

Court of Appeal File No.: C66803
Court File No.: 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427
ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS,
IN THE PROVINCE OF ONTARIO

FACTUM OF THE RESPONDENT, 1787930 ONTARIO INC.

June 13, 2019

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PART I - OVERVIEW - NATURE OF CASE AND ISSUES

1. This is an appeal from the Order of The Honourable Justice R. Raikes dated March 13, 2019 (the “**Costs Order**”) awarding costs payable by the Appellant, Transit Petroleum Inc. (“**Transit**”) to 1787930 Ontario Inc., carrying on business as Messenger Freight Systems (“**Messenger**”) relating to the Motion which resulted in Justice Raikes’ Order dated January 28, 2019 (the “**Merits Order**”)

PART II - SUMMARY OF FACTS

2. On this appeal with respect to the costs alone, which presumes the decision below is undisturbed, the facts relevant to the cost award include the findings of fact made by the Motion Judge.

3. The Motion Judge adopted the following as undisputed facts:

- (a) Messenger issued its Notice of Intention to Make a Proposal (“**NOI**”) on July 2, 2018;

- (b) The Pre-Authorized Debit (“**PAD**”) for \$83,734.05 was submitted by Libro Credit Union (“**Libro**”) on July 3, 2018 and processed on July 5, 2018, three days after the NOI was issued;
- (c) that payment was on account of monies owing by Messenger to Transit for fuel supplied before the NOI was issued;
- (d) After the NOI was issued, Transit supplied additional fuel to Messenger in the amount of \$48,434.30;
- (e) On July 11, 2018, Messenger entered into arrangements with Petro Canada for fuel for its trucks;
- (f) Messenger severed its fuel supply relationship with Transit on that date;
- (g) Transit filed a Proof of Claim in Messenger’s Proposal in the amount of \$202,791.59 as arrears owing as of July 2, 2018. That figure includes the monies subsequently received on July 5, 2018 through the PAD.

1787930 Ontario Inc. v. Transit Petroleum, 2019 ONSC 716 at paragraph 28; Appeal Book and Compendium, Tab 4.

4. The Motion Judge also noted that there were facts in dispute, including whether there was an agreement to pay the arrears by four PAD’s including the first on July 5, 2018, whether Messenger asked Transit not to proceed with that payment before July 5, 2018 and whether Messenger approved of that payment after the NOI was issued as part of an arrangement to ensure ongoing fuel supply from Transit.

1787930 Ontario Inc. v. Transit Petroleum, 2019 ONSC 716 at paragraph 27; Appeal Book and Compendium, Tab 4.

PART III - POSITION ON ISSUES

5. Messenger agrees that the legal standard for interference in the costs decision is as set out at paragraph 23 of the Appellant's factum, citing *Boucher v. Public Accountants Council (Ontario)* at paragraphs 19-20, and that Rule 57 of the *Rules of Civil Procedure* sets out the factors the Motion Judge may consider in fixing costs.

Factum of the Appellant, Transit Petroleum Inc. at paragraphs 23-25.
Rules of Civil Procedure, R.R.O. 1990, Reg 194, s. 57.01(1).

6. Motion Judges have broad discretion in the award of costs and their decisions are entitled to deference on appeal. Having regard to the disposition of the Merits Order, there is no basis on which to interfere with Justice Raikes' exercise of discretion. The Costs Order is not "plainly wrong"; it is, in fact, clearly reasonable.

7. The Appellant's starting position is that Justice Raikes erred in concluding that Transit was not partially successful on the Motion. This position is relied on to dispute Messenger's entitlement to any costs, as well as to challenge the Motion Judge's assessment of the Rule 57 factors in fixing the amount.

Factum of the Appellant, Transit Petroleum Inc. at paragraphs 29, 32, 35 and 42.

8. Transit claims partial success because it received payment for the post-NOI fuel purchases. However, the Notice of Motion sought, as alternative relief to the return of the full sum, "an Order requiring [Transit] to return the sum of \$35,299.77, being the amount which [Transit] received and retained from [Messenger] for fuel provided prior to the issuance of the NOI less the amount which remains owing for fuel provided by Hogg post NOI."

Notice of Motion at paragraph 3, Appeal Book and Compendium, Tab 5.

9. That is exactly the result which Justice Raikes ordered.

1787930 Ontario Inc. v. Transit Petroleum, 2019 ONSC 716 at paragraph 46; Appeal Book and Compendium, Tab 4.

10. The Appellant's invitation to identify sub-issues and tally them in order to find partial success is an argument that the Motion Judge ought to have made a distributive cost award of the kind disapproved of by this Court. It would have been an error for the Motion Judge to have done so.

Murphy v. Alexander, 2004 CanLII 15493 (ON CA) at paragraph 72; Respondent's Brief of Authorities, Tab 1.

11. The balance of Transit's submissions address the amount which Justice Raikes awarded rather than Messenger's fundamental entitlement to costs.

12. To put the cost award into context, the economic effect of Justice Raikes' decision was to improve Messenger's position by \$83,734.05. Justice Raikes ordered the return of \$35,299.77 to Messenger, and the application of \$48,434.30 to pay off the amount admitted to be due for post-NOI fuel purchases. Had the Motion Judge concluded that Transit was entitled to retain the payment on account of pre-NOI fuel purchases, Messenger would have remained indebted for the \$48,434.30 outstanding for post-NOI fuel purchases. The exposure to Messenger, therefore, was \$132,168.35.

13. On their respective costs outlines, the lawyer for Transit, Ms. Kettle, claimed 69 hours; Messenger had two lawyers, senior counsel Bruce Simpson (35+ years experience) and a new call, Michael Ly, who claimed 72.6 and 30.8 hours, respectively. Justice Raikes noted that Mr. Simpson's proposed partial indemnity rate was reasonable but that it was unnecessary duplicative

for Messenger to have two lawyers involved and exercised his discretion to reduce the amount claimed to account for that duplication.

Cost Submissions of Messenger, Appeal Book and Compendium at Tab 18.

Cost Submissions of Transit, Appeal Book and Compendium at Tab 19.

1787930 Ontario Inc. v. Transit Petroleum, 2019 ONSC 1623 at paragraph 11(e); Appeal Book and Compendium, Tab 4.

14. Given the economic impact of the decision and the amount of work involved on each side, a cost award of \$26,750 plus fees and disbursements was a fair amount the unsuccessful party could reasonably be expected to pay.

15. The bulk of Transit's submissions with respect to quantum focus on the complexity arising from the "unique fact situation" and "inaccurate and inconsistent evidence". Justice Raikes was alive to these issues, remarking that "the evidence offered by Messenger was less than fulsome and arguably inaccurate." Justice Raikes also explicitly referenced the "fraudulent preference position of dubious merit."

1787930 Ontario Inc. v. Transit Petroleum, 2019 ONSC 1623 at paragraph 9; Appeal Book and Compendium, Tab 4.

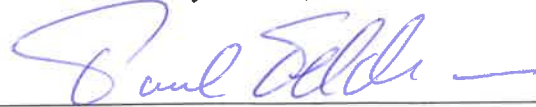
16. Justice Raikes considered whether Messenger should be awarded substantial indemnity costs, which would be the presumptive effect of Transit's rejection of Messenger's settlement offer. This element of Justice Raikes' decision cannot be considered in isolation, but rather as an element of the determination of the appropriate costs that were fair and reasonable in the circumstances in light of the other factors identified. It was open to the Motion Judge to deprive Messenger of the benefit of its offer to settle without further reduction to explicitly address other factors which would have militated for a reduced cost award.

17. Justice Raikes' reasons therefore demonstrate appropriate consideration of the relevant factors for which there is no reason to deviated from the ordinary deference afforded to the exercise of discretion.

PART IV - ORDER REQUESTED

18. The Respondent respectfully submits that for the foregoing reasons the appeal of the Costs Order be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of June, 2019.



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CERTIFICATE

I estimate that $\frac{3}{4}$ of an hour will be needed for my oral argument of the appeal, not including
reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT this 13th day of June, 2019.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *1787930 Ontario Inc. v. Transit Petroleum*, 2019 ONSC 716
2. *Murphy v. Alexander*, 2004 CanLII 15493 (ON CA)
3. *1787930 Ontario Inc. v. Transit Petroleum*, 2019 ONSC 1623

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, s. 57.01(1)

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (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,

- (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;
- (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;
- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the apportionment of liability;
- (c) the complexity of the proceeding;
- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been 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. R.R.O. 1990, Reg. 194, [r. 57.01 \(1\)](#); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, [r. 57.01 \(2\)](#).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or [rules 57.02](#) to [57.07](#) affects the authority of the court under [section 131](#) of the [Courts of Justice Act](#),

- (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
- (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
- (c) to award all or part of the costs on a substantial indemnity basis;
- (d) to award costs in an amount that represents full indemnity; or
- (e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, [r. 57.01 \(4\)](#); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

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Proceeding commenced at London

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