

CITATION: 1787930 Ontario Inc. v. Transit Petroleum, 2019 ONSC 1623
COURT FILE NO.: 35-2395487 and 35-2395481
ESTATE FILE NO.: 35-2395487 and 35-2395481
DATE: 20190313

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
1732427 ONTARIO INC. AND 178930 ONTARIO INC. BOTH OF THE CITY OF ST.
THOMAS, IN THE PROVINCE OF ONTARIO

BEFORE: Justice R. Raikes

COUNSEL: Sherry Kettle Counsel, for Transit Petroleum

Bruce Simpson and Mr. Ly Counsel, for 1787930 Ontario Inc.

Trustee of 1787930 Ontario Inc. – MNP Ltd. (Att'n: Sheldon Title)

HEARD: In Writing

COSTS ENDORSEMENT

- [1] This costs endorsement arises from my decision released January 28, 2019. In that decision, I directed the parties to make written submissions as to costs if they could not agree on same. They could not.
- [2] 1787930 Ontario Inc., referred to in my earlier decision as “Messenger”, seeks costs of \$51,350.42 plus \$1,000 for costs submissions, and interest. The amount claimed is largely calculated on a substantial indemnity scale.
- [3] The respondent, Transit, submits that each side should bear their own costs as each was partially successful.
- [4] Messenger sought return of \$83,734 paid to Transit by PAD after Messenger issued an NOI. In the alternative, it asked that Transit apply \$48,434 of that sum to fuel provided after the NOI issued, with the balance of \$35,299 to be refunded to Messenger. Transit took the position that the payment by PAD of the \$83,734 did not constitute a remedy and was not stayed by operation of s. 69(1) of the *BIA*. In my decision, I agreed with the alternate position of Messenger.
- [5] In my view, Messenger was the successful party on the application. If Transit had succeeded, it would have been entitled to retain the \$83,734 for past fuel provided **and** would have been owed for post-NOI fuel of \$48,434 which all agreed was not affected by

the stay in the BIA. Instead, the \$83,734 PAD was stayed and the funds obtained through the PAD were used to offset what was owing for fuel after the NOI.

- [6] Messenger served an offer to settle dated September 27, 2018. The offer required Transit to repay Messenger \$35,000 and give Messenger a full and final release for all post-NOI fuel provided. It also required payment of pre-offer costs on a partial indemnity basis and post-offer costs on a substantial indemnity basis.
- [7] By my decision, Transit must pay to Messenger \$35,299 – more than the amount offered by Messenger albeit only by a very modest amount. The order to use the funds held by Transit to pay post-NOI fuel costs is substantially the same as provision of a release. Messenger bettered its offer to settle.
- [8] Rule 49.10 governs the consequences of the failure to accept an offer to settle. Where the plaintiff (moving party) betters its offer to settle, it is *prima facie* entitled to costs on a partial indemnity scale to the date the offer was made and on a substantial indemnity scale thereafter “unless the court orders otherwise”. Where the offer does not reflect a real element of compromise, the court may decline to award substantial indemnity costs: *Celanese Canada Inc. v. Canadian National Railway Co.* (2005), 196 O.A.C. 60 (ON CA), leave to appeal to S.C.C. refused 214 O.A.C. 398*n*.
- [9] I am not satisfied that the offer to settle here reflects any real compromise on the part of Messenger. Transit stood to gain by only \$299 on acceptance. The offer made required Transit to capitulate when the evidence offered by Messenger was less than fulsome and arguably inaccurate. I exercise my discretion to decline to rigidly apply r 49.10(1) in these circumstances.
- [10] I find that costs should be awarded to Messenger on a partial indemnity basis.
- [11] Having regard to the factors applicable to fixing the quantum of costs, I find that:
- a. The issues engaged on this application were not complex;
 - b. The law in the area is well-settled although its application to the facts here was uncertain;
 - c. The parties understood and expected that costs would follow upon the outcome of the application;
 - d. The time expended by Messenger is significantly more than that of Transit; however, the costs outline filed by counsel for Transit does not include time spent preparing and arguing the matter. Allowance must be made for that omission;
 - e. The amount of time expended by counsel for Messenger strikes me as higher than necessary. It was unnecessary to have two counsel appear for Messenger to argue the application;
 - f. Messenger raised and argued a fraudulent preference position of dubious merit;
 - g. The amount at stake was modest;

- h. The issues were important to the parties; and
- i. The hourly rate of Mr. Simpson is appropriate to his year of call and experience. The same cannot be said of Mr. Ly.

[12] The disbursements claimed are reasonable and are fixed at \$1,540.02.

[13] In light of the above, the amount for legal fees is fixed at \$26,750 plus HST which I calculate to be \$3,477.50.

[14] Thus, Transit shall pay to Messenger the sum of \$31,767.52 for costs.



Raikes, J.

Date: March 13, 2019