasons (see paragraphs 565, 566 and 587), I found these witnesses to be credible. Further, even though I came to the conclusion that I was in a better position to deal with the issues commented upon by these experts, their testimony was helpful in marshalling the evidence and assisting me with my deliberations.

[32] The issues upon which all three experts opined were important and complicated. I appreciated hearing from them as well as the experts called by Cassels and GMCL. I would not, therefore, disallow or reduce the amounts of those reports on that basis.

[33] Insofar as Mr. Kandestin is concerned, I did note in my Reasons that I had difficulty with his idea of a second, unpopulated Steering Committee, but overall I found his testimony to be helpful.

[34] Insofar as Schonholtz's fees are concerned, it is fair to say that the amount claimed is very high. Of interest, however, is the fact that the responding expert that was retained by GMCL, Robert Harlang, delivered a report at a cost of $880,930.00. Given the similar cost of the reports and the fact that both Schonholtz and Harlang conducted complicated analyses and provided extensive evidence at trial, I have come to the conclusion that the Schonholtz account is not unreasonable and should not have been beyond the contemplation of Cassels in a significant, complicated case.

[35] Additionally, Rosch's account compares favourably to GMCL's responding expert, John McKenna, who charged $370,858.77.

[36] For these reasons, I do not have difficulty with the amounts claimed with respect to the fees incurred by Rosch, Kandestin and Schonholtz.

[37] Last, with respect to the three experts' fees, I would allow them at a rate of 50 percent. I realize that this runs contrary to my aforementioned apportionment of 40/60 (as between the Cassels and GMCL claims), but, in my view, the disbursements ought to be treated differently, including the experts' reports, as they were equally important to either action.

[38] For the reasons above, I award Trillium the following costs:

1) 40 percent of its partial indemnity fees;

2) 50 percent of its disbursements, including experts' fees;

3) motion costs in the amount of $83,610.00.

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[2] *Shibley v. Harris,* [1995] B.C.J. No. 2069; *Rushton v. Hofer* [1999] A.J. No. 380

[44] Based on the above, I have calculated the costs as follows:

Fees		$1,805,963.50
HST (13 percent)		$234,775.25
Disbursements (including HST)		$805,204.68
	TOTAL:	$2,845,943.43

Trillium's Claim Against GMCL

[45] GMCL was entirely successful in defending the action and is entitled to its costs. Trillium, similarly, was entirely successful in defending the counterclaim and is entitled to its costs of the counterclaim.

[46] I will first deal with the issue of GMCL's costs of defending the main action. Generally, Trillium does not dispute that GMCL is entitled to its partial indemnity costs. GMCL, however, seeks costs on a substantial indemnity basis.

[47] GMCL submits that Trillium, a sophisticated and experienced business represented by experienced litigation counsel, advanced serious allegations of misconduct against GMCL and its senior executives. These allegations contained those of dishonesty, misrepresentation and bad faith. GMCL argues that Trillium impugned the business reputation of GMCL.

[48] Since GMCL was successful in defending the claim, it therefore submits that substantial indemnity costs are warranted. GMCL relies upon Trillium's pleadings, opening and closing submissions, as well as Trillium's press releases.

[49] I do not agree that GMCL is entitled to substantial indemnity costs.

[50] In analyzing this issue, I had regard to the pleadings, the evidence and Trillium's submissions. I did not have regard to Trillium's press releases. In my view, if GMCL has a problem with the nature of these releases, it should be dealt with in another forum.

[51] In support of its submissions, GMCL relies upon a number of cases in which courts have awarded substantial indemnity costs where plaintiffs have made unfounded allegations of deceit, dishonesty, bad faith and/or fraud.[3] In light of these authorities, GMCL submits that it is entitled to substantial indemnity costs given the allegations made against it which were dismissed.

[52] Trillium, on the other hand, submits that the cases relied upon by GMCL are

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[3] *McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.*, [2005] O.J. No. 179 (S.C.); *Lewis v. Cantertrot Investments Ltd.*, 2010 ONSC 5679 (QL); *Sagan v. Dominion of Canada General Insurance Co.*, 2014 ONSC 2245 (QL); *Cushnaghan v. Kwan*, 2015 ONSC 6000; *1175777 Ontario Ltd. v. Magna International Inc.*, [2001] O.J. No. 1621 (C.A.); *Greenlight Capital Inc. v. Stronach*, [2007] O.J. No. 1877 (S.C.).

distinguishable, particularly given the fact that there were no allegations of fraud made against GMCL, nor were any claims made against its employees.

[53] Trillium relies on a number of decisions in support of its position that partial indemnity costs should be awarded. It particularly relies upon two cases. First, the decision of D. Brown J. (as he then was) in *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, [2012] O.J. No. 129 (S.C.), wherein he held:

> [5] The BRRC Defendants seek substantial indemnity costs for the entire action on the basis that the plaintiff made extremely serious allegations against the defendants which were not proven at trial and that findings of fact were made against the plaintiff and its principals. The GR Clients adopted those submissions. While unfounded allegations of improper conduct which are seriously prejudicial to the character or reputation of a party may justify an award of substantial indemnity costs in an appropriate case, in my view the nature of the plaintiff's allegations did not rise to that level. The plaintiff argued that the defendants had breached a contractual right of first refusal, as well as disclosure and good faith performance obligations under the *Arthur Wishart Act*. No allegations of fraud were made against the defendants, and at trial the plaintiff was not prepared to go so far as to contend that the July 6 Letter had been concocted.
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> [6] The BRRC Defendants and the GR Clients also point to many findings of fact which were made against the plaintiff and its principals, including adverse findings of credibility, and argue that substantial indemnity costs should result. But adverse findings of fact and credibility quite often are made against the losing party in standard-fare commercial litigation, yet substantial indemnity costs normally do not arise. I reject the contention implicit in the submission of the BRRC Defendants that if a court does not accept the evidence of a party, then substantial indemnity costs should follow. Such logic would see substantial indemnity costs become the norm, not the exception as they are treated under our law. Something more is required to push costs to an elevated level, and I do not see that "something more" in this case. The litigation was hard-fought and the commercial allegations asserted by the plaintiff were not proven, but such circumstances point only to an award of partial indemnity costs to the successful defendants, not substantial indemnity.
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> ...
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> [8] Although Rule 49.10(2) of the *Rules of Civil Procedure* does not speak in terms of awards of substantial indemnity costs to defendants who "better" their offers to settle when the plaintiff's action is dismissed, the BRRC Defendants submit that the case law entitles a court to make such a discretionary award. Yes and no. The decision of the Court of Appeal in *St. Elizabeth Home Society v. Hamilton (City)* re-iterated that substantial indemnity costs are only awarded in "rare and exceptional cases", and that it would be an error for a trial judge to rely on offers to settle to award successful defendants substantial indemnity costs

> absent conduct by a plaintiff which supported a finding of reprehensible conduct. As I stated above, I do not regard the conduct of the plaintiff as egregious or reprehensible, therefore I see no basis for an award of substantial indemnity costs in favour of the defendants.

[54] Trillium also puts emphasis on the Supreme Court of Canada's decision in *Hamilton v. Open Window Bakery Limited,* 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 26, wherein the Court stated:

> In *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at para. 219.

[55] The allegations made by Trillium against GMCL were, no doubt, significant and called GMCL's credibility into question. I am not, however, of the opinion that the allegations were reprehensible and outrageous. It also cannot be said that Trillium's counsel behaved improperly at trial in any way. Further, in my view, the trial did not take any longer to complete by virtue of the way the allegations were characterized. Notwithstanding the nature of the allegations against GMCL, the vast majority of the trial time was spent determining the answers to the common issues, time which would have been spent anyway, notwithstanding how the allegations were framed.

[56] Additionally, the facts in this case were unique, complex and involved a significant event between GMCL and its dealers during the global financial crisis. Notwithstanding the fact that the claim was dismissed against GMCL, I did make findings[4] that the information that was provided to the dealers by GMCL was, at times, non-specific and less than frank.

[57] It was therefore not reprehensible, scandalous or outrageous for Trillium to frame the accusations as it did, although they were ultimately not accepted at trial and the claim was dismissed. When viewed in totality, Trillium did not engage in behavior that is deserving of sanction. GMCL is therefore entitled to its costs on a partial indemnity basis.

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[4] See paras. 66, 67, 68, 90 and 180

[58] With respect to GMCL's costs, I will first deal with disbursements. I accept GMCL's submission that it should receive the amount of disbursements incurred of $1,466,940.50 plus HST as applicable.

[59] The most significant disbursements in this regard involve the costs of the reports of Harlang ($880,930.00) and McKenna ($370,858.77). These compare favourably with Trillium's own experts who testified in the same areas: i.e., Schonholtz ($806,952.16) and Rosch ($273,318.05).

[60] Trillium generally submits that, since GMCL's total disbursements are about $250,000 greater than Trillium's, the amount should be reduced by that amount without providing any specificity. I do not agree with Trillium's general submission in this regard. Trillium did not point to any specific deficiencies in the disbursement claim. Further, I do not accept Trillium's argument that GMCL's disbursements do not reflect the reasonable expectations of the plaintiff given the modest difference between those disbursements incurred by GMCL and those by Trillium.

[61] The second dispute between the parties involves hourly rates for fees.

[62] Trillium takes issue with the partial indemnity rates claimed by GMCL. Trillium submits that the rates are in excess of generally accepted partial indemnity rates, and above the accepted rates set out in the guideline adopted by the Costs Subcommittee of the Civil Rules Committee.

[63] In this regard, Trillium submits that the rates of the senior most lawyers, Messrs. Morritt and Thomson, should be capped at $400.00, which is the rate claimed by Trillium's senior most lawyers against Cassels and accepted by Cassels in its own Bill of Costs.

[64] I do not agree that rates need to be capped at $400.00 per hour. The actual rates charged by Messrs. Morritt and Thomson are in keeping with typical rates charged by senior, experienced commercial litigators. Furthermore, the cap urged upon me by Trillium has been rejected in a number of cases involving significant commercial litigation, including the decision of Newbould J. in *Stetson Oil & Gas Limited v. Stifel Nicolaus Canada Inc.*, [2013] O.J. No. 3702 (S.C.). The Court of Appeal also held in *Inter-Leasing, Inc. v. Ontario (Revenue)*, 2014 ONCA 683 (CanLII) that the cost rates previously set out in the *Rules of Civil Procedure* are now out of date.

[65] Based on the foregoing, the partial indemnity claimed on behalf of Messrs. Morritt and Thomson of $465.00 per hour is reasonable. This is particularly so when one considers the complicated nature of this litigation where the initial gap between the parties was near $1 billion, and in which the plaintiffs sought damages at trial in the amount of $425 million. With respect to the remainder of GMCL's more junior lawyers, I would accept the partial indemnity rates based on my comments above. I do not deny that they are at the high end of the scale, but, once again, given the context of this litigation, they are not unreasonable.

[66] I would therefore not make any adjustments with respect to the hourly rates sought. It should not have been a surprise to Trillium that the lawyers defending the matter on behalf of GMCL would be employing rates at the high end of the commercial litigation scale.

[67] Trillium's next argument is that the overall amount sought by GMCL is unreasonable

since GMCL decided to retain two law firms to defend itself, with the second firm entering the fray when the litigation was well underway which would reasonably result in duplication. Trillium also points to its total partial indemnity fees which are approximately $4,500,000.00, which Trillium incurred with respect to both actions. In this context, Trillium submits that GMCL's partial indemnity fees of approximately $3,700,000.00 in the defence of the action are excessive.

[68] GMCL submits that, given the complicated nature of the action and the amount of damages sought, it was reasonable to have two law firms involved, and it is not unreasonable for Trillium to expect to pay significant costs if unsuccessful. GMCL denies that there was any duplication to any real extent given the fact that the two firms divided up the work between them into discrete areas.

[69] Further, GMCL points to the fact that, in actuality, 80 lawyers, clerks and students worked on the file, but only 11 lawyers and one clerk are claimed with respect to GMCL's costs. This resulted in a reduction from actual hours billed (30,179.70) to hours claimed (11,309). I did not, however, receive any context as to what services the deleted lawyers, students and clerks performed.

[70] While it is typical for a plaintiff to incur more fees than the defendant in presenting a case, the reality is that, in this situation, GMCL was put to great expense to defend the action. It had to locate, review and produce thousands of documents. GMCL was also put to the expense of defending multiple claims. Furthermore, in a case where the initial differences between the parties approached $1 billion, I do not accept Trillium's argument that it could not have reasonably expected to pay partial indemnity fees at either the rates proposed by GMCL as outlined above or the total amount. This was a case of high stakes litigation involving complicated factual and legal issues of great importance to Trillium and GMCL.

[71] I am prepared, however, to reduce GMCL's fees by 10 percent to take into account some modest duplication that would have occurred when the second law firm became involved later on in the litigation. I generally accept GMCL's proposition that the work was discretely divided between the two firms and that GMCL is not claiming for a number of the aforementioned timekeepers, but in all of the circumstances a 10 percent reduction is reasonable.

[72] Last, with respect to this issue, Trillium submits that, since it enjoyed success with respect to Common Issues (a) and (b), there should be some reduction in GMCL's fees. I disagree. GMCL admitted Common Issue (a), and Common Issue (b) was a simple, straightforward legal argument that consumed virtually no trial time.

[73] Insofar as the counterclaim is concerned, GMCL brought a $123 million counterclaim against Trillium and Thomas Hurdman. Trillium seeks costs of defending the counterclaim on a partial indemnity scale in the amount of $300,000.00. It submits that costs of defending the counterclaim cannot be segregated from the costs of the main action and that I should fix an amount that is fair and reasonable for GMCL to pay. Trillium submits that since the amount of the counterclaim ($123 million) was approximately 15 percent of the amount initially claimed in the main action ($750 million) Trillium and Hurdman ought to be able to recover 15 percent of the amount it asserts that GMCL could recover in the main action for costs ($2 million) i.e.

$300,000.00. Trillium also submits that the $300,000.00 should be divided equally between Trillium and Hurdman and that there should be no offset for costs awarded to Hurdman since he was brought into the action by GMCL in the counterclaim and was not a plaintiff.

[74] GMCL submits that Trillium has failed to deliver a bill of costs with respect to the counterclaim and that Trillium's approach, noted above, is unprincipled since it is not linked in any way to costs actually incurred. It submits that Trillium and Hurdman should only be entitled to a nominal amount, somewhere in the neighbourhood of $20,000.00, and further that Hurdman never had an account rendered to him at all and has incurred no costs.

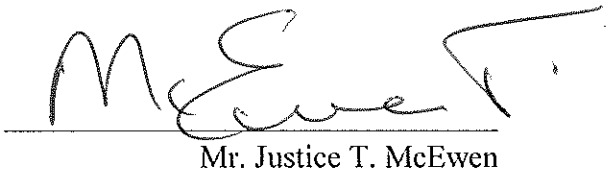
[75] This claim is rather difficult to assess since I am asked to do so, essentially, in a vacuum with little supporting information. That being said, the counterclaim was dismissed. It involved a significant amount of money and no doubt Trillium/Hurdman's counsel spent time considering it, drafting pleadings to respond and some time was spent defending it at trial.

[76] In all, however, very little time was spent at trial addressing the counterclaim since it was based on a fairly technical legal point. In my view, fees in the amount of $150,000.00 would be reasonable. In my view, GMCL is entitled to an offset for the entire amount. I do not accept the argument that no offset should be applied to Hurdman. As Trillium's counsel conceded in argument, no account was ever rendered to him and the action was pursued on a contingency fee basis. On this basis and given the fact that Hurdman is the principal of Trillium, I see no reasonable basis to allow Hurdman to recover costs for which he was not billed.

[77] As a result of my findings above, GMCL is entitled to 90 percent of its fees on a partial indemnity basis, plus applicable HST, as well as the entirety of its disbursements, inclusive of HST, which I calculated as follows:

Fees		$3,380,917.50
HST (13 percent)		$439,519.27
Disbursements		$1,466,940.50
HST on applicable disbursements		$190,628.05
	TOTAL:	$5,478,005.32

[78] Trillium and Hurdman are entitled to their costs of the counterclaim in the amount of $150,000.00, for which GMCL is entitled to an offset.



Mr. Justice T. McEwen

Date: March 22, 2016