File No. CT - 2006 - 010

The Competition Tribunal

In the matter of the *Competition Act*, R.S., 1985, c. C-34;

And in the matter of an inquiry pursuant to subsection 74.01(1)(b)(ii) of the *Competition Act* relating to the marketing practices of Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)

Between:

The Commissioner of Competition

Applicant

- and -

Imperial Brush Co. Ltd. and **Kel Kem Ltd.**
(c.o.b. as Imperial Manufacturing Group)

Respondents

Submissions of the Respondents with respect to Remedy

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1. These submissions are made in accordance with paragraph 233(c) of the decision and order of the Tribunal dated February 7, 2008, in which the Commissioner and the Respondents were directed to serve and file submissions in respect of:

   (i) the nature, form and dissemination of the public notice of the Tribunal's finding;

   (ii) product recall/withdrawal and/or change in packaging; and

   (iii) the proper award of costs.

THE ADMINISTRATIVE REMEDY

2. The remedy is ordered pursuant to s. 74.1 of the *Competition Act* which provides:

> **Determination of reviewable conduct in judicial order**
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> 74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
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> (a) not to engage in the conduct or substantially similar reviewable conduct;
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> (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
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> (i) a description of the reviewable conduct;
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> (ii) the time period and geographical area in which the conduct relates; and
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> (iii) a description in the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
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> (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
>
> (i) in the case of an individual, $50,000.00 and, for each subsequent order, $100,000.00, or
>
> (ii) in the case of corporation, $100,000.00 and, for each subsequent order, $200,000.00…
>
> **Purpose of order**
>
> (4) The terms of an order made against a person under paragraph 1(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

3. The remedy is thus to be designed to fulfill the purposes of the *Competition Act* and in particular, Part VII.1 and s. 74.01. The purpose of the *Competition Act* is to promote effective competition in each market, and to protect the competitive process. It is not

primarily concerned with matters of distribution of benefits between buyers and sellers – matters that might be described generally as "consumer protection".

4. The specific purpose of s. 74.01 was canvassed extensively in connection with the constitutional arguments in this proceeding. The purpose and justification for that section put forward by the Commissioner, and accepted by the Tribunal, was that unsubstantiated claims were forbidden because of the harm they caused to economic competition through the so-called "lemons effect" – that theory that unsubstantiated claims lead to the devaluation of all product claims in the eyes of purchasers. This is detrimental to competition because it amounts to unfair competition vis-à-vis competitors who have substantiated their claims.

5. It was not asserted that the purpose of the provision was to protect individual consumers from harm arising from unsubstantiated claims – indeed, it was not asserted or shown that unsubstantiated claims, the truth or falsity of which is not known, are harmful to individual consumers. Harm would arise from representations which are false and misleading, but that was neither alleged or proved in this case.

6. It is therefore wrong to approach the remedy in terms of consumer protection – and much less, of product safety. There is no evidentiary basis for a product safety concern – it was neither alleged nor proved that the products which are the subject of this application are in any way dangerous. The evidence showed that these products, and products of other suppliers which are substantially similar, have been on the market for many, many years. The Respondents' evidence was that they had received no complaints, and no evidence of complaints to other suppliers was presented. Although the Tribunal has determined that the Respondents' testing was not sufficiently rigorous to meet the standard required by s. 74.01, those tests all indicated that the products had a beneficial effect.

7. The Respondents therefore submit that the remedy should be designed to rectify the harm to the competitive process, which is the purpose and goal of the *Competition Act* and, in particular, Part VII.1 and s. 74.01.

COMPLIANCE WITH THE REASONS AND ORDER OF FEBRUARY 7, 2008

8. In correspondence to the Tribunal, counsel for the Commissioner takes the position that the Respondents were obliged by the Reasons and Order of February 7th to immediately withdraw the products which are the subject of this application from retail trade. The Respondents submit that this is not and cannot be the effect of the Tribunal's February 7th Order.

9. The remedial power is purely statutory and there is no independent power under section 74.1(1) to order the Respondents to recall the products, or do anything else with respect to products no longer in its control. The section provides for only three types of remedial order: (a) an order not to engage in the conduct found to be reviewable or substantially similar reviewable conduct (prohibition order); (b) publication or other dissemination of notice (publication order); and (c) an administrative monetary penalty. The scope of the

remedial jurisdiction is thus confined (unlike the open-ended remedial jurisdiction under section 79(2) with respect to abuse of dominant position).

10. In the absence of jurisdiction of the Tribunal to order a recall, an argument might be made that such an order is part of the prohibition against further reviewable conduct, and that appears to be the Commissioner's position here. In response to this the Respondents submit:

(a) The Commissioner's position overreaches. The reviewable conduct is the *making* of a representation [s. 74.01(1)(b)]. The Respondent does not make a representation by failing to take steps to prevent a prior representation from continuing.

(b) The representation on a product package is deemed to be made by the person who "causes the representation to be so expressed" [s. 74.03(1)]. In the case of supply to a wholesaler, supply of the material containing the representation is deemed to be a representation to the public. The effect of these is that the representation is made by the manufacturer at the time of supply of the material to the wholesaler or distributor.

(c) The jurisdiction under s. 74.1(1) is specifically prospective – a prohibition against engaging in future conduct. The jurisdiction is to grant a prohibitory order; there is no jurisdiction to issue a mandatory injunction requiring the Respondents to take any affirmative actions in future (other than the jurisdiction to require publication under s. 74.1(1)(b)(c)).

(d) While the power to make remedial orders under s 74.1(1) is statutory, it is noteworthy that courts have distinguished between prohibitory and mandatory injunctions.

(e) The Respondents have no control over the product once it has been delivered by them to distributors or retailers, and the Tribunal should not order a party to do something which is not within that party's control. However, if product containing representations which have been found to be insufficiently substantiated remain in the market, this is a factor which the Tribunal can properly take into account in considering the scope of the publication order.

(f) In this case, there can be no argument that the Order of February 7 implicitly included a mandatory injunction to withdraw the products because the Tribunal has carefully and specifically retained a question of recall or withdrawal to be dealt with following further submissions. (Paragraph 232; paragraph 233 (c))

However, it is not necessary to decide this question because, as set out below, the Respondents have withdrawn the products.

THE RESPONDENTS' RESPONSE TO THE ORDER

11. As noted above, the log products were withdrawn and recalled in the spring of 2007. To the best of the knowledge of the Respondents, no such product remains in retail trade.

12. On receipt of the Reasons and Order of February 7, 2008, the Respondents immediately ceased shipment of any of the products which were the subject of the Commissioner's application. Further, although it was not the subject of the application, the Respondents also ceased shipment of their Soot Remover product, the label of which contains representations with respect to removal of creosote from chimneys. The Respondents also advised the distributors of the products that they should cease shipment from their warehouses to retail outlets. The Respondents thus ceased making any representations within the meaning of s. 74.03(3).

13. The Respondents subsequently issued a request to wholesalers and retailers to return all shelf stock and other inventory of Conditioner, Cleaner and Soot Remover to the Respondents. The wholesalers and retailers have been provided with a 1-800 number for information and to arrange for pickup of the remaining product.

14. Accordingly, the Respondents submit that (a) they complied in good faith with the Reasons and Order of the Tribunal; (b) there is no jurisdiction in the Tribunal to order recall of the a product pursuant to s. 74.1 but (c) in any case, the Respondents have withdrawn the products and requested their return.

PUBLICATION OR OTHER DISSEMINATION OF A NOTICE

15. In order to consider what sort of dissemination of a notice is appropriate to remedy the effect of the impugned representations, the Tribunal must consider the nature and extent of dissemination of those representations. The representations in question were made on the packages in which the respective products were sold. Imperial Brush and Kel Kem have never conducted any print or broadcast media advertising.

16. The Tribunal was informed at the hearing last July that, because of product quality issues, Imperial Brush had discontinued production and distribution of the Supersweep and Imperial log products, and had recalled them. No such products have been distributed by Imperial Brush for almost a year now and, to the best of the knowledge of the Respondents, no product remains in retail trade.

17. Sales of the remaining products, the Cleaner and Conditioner, across Canada have been modest. Sales figures for the years 2004, 2005 and 2006 were presented in evidence at the hearing[1], and corresponding figures for 2007 are now provided, as follows:

[1] Exhibit R-2a

Units	Cleaner	Conditioner – 1 lb	Conditioner – 2 lb
2004	1,425	3,805	8,712
2005	2,160	4,032	10,260
2006	3,046	12,183	22,580
2007	2,500	12,968	13,572

18. The products were distributed through hardware stores, home building centres and specialty stove and fireplace stores. The bulk of the products were distributed through chain retailers (notably Canadian Tire and Home Hardware). These chains have stores in many locations Canada, but the Respondents have no information with respect to how widely the products were distributed within those chains.

19. Photographs provided by the Commissioner on February 26 show typical product displays – a few containers representing a few inches of shelf space in large stores operated by major retailers. This is a very limited dissemination of representations, and any remedial dissemination should be proportionate to this.

20. In light of the fact that the products have been withdrawn and the representations are no longer being made to the public, the Respondents submit that no publication is necessary to fulfil the purposes of the Act. The impugned representations have ceased, and conformity by the Respondents with the purposes of Part VII.1 has been achieved.

21. The purpose of the remedial order, as prescribed by s. 74.1(4) is to promote conformity with the act, and not punishment. It is important to note that the purpose of the order is to promote conformity *by the person against whom the order is made* – deterrence of others is not a proper consideration in making a publication order or imposing an AMP. Considering the limited scope of dissemination of the representations and the weak financial condition of the companies, an extensive publication requirement would be more punitive than remedial.

22. In *Gestion Lebski* , Blanchard J., sitting as a member of this Tribunal, considered the scope of publication of the representations by the Respondent (in that case, through advertising) and the financial condition of the company to be relevant factors:

> [307] As stated in the preceding paragraphs, little advertising was done for Noctoslim and Nopasim, little of which was in fact sold. The evidence also is that the respondents did very little advertising in 2004, 2005 and 2006 regarding the products and apparatus that are the subject of the inquiry. The decline of Centres de santé minceur, which began in about 2001, is not in dispute. In 2005, the year the application was filed, more than three quarters of the centres that were in existence in 2001 had closed, and at the time of the hearing in May 2006 there were only eight centres still open. All of them had to close by June 15, 2006, at the latest. As part of

> that process, the Centre de santé minceur Internet site ceased operating around the end of May or beginning of June 2006.
>
> [308] The products and apparatus that are the subject of the application are no longer being sold by the respondents and no advertising is being done regarding them. In this case, a corrective advertising order would serve no purpose, since the market has corrected itself with the closing of Centres de santé minceur. If the respondents had to publish corrective notices in the same media they used to promote the products and apparatus that are the subject of this application, they would undoubtedly have to spend large amounts of money, at a time when the centres seem to have closed down because they are no longer profitable. Having regard to the situation, I am of the opinion that if a corrective advertising order were made it would be more punitive than remedial.

23. The Respondents submit that in this case, as in *Gestion Lebski*, a publication order is unnecessary, and would be more punitive than remedial.

COSTS

24. As a preliminary point, the Respondents observe that, as noted in the Tribunal's decision, the Commissioner failed to request costs, either in her written or oral submissions before the Tribunal. The request was made in a letter to the Tribunal after the arguments were closed. The Respondents submit that this precludes <u>any</u> award of costs in the within matter and that the Federal Court of Appeal decision in *Balogun v. Canada*, 2005 FCA 350 is determinative in this regard. There, Justice Nadon noted at para. 2 as follows:

> We all agreed that in doing so, the judge plainly erred since the respondent did not comment either in their written submissions or in their viva voce submissions before the judge, request that they be granted costs. In these circumstances, we are of the view that the judge should not have made an award of costs.

25. If the Tribunal does not consider this principle to be determinative and requires a more substantive analysis of the issue, Part 11 of the *Federal Courts Rules* deals with the subject of costs. Rule 400(1) entrenches the basic principle is that costs are in the complete discretion of the Court or, in this case, the Tribunal. Rule 400(1) reads:

> 400. (1) Discretionary powers of Court – The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are paid.

26. Rule 400(2) makes it clear that costs may be awarded either to or against the Crown. The Respondents do not dispute the entitlement of the Crown to costs under appropriate circumstances. However, the Respondents submit that the nature of this proceeding

requires that the Tribunal's discretion to award costs in favour of the Crown be exercised with caution. Although designated a "civil proceeding", this is not a case involving a claim for compensation between the Crown and one of its subjects.

27. While applications under s. 74.01 are classified as "civil", such applications clearly embody the spirit of prosecutions for regulatory offences. Arguably, such proceedings are more criminal than civil in nature[2]. Notably, the *Competition Act* provides for administrative monetary penalties (which are, in practice, indistinguishable from fines) to a maximum of $100,000.00 for an initial offence.

28. As pointed out by Kenneth Jull in "Costs, the Charter and Regulatory Offences: The Price of Fairness" *The Canadian Bar Review* [Vol. 81 - 2002], the prevailing convention is that costs are not awarded in criminal cases. This is true also true for "public welfare" or regulatory offences. While Jull does not espouse a continuation of the status quo[3] given that many of the elements of modern regulatory offences resemble civil proceedings, he does make some interesting observations. Indeed, he observes that a substantive costs order would be antithetic to the traditional notion that Crowns "ought not to win or lose".

29. The "civil" costs rule and practice does not sit easily in the quasi-criminal proceedings of this type. One of the purposes of the costs rule is to promote settlements, but the dynamic of what is essentially a criminal prosecution does not lend itself to compromise and settlement.

30. In the absence of settlement motivation, an award of costs against the Defendant/Respondent in addition to a penalty is merely punitive. At p. 674 – 675, Jull notes as follows:

> Upon reflection, a costs order against the accused, separate and apart from a fine in regulatory offences, is an added layer of

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[2] McLachlin CJC concluded that this was the case with respect to prosecutions for regulatory offences within Provincial jurisdiction:

> 78 The function of a provincial court operating under the *POA* is to try provincial offences. While the majority of these offences involve minor regulatory infractions, they also concern important matters like environmental protection and, as here, workplace health and safety. These offences carry penalties ranging from significant fines to terms of imprisonment. The public and penal nature of such prosecutions suggests they are more criminal than civil in nature: see W. D. Drinkwalter and J. D. Ewart, *Ontario Provincial Offences Procedure* (1980), at pp. 4-7. Provincial offences courts are, for practical purposes, quasi-criminal courts, determining guilt and innocence and imposing commensurate criminal penalties.
>
> *R. v. 974649 Ontario Inc. cob as Dunedin Construction*, [2001] 3 S.C.R. 575 ("Dunedin")

[3] The article considers orders for payment of costs by the Crown to successful defendants, and not the payment of costs by unsuccessful defendants. The author notes that Courts have always had jurisdiction to award costs in criminal matters but did so sparingly until the advent of the Charter. Costs are now awarded against the Crown for conduct which violates the accused's constitutional rights. *Dunedin* reserved costs orders for cases of egregious conduct of the Crown.

> complexity that is not necessary. A Court must conduct an inquiry into the means of any accused, corporate or otherwise, before imposing a fine, to ensure that the accused has sufficient means to pay such a fine. It would be duplicitous to conduct a similar inquiry under a costs order. In light of the fact that a fine goes to the State, as would a costs order, the extra layer of complexity is not warranted.

31. The Respondents respectfully submit that the nature of the within proceeding warrants that costs not be awarded to either of the parties.

32. Notwithstanding the above, Rule 400(3) outlines various factors which the Tribunal may consider in exercising its discretion to award costs. These include:

> a) Result of the proceedings;
> b) The amounts claimed and the amounts recovered;
> c) The importance and complexity of the issues;
> …
> e) Any written offer to settle…any other matter that it considers relevant.

33. The Respondents submit that, while the result of the proceeding clearly favoured the Commissioner, the Tribunal's Reasons and Order made note of the fact that "the representations were based on a sincerely held belief without any intent at deception." Further, the imposed global AMP of $25,000 was significantly less than the maximum allowable of $100,000 per respondent (i.e. $200,000), which was the amount sought by the Commissioner in final argument. The fact that the Commissioner recovered only 12.5% of what she was seeking by way of AMP is something that, according Rule 400(3), the court should take into account when assessing costs.

34. The Respondents also submit, that while the issues before the Tribunal were important, the matter was dealt with efficiently throughout the proceeding and the Respondents were at all times proponents of moving the matter along quickly and efficiently. It should be noted that the time spent presenting the Respondents' case at both the evidentiary hearing in Halifax and the argument phase in Ottawa was significantly less than the time required by the Commissioner, although the evidentiary burden in this proceeding is cast on the Respondent. Further, the constitutional issue argued by the parties was one on which the Commissioner herself required clarification in light of the decision in *Gestion Lebski*, which determined that s. 74.01(1)(b) violated constitutional rights of free speech and held it inoperative in the absence of evidence of justification under s. 1 of the *Charter*. Indeed, it could be argued that the Commissioner sought judicial consideration of s. 74.01(1)(b) itself and, in many respects, viewed within proceeding as a "test case". The Respondents submit that these factors support the argument that the parties should simply bear their own costs.

35. There is a little jurisprudence from this Tribunal to aid in the assessment of a costs award for contested proceedings under s. 74.01. In the *Sears Canada* case (previously

submitted), the court awarded costs, fees and disbursements in the global amount of $387,000. No details were provided regarding the calculation of that award. The Respondents, however, would point out that the hearing in that case was significantly longer than the within application and the proceeding, in general, far more complex. It should also be noted that the costs award arrived at in the *Sears* case was one reached by Joint Submission and, accordingly, did not involve the Tribunal's exercise of its discretion.

36. In *Gestion Lebski*, which followed a 23 day hearing in Montreal (including three preliminary motions dealing with the constitutional challenge, the removal of certain respondents as parties, and a confidentiality order) the Tribunal, ordered that each party bear its own costs. The Respondents submit that this decision should be considered highly persuasive.

37. As noted above, pursuant to Rule 400(3)(e) of the *Federal Courts Rules*, the Tribunal may also consider "any written offer to settle" in exercising its discretion over the amount of costs and the determination of by whom they are to be paid. Rule 420 goes on to prescribe the costs consequences where a party obtains a judgment which is less favourable than a written offer to settle made by the opposing party. Specifically, Rule 420(2) provides that, where a defendant makes a written offer to settle and the plaintiff obtains a judgment that is less favourable than the terms of that offer, the plaintiff is entitled to party and party costs to the date of the offer and the defendant is entitled to costs calculated at <u>double</u> that rate from that day until the date of judgment. Nothing in either Rule 400(3) or Rule 420 requires that the offer to settle be in any specific form. Rather, the Rules simply suggest that "any written offer to settle" will suffice.

38. The Federal Court of Appeal, in the case of *Francosteel Canada Inc. v. The African Cape*, 2003 FCA 119, considered a situation where the Prothonotary, in assessing costs, considered the plaintiff's success on the issue of liability as the sole determining factor in its entitlement to costs. The Prothonotary did not consider the factors enumerated at Rule 400(3)(b) and (e), which relate to the quantum payable by the defendants. In considering the appeal, the court found that it was clear from Rule 400 that <u>all of the relevant factors</u> must be considered in determining the quantum and allocation of costs.

39. In *Francosteel*, the appellants, prior to filing their defence, made an offer to settle the claim for the all-inclusive sum of $125,000. The respondents rejected the offer. The appellants reiterated the offer some 30 months later and left it open for acceptance until the fourth day of the arbitration hearing. The arbitrator's eventual award was for the global sum of $108,887.75, inclusive of capital and interest. Despite the fact that the award was somewhat lower than the offer to settle, the respondent argued that it had succeeded before the arbitrator on the issue of liability and was thus entitled to its costs. The appellants, maintained that they were entitled to *their* costs on the basis that the settlement offer exceeded the amount of the award.

40. In concluding that the Prothonotary failed to fully consider the circumstances of the case, in particular Rule 400(3)(e), Justice Nadon concluded as follows at paras. 24-26:

> I am satisfied that had the Prothonotary given proper consideration, as he ought to have, to factors (b) and (e), he would have come to a different conclusion as to which of the parties should bear the costs of the proceedings.
>
> Firstly, as he himself noted in regard to his determination of the amount of costs to which the respondent was entitled, the amount of damages obtained by the respondent as a result of the arbitration award falls dramatically short of the amount claimed in the Statement of Claim. Secondly, the offer of settlement made by the appellants was in excess of the amount ultimately recovered by the respondent. That offer was unequivocal and was made early on in the proceedings; had it been accepted by the respondent, the parties would not have incurred the substantial costs which were ultimately incurred. Thirdly, bearing in mind that the offer of settlement exceeded the arbitrator's award, it cannot be said that the respondent improved its position by proceeding to the arbitration hearing. In the end, the respondent would have been better off had it accepted the settlement offer.
>
> I am therefore of the view that on a proper consideration and weighing of all of the relevant factors, the appellant sought to have their costs. I might add that the effect of depriving the appellants of their costs, in the circumstances of this case, would render the offer to settle meaningless.

41. As stipulated by the court in *Francosteel*, the purpose of the costs award in civil matters is to promote settlements. The Respondents submit that, unless the rule is used to encourage settlement, it simply becomes a punitive element, which is inconsistent with the intention of s. 74.1(4).

42. The Respondents diligently attempted to settle this matter prior to the hearing and were prepared to enter into a Consent Agreement with the Commissioner for that purpose. Unfortunately, it was not possible to reach agreement, and the hearing proceeded.

43. In the Commissioner's written response, she stipulated for an administrative monetary penalty of $30,000.00 for the logs alone. It was clear that a similar or larger AMP would be demanded in respect of the Conditioner and Cleaner. (This, however, was a substantial moderation of the Commissioner's original demand in 2004, when she sought AMPs of $400,000.00.)

44. The Respondents had offered a payment of $50,000.00 in aggregate for AMP and costs. In light of the costs of $15,000.00 claimed by the Commissioner at that time, this offer is slightly higher than the AMP which has been awarded by the Tribunal.

45. The exchange of offers also referred to other terms upon which the Tribunal has not yet ruled. The Respondents will invite the Tribunal to consider the exchanged offers in light

of the remedies which may ultimately be awarded. On the issues decided to date, there has been divided success as compared to the offers of settlement.

46. Finally, the case included consideration of the constitutional issue, which was necessarily before the Court because of the finding in *Gestion Lebski*. Although validity of the legislation has been upheld, it is not the practice to award costs to the Crown with respect to a constitutional challenge. The Respondents submit that no costs award would be in order in this case with respect to the constitutional issue.

47. In the overall circumstances, the Respondents submit that the Court should exercise its discretion and make no award of costs.

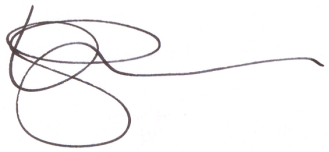
OTHER MATTERS

48. The order incorporated in the reasons and order of February 7th, at paragraph 233(a) includes an extended definition of "Respondents" to include the Respondents to the application (Imperial Brush Co. Ltd and Kel Kem Ltd.) and any person acting on their behalf or for their benefit, including all directors, officers, employees, agents or assigns of the Respondents, or any other person or corporation acting on behalf of the Respondents or any successors thereof. The order prohibits all those persons from making representations of the specified type. The order then goes on to direct those persons to make further submissions with respect to remedies, and directs that "the Respondents" are jointly and severally liable for the administrative monetary penalty ordered by the Tribunal.

49. The remedies are granted pursuant to, and are limited by, the statutory jurisdiction in s. 74.1 of the Act. The section is quite specific – where, on application by the Commissioner, a Court determines that "a person" is engaging in or has engaged in reviewable conduct, the Court may make an order against "the person". There is jurisdiction to make an order against the person against whom the application has been made, and who has been found to have committed reviewable conduct. There is no jurisdiction to make an order against any other person. Specifically, there is no jurisdiction to make an order against officers, directors, employees or agents of the person found to have committed reviewable conduct. Only a person against whom a finding has been made could be subject to the enhanced AMP for a "second order" following a future case. Needless to say, only the persons against whom the order is made can be responsible for payment of the AMP in this case.

50. The Respondents request that the final order to be issued by the Tribunal should clarify this and specify that the terms of the order apply only to the persons against whom the application has been made and with respect to whom the Tribunal has made findings. The prohibition order would be applicable to the actions of other persons mentioned in the Order of February 7 only to the extent that they may be acting on behalf of the named Respondents at the time the alleged conduct is committed, and in such case it will be deemed to be the conduct of the Respondent.

Respectfully submitted at Halifax, Nova Scotia, this 10th day of March, 2008.



Daniel M. Campbell, Q.C.

Joseph F. Burke

COSTS, THE CHARTER AND REGULATORY OFFENCES: THE PRICE OF FAIRNESS

Kenneth Jull*
Toronto

The pendulum is swinging back toward increased regulation of various sources of risk in our post-modern society. A just system ought not to penalize whichever side is financially the weakest and ought to do everything in its power to level the playing field. The first part of the article briefly reviews the restricted role of costs in criminal and quasi-criminal proceedings, including costs as a remedy for a violation of the Charter.

The second part highlights the elements of modern regulatory offences that mirror civil proceedings, absent a costs rule.

The final part proposes some principles for reform. Access to justice is one of the most important challenges to the legal system today. In the civil system, access to justice has been enhanced by mediation, costs rules, and class action legislation. Regulatory proceedings, which mirror civil proceedings in many respects, are lagging behind. A system of justice can only pride itself in fairness, when all can afford to enter the Courtroom door.

Dans notre société post-moderne, le pendule revient vers une plus grande réglementation de risques provenant de diverses sources. Un système juste ne doit pas pénaliser le côté qui est financièrement le plus faible, quel qu'il soit; il doit faire tout en son pouvoir pour égaliser les chances. La première partie de cet article examine brièvement le rôle restreint des frais dans les procédures criminelles et quasi criminelles, y inclus les frais comme redressement pour une violation de la Charte.

La seconde partie met en lumière les éléments des infractions réglementaires modernes qui sont le reflet des procédures civiles, mais sans règle sur les frais. La dernière partie propose quelques principes pour une réforme.

L'un des plus grands défis du système juridique aujourd'hui est l'accès à la justice. Dans le système civil, l'accès à la justice s'est élargi grâce à la médiation, aux règles sur les frais et à la législation sur le recours collectif. Les procédures réglementaires, qui sont le pendant des procédures civiles à bien des égards, traînent de l'arrière. Un système judiciaire ne peut s'enorgueillir de son équité que lorsque tous ont les moyens de franchir la porte de la salle d'audience.

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* Kenneth Jull, B.A. (Toronto) LL.B. LL.M. (Osgoode) of Beard Winter LLP and adjunct faculty of Osgoode Hall Law School, Toronto, Ontario. An earlier version of this paper was presented at a Continuing Education seminar on Regulatory Offences, Osgoode Hall Law School, Professional Development Program, January 18th, 2001, and was significantly revised as a result of helpful comments from participants. This article is part of a larger project co-authored with Justice Todd Archibald of the Ontario Superior Court and Kent Roach of the University of Toronto, faculty of law, entitled *Regulatory Offences, Corporate Liability and Alternative Regulation: Outside the Penalty Box*, forthcoming.

I. *Introduction*

This article is about money, efficiency and access to justice. In the recent case of *Ontario* v. *974649 Ontario Inc.* (*"Dunedin"*), the Supreme Court of Canada has affirmed the power of a Provincial Offences Court, trying a quasi-criminal regulatory matter, to award costs as a *Charter* remedy.[1] The bar is raised, however, to prevent costs from being given unless the case falls into "remarkable" territory where there is a "marked and unacceptable departure from the reasonable standards expected of a prosecution".[2] In *Dunedin*, the *Charter* rights related to disclosure of documents. In the parallel civil world, a failure to provide documents would likely be accompanied by a costs order, regardless of the level of fault. There is a danger in the criminal system that inadvertent failures to comply with procedural obligations will impose extra costs upon the accused that are not redressed; these costs may become the unintended equivalent of a hidden "fine" against those presumed innocent.

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[1] *The Queen in right of Ontario* v. *974649 Ontario Inc. c.o.b. as Dunedin Construction (1992) et al.*; *Attorney General of Canada et al., Interveners* (2002), 159 C.C.C. (3d) 321 ("Dunedin") (S.C.C).

[2] *Ibid.* at 355-56.

The reality is that the costs of defending a criminal case are increasing, and these costs are elevated in the regulatory offence where the onus is on the defence to prove due diligence on a balance of probabilities. Yet when the regulatory accused is successful in proving due diligence, no costs are awarded. Forty years ago, Pierre Trudeau argued in the *McGill Law Journal* that civil rights are empty if they ignore economic rights. "The high cost of litigation, in the absence of a universal system of legal aid, makes a farce out of the right of equality before the law and the high cost of conducting elections nullifies high-sounding platitudes about political equality."[3] These words are as applicable today as they were then.

The first part of the article briefly reviews the restricted role of costs in criminal and quasi-criminal proceedings, including costs as a remedy for a violation of the *Charter*. The absence of a comprehensive statutory remedies provision has forced the Courts to step in with creative remedies, but these are primarily within the criminal paradigm. As a result, the goal of compensation has been relegated to the back burner.

The second part of this article traces the tension between civil and criminal models inherent in the regulatory offence. Justice Dickson's seminal decision in *R.* v. *City of Sault Ste. Marie*[4] described public welfare offences as being "in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application."[5] Despite these civil parallels, like a chameleon, the regulatory offence has evolved toward the criminal model. Justice McLachlin's decision in *Dunedin* characterized regulatory prosecutions as "more criminal than civil in nature", due to their public and penal nature, including penalties ranging from significant fines to terms of imprisonment. Recent tragedies, such as occurred in Walkerton, Ontario, have underscored the importance of regulatory offences in protecting public safety and may lead to an expansion of the regulatory web.[6] If the price of a complex trial is beyond the reach of some defendants or fiscally challenged government ministries,[7] fairness issues are raised.

The final part proposes some principles for reform. The thesis of this article is that a just system ought to have costs rules that takes into account the economic reality of funding litigation. Where there is a violation of procedural

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[3] P. Trudeau *(February 1962) 8:2* McGill L.J., reprinted in G. Pelletier, ed., *Against the Current* (McLelland & Stewart, 1996) at 135.

[4] *R.* v. *City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.) at 357 ("*Sault Ste. Marie*").

[5] *Ibid.* at 357.

[6] The Honourable D. O'Connor, *Report of the Walkerton Inquiry*, Chapter 12, "The Failure to Enact a Notification Regulation" (Toronto: Queen's Printer for Ontario, 2002).

[7] *Ibid.*, Chapter 11, "The Ministry of the Environment Budget Reductions". B. Doern and T. Reed, "Patient Science versus Science on Demand: The Stretching of Green Science at Environment Canada", in *Risky Business: Canada's Changing Science-based Policy and Regulatory Regime*" (Toronto: University of Toronto Press, 2000).

rights, the primary goal should be to restore the parties to the position they occupied prior to the violation of the rules. The level of blame for the non-compliance ought to be relevant only to the scale of costs. On a substantive level, it is submitted that the civil components inherent in proving due diligence in a regulatory trial ought to be accompanied by a modified costs rule, which would serve to level the playing field.

II. *Costs and the Queen*

(a) *Costs and Verdicts*

Historically, costs were not awarded in criminal cases as the King had a prerogative not to pay them to a subject, and it would be "beneath his dignity to receive them".[8] The prevailing convention of criminal practice is that whether the criminal defendant is successful or unsuccessful on the merits of the case, he or she is generally not entitled to costs.[9] This rule has its origins in the common law criminal justice system which is unique, in having a high burden of proof and no reciprocal disclosure. The implicit reverse of this proposition is that the State is not entitled to costs upon a finding of guilty.

There are some quirky exceptions to the general rule. The summary conviction provisions of the *Code* allow costs between informant and defendant, which appear to be directed at private prosecutions. The costs are restricted to anachronistic fees set out in a schedule in the Code.[10] Reading the schedule for costs pursuant to section 840 is like taking a walk back 100 years into legal history. Fees for hearing and determining the proceeding are $1.00 and where the hearing lasts more than 2 hours, it is $2.00. The fees outlined in the tariffs do not include counsel fees and the Court cannot award them under section 840.[11] Similarly, Provincial offences legislation may provide for costs based on success, but these are usually restricted to disbursement type costs and exclude the payment of legal fees.[12]

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[8] Blackstone, *Commentaries on the Law of England.* For an historical review and a counter-position to that developed in this article, see M. Humphrey, *A Response to Ken Jull's Paper, Regulatory Offences, Legal Costs and Proving Due Diligence: the Legal Version of Survivor: The cost is still too high* (Part-time LL.M. Major Paper, Osgoode, York University, 2000) ("Humphrey"). In civil matters, in most jurisdictions, there are now express statutory provisions making the Crown both liable for costs and entitled to them. See P. Hogg and P. Monahan, *Liability of the Crown*, 3d ed.(Toronto: Carswell, 2000) at 69.

[9] *R.* v. *M (CA)*, [1996] 1 S.C.R. 500 as cited in *The Queen* v. *Logan* (2001), 52 O.R. (3d) 646 at 650 (Ont. Sup. Ct.), affirmed (2002), 59 O.R. (3d) 575 (C.A.) ("*Logan*").

[10] *Criminal Code*, R.S.C. 1985, as amended, c. C-46, ss. 809 and 840 ("the *Code*").

[11] *A-G Que.* v. *A-G. Can.* (1945), 84 C.C.C. 369 (S.C.C.).

[12] See for example, *Ontario Provincial Offences Act*, R.S. O. 1990, c. P-33 ("*POA*"). Section 60 provides for costs against the defendant on conviction, said costs being fixed by regulation. The regulations authorize small amounts payable upon conviction for such things as service of a summons. All of these various costs are under $100. There appears to be no reciprocal obligation upon the State to pay costs on acquittal.

Academic writing on costs in criminal proceedings has been sporadic. A standard argument against costs in classic criminal cases, is that the public might be outraged if public funds were used to pay successful criminal defendants who were perceived as "probably guilty", but the case was not proven beyond a reasonable doubt almost to a point of absolute certainty.[13] This is not simply a pro-prosecution sentiment. Some defence counsel are opposed to the concept of costs in criminal matters, fearing that juries might be more reluctant to acquit if they knew that it would cost the State funds. A criminal costs rule might create three types of verdict: innocent (and thus deserving of costs), not guilty (no costs) and guilty.[14] Recent high profile cases of wrongfully convicted accused have stimulated the debate again about whether there should be some discretion to compensate in clear-cut cases of innocence, such as cases of mistaken identity.[15]

There is an unspoken premise that perhaps explains the lack of attention to costs in criminal proceedings. The public views criminal defendants as a group that is on the margins of society; a law abiding citizen does not think that he or she will ever be a criminal defendant, but will overestimate the chances of becoming a victim of crime.[16] Politicians gain more votes by "law and order" platforms[17], with the result that reform of the costs rule is not likely to be on the agenda soon. In the colourful words of Ed Greenspan, "Any government that said, in a speech from the throne, that they were going to put $75 million into a fund to compensate wrongfully accused people wouldn't be the government for very long".[18]

Regulatory offences would likely get the same reception from the public as criminal offences, although it is hard to predict as there has been little empirical measurement in this area. One could speculate that the general Canadian public is not acquainted with the concept of a "public welfare offence". The nomenclature of "charges", informations, and a prosecution brought by the State all have the

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[13] *Starr* v. *The Queen* (2000), 147 C.C.C. (3d) 449 (S.C.C.). *R.* v. *Lifchus* (1997), 150 D.L.R. (4th) 733 (S.C.C.).

[14] Scotland, has three such verdicts: guilty, not proven and not guilty. See P. MacKinnon, "Costs and Compensation for the Innocent Accused" (1988) 67 Can. Bar Rev. 489 at 497. MacKinnon summarizes the approaches of various jurisdictions to this vexing problem and argues the thesis that existing provisions for compensating innocent accused are at best inadequate (at 500).

[15] C. Schmitz, "Judge urges Compensation for 'Wrongfully Accused'" *The Lawyers Weekly* (14 May 1999) referring to remarks made by Ontario Court of Appeal Justice Michael Moldaver. See also M. Bourrie, "Compensating the Innocent" [November/December 1999] Can. Law. 29 at 31. C. Freeze, "Ottawa pays $1.7 million in failed war-crimes cases" *The Globe and Mail*, (5 December 2001) A1.

[16] For an empirical analysis, see J. Sprott and A. Doob, (1997) "Fear, Victimization, and Attitudes to Sentencing, the Courts, and the Police", 39 Can. J. Crim. 275.

[17] I. Taylor, *Crime, Capitalism and Community* (Toronto: Butterworths, 1983); D. Martin, "Both Pitied and Scorned: Child Prostitution in an Era of Restructuring" in B. Cossman and J. Fudge, eds. *Feminism, Law and the Challenge of Privatization* (Toronto: University of Toronto Press, 2002) 355-402.

[18] Bourrie, *supra* note 15 at 31.

trappings of a criminal trial. Allegations of breaches of statutes designed to protect values such as the environment and the integrity of markets, are not likely to engender sympathy for defendants.

(b) *Costs Related to Procedure in Criminal Cases*

Costs awards have a long history as a traditional criminal law remedy, although this was sparingly used prior to the advent of the Charter; a point made by Chief Justice McLachlin:

> Costs awards to discipline untimely disclosure are integrally connected to the function of the provincial offences court as a quasi-criminal trial court. Costs awards have a long history as a traditional criminal law remedy. Although sparingly used prior to the advent of the Charter, superior courts have always possessed the inherent jurisdiction to award costs against the Crown: *R.* v. *Ouelette*, [1980] 1 S.C.R. 568; *R.* v. *Pawlowski* (1993), 12 O.R. (3d) 709 (C.A.), at p. 712. In recent years, costs awards have attained more prominence as an effective remedy in criminal cases; in particular, they have assumed a vital role in enforcing the standards of disclosure established by this Court in *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326. See, for example: *Pawlowski*, supra; *Pang*, supra; *R.* v. *Regan* (1999), 137 C.C.C. (3d) 449 (N.S.C.A.).[19]

Despite the long history of cost awards, the framework for them is a patchwork quilt. For trials in indictable matters, the *Criminal Code* has no coherent structure to govern procedural costs, but rather has a few isolated provisions such as section 601(5), which permits costs resulting from the necessity of an amendment to an indictment. There is no definition of "costs" and the jurisprudence concerning procedural costs in criminal cases is sparse.[20] Kent Roach describes the present statutory framework governing costs as "archaic, incoherent and restrictive".[21]

Procedural costs in summary conviction trials or under Provincial Offences legislation basically follow the model in indictable offences, with some

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[19] *Supra* note 1 at 353.

[20] *The Queen* v. *Oulette*, [1980] 1 S.C.R. 568. For an example of procedural costs incurred due to systematic problems beyond the control of the accused, see *Phillips and Parry* v. *The Queen* (1997), 113 C.C.C. (3d) 481 (S.C.C.), where the accused recovered reasonable legal costs resulting from the need for a new trial caused by an apprehension of bias. In general, see M. Orkin, *The Law of Costs* (Toronto: Canada Law Book, 2001), c.15 "Costs in Criminal Proceedings".

[21] K. Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 2001), c.11 "Damages and Costs" at 11-45, summarizes the present scheme: "In contrast, courts of criminal jurisdiction have been thought to require explicit statutory jurisdiction to award costs and have in modern times of public prosecutions awarded costs either for or against the Crown only in extraordinary circumstances. The *Code* does not provide a coherent structure to govern the award of costs. With the exception of costs in proceedings for defamatory libel, and when the accused has been misled or prejudiced by a defect in the indictment, there are no provisions for the award of costs on the trial of indictable offences, and the award of costs on appeals of indictable offences is specifically prohibited".

modifications. The Ontario *Provincial Offences Act*,[22] which was considered in *Dunedin*, contains a broad remedial provision designed to cure irregularities, which was previously thought to not permit legal fees as they are not included in the regulations. The decision in *Dunedin* widens this provision to now include legal costs where an accused has been misled by a procedural irregularity.[23]

It is an anomaly that costs could be awarded for procedural matters, such as an adjournment required by an amendment sought by the Crown, and yet they are not statutorily authorized when an adjournment is necessitated by a failure to disclose by the same Crown. The absence of a general statutory remedial provision restricts the flexibility of Courts to adjust to new concepts such as disclosure obligations. Statutory authorization, of course, relates to the ability of provincial courts to award costs, as contrasted to superior courts. This is not merely of academic interest, since the bulk of criminal trials occur at the provincial court level.

The Supreme Court in *R.* v. *Stinchcombe* contemplated that there might be legal consequences from a failure to disclose, but considered the issue from the perspective of whether it might cause an impairment of the right to make full answer and defence.[24] It is now over ten years after the decision in *Stinchcombe*, with only minimal reaction from the legislative branch in the area of disclosure.[25] Yet again, litigants are forced to turn to the courts to seek a remedy, and then,

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[22] The scheme under the *P.O.A.* is to link costs orders to section 60, which sets out costs fixed by regulations. The scheme provides for procedural costs and very limited costs relating to the result. For example, where an adjournment is necessitated by an amendment, costs may be payable under s. 37, as authorized by s. 60. S. 90(2) is designed to cure irregularities through an adjournment, which can include a costs order under s. 60.

[23] *Supra* note 1 at 331, citing the reasons of O'Connor J.A., in the Ontario Court of Appeal. This creates its own anomaly, as the specific section in the *P.O.A.* permitting costs for an adjournment caused by the need for an amendment or particulars, is restricted to costs under section 60, which do not include legal costs.

[24] *R.* v. *Stinchcombe*, [1991] 3 S.C R. 326 at 348 ("*Stinchombe*").

[25] The history of disclosure obligations in Canada illustrates the dynamic between the Courts and the legislature. In 1991, the Supreme Court of Canada rendered its decision in the case of *Stinchcombe*, and went out of its way to comment that no legislative action had been taken in response to the Law Reform Commission proposals:

> The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject. See, for example, *Cunliffe* v. *Law Society* of British Columbia (1984), 40 C.R. (3d) 67 (B.C.C.A.); *Savion* v. *The Queen* (1980), 13 C.R. (3d) 259 (Ont. C.A.); *R.* v. *Bourget* (1987), 56 C.R. (3d) 97 (Sask. C.A.). No case in this Court has made a comprehensive examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled *Criminal Procedure: Discovery* (the "1974 Working Paper") and a 1984 report titled *Disclosure by the Prosecution* (the "1984 Report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in s. 603 of the *Criminal Code*, R.S.C., 1985, c. C-46, enacted in the 1953-54 overhaul of the *Code* (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts. (at 332)

under the *Charter*. It is arguable that the lack of remedy provision favours the State over the accused, as it is the accused most likely to be applying for relief. A failure by the Crown to provide timely disclosure is likely to be remedied by an adjournment. If the accused seeks costs for such an adjournment, they must step up to cloak the remedy in a *Charter* violation.

(c) *Costs as Remedies for Charter Violations: a Remarkable Event*

The decision in *Dunedin* sets the parameters for costs remedies under the *Charter* for the foreseeable future. Echoing the ghost of *Stinchcome*, the facts in *Dunedin* concerned a disclosure issue. The defendants were charged under the Ontario *Occupational Health and Safety Act*, and they requested that the Crown disclose a copy of the Prosecution Approval Form. The Crown asserted solicitor-client privilege over the form, and refused to provide it. A Justice of the Peace acting as a trial justice under the *Provincial Offences Act* ordered the Crown to disclose the form and to pay the costs of the defence disclosure motion brought under the *Charter*.

(i) *The Jurisdictional Threshold*

The Supreme Court decides that a trial justice acting under the POA has power to order legal costs against the Crown for a *Charter* breach. The Court treads a line between a broad purposive interpretation of remedies and respect for the role of Parliament in prescribing the jurisdiction of courts and tribunals. The starting point for this journey is the watershed decision of Justice Lamer in *Mills*,[26] who observed that there were fundamental differences between the criminal and civil trial processes. For example, it would be difficult to grant damages against a police officer within the criminal trial process, as the officer would be entitled to a fair hearing which would be separate and apart from the criminal trial process. Justice LaForest supported this distinction in *Mills*, requiring that "civil remedies should await action in a civil court".[27]

The only route left, is to award costs under the rubric of remedies designed to control the court's process. Chief Justice McLachlin identifies costs awards as having "assumed a vital role in enforcing the standards of disclosure established by this Court in *R. v. Stinchcombe*".[28] The characterization of the remedy within the criminal paradigm, as being primarily directed towards control of the process, permits the Supreme Court to keep the remedy within the jurisdiction of a criminal trial Court. Chief Justice McLachlin is cognizant of the practical reality that splitting the remedy between the provincial and Superior Courts would in some cases effectively deny the

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[26] *Mills* v. *The Queen*, [1986] 1 S.C.R. 863 ("*Mills*").

[27] *Ibid.* at 971, as cited in *Dunedin*, *supra* note 1 at 345-46.

[28] *Supra* note 1 at 353.

accused access to a remedy. Most accused would not have the resources to commence separate legal proceedings in the Superior Court, subsequent to the hearing of the regulatory trial.

(ii) *The Test*

Prior to the decision in *Dunedin*, a split had developed in the cases as to the appropriate test for the award of costs. At one end of the spectrum were those cases that only award costs in the most egregious cases of misconduct;[29] the prosecution was only forced to pay costs for conduct that went well beyond inadvertent or careless conduct.[30] The language used to support a costs order often included terms such as "reprehensible conduct", or "interference with the administration of justice" and "oppressive and improper conduct".[31]

At the opposite end of the spectrum, some Courts had awarded costs to remedy unacceptable negligence, without requiring egregious conduct.[32] At this end of the spectrum, the focus or goal of the remedy relates to compensation to the accused, rather than conduct of the Crown. In the Ontario case of *The Queen* v. *Logan*,[33] the trial judge exhorted that we should perhaps move out of the paradigm of the criminal process and ordered costs as a Charter remedy to compensate the applicant for economic hardship arising from a failure to make timely disclosure. The nature of the misconduct was simply to mismanage.[34]

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[29] *R.* v. *Pawlowski* (1993), 12 O.R. (3d) 709, 79 C.C.C. (3d) 353 (C.A.).

[30] *R.* v. *Jedynack* (1994), 16 O.R. (3d) 612.

[31] *R.* v. *Dodson* (2000), 142 C.C.C. (3d) 134 (Ont. C.A.); *R.* v. *Stapeldon* (1999), 214 N.B.R. (2d) 57 (C.A.); *R.* v. *Veri* (2000), 71 C.R.R. (2d) 196.

[32] See *R.* v. *Robinson* (1999), 142 C.C.C. (3d) 303 (Alta. C.A.).

[33] *Supra* note 9 at 650. Justice Marshall's discussion of the competing paradigms in the ordering of costs provides a good framework for analysis:

> The "remedy" is a remedy under s. 24 of the *Charter* for a *Charter* breach. We must be clear that this is a remedy for a wrong and not particularly a criminal wrong. It may be seen as a remedy for Mr. Logan, not a sanction against the Crown. The other confusion is that we should perhaps move out of the paradigm of the criminal process. The accused is, of course, clothed with the presumption of innocence. In this case, charges have been stayed. Our thinking must move from the standard parameters of the criminal process and consider this as a *Charter* breach for which an appropriate remedy may be fashioned.

[34] In *Logan*, after two weeks of trial on a charge of manslaughter, where most of the Crown's case had gone in including cross-examination of witnesses, the Crown revealed that they had not disclosed the contents of an interview with an important eyewitness. The Court of Appeal found: "In these circumstances, disclosure of the notes of the eyewitness interview shoud have been automatic and, in our view, no adequate explanation has been provided for the omission. In all the circumstances, this omission and failure to disclose constituted 'a marked and unaccepatable departure from the reasonable standards expected of the prosecution.'" *Supra* note 9 at 576.

The Chief Justice resolves the split in the cases by costs requiring a marked and unacceptable departure from reasonable standards, which is consistent with the deterrence rationale:

> Neither is there any indication that the Crown will be subjected to such awards unfairly or arbitrarily. Crown counsel is not held to a standard of perfection, and costs awards will not flow from every failure to disclose in a timely fashion. Rather, the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution. I fail to see how the provision of an expedient remedy in such cases, from a trial court that is not only competent but also ideally situated to make such an assessment, risks disrupting the existing system of justice.[35]

The Supreme Court's decision in *Dunedin* reserves a cost remedy only for those egregious cases of non-compliance:

> In summary, the provincial offences court's role as a quasi-criminal court of first instance weighs strongly in favour of an expansive remedial jurisdiction under s. 24 to promote complete resolution of Charter issues in the forum best situated to resolve them. In this light, authority to discipline egregious incidents of non-disclosure through awards of legal costs is consistent with — and would enhance — the role performed by these courts in the administration of criminal justice.[36]

The wording of the test in *Dunedin* is reminiscent of the modified objective test in dangerous driving, which has never been easy to apply in practice. A "marked and unacceptable departure from the reasonable standards expected of the prosecution" suggests a purely objective test as a minimum. The reference to discipline of "egregious" incidents suggests a subjective element, short of malice but tending toward some bad faith. The test is connected to the court's control of its trial process, as a means of disciplining and discouraging "flagrant and unjustified incidents of non-disclosure".[37] The test set in *Dunedin* is perilously close to, but clearly below, the test for malicious prosecution. As recently affirmed by the Supreme Court of Canada in the case of Proulx,[38] the

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[35] *Supra* note 1 at 356.

[36] *Supra* note 1 at 356.

[37] *Ibid.* at 354.

[38] *Proulx* v. *Attorney General of Quebec* (2001), 159 C.C.C. (3d) 225 (S.C.C) ("*Proulx*"), Justice Iacobucci and Binnie JJ. state (McLachlin C.J.C. and Major J. concurring): "Under our criminal justice system, prosecutors are vested with extensive discretion and decision-making authority to carry out their functions. Given the importance of this role to the administration of justice, courts should be very slow indeed to second-guess a Prosecutor's judgment calls when assessing Crown liability for prosecutorial misconduct. *Nelles* v. *Ontario*, [1989] 2 S.C.R. 170, affirmed unequivocally the public interest in setting the threshold for such liability very high, so as to deter all but the most serious claims against the prosecuting authorities, and to ensure that Crown liability is engaged in only the most exceptional circumstances. Against these vital considerations is the principle that the Ministry of the Attorney General and its Prosecutors are not above the law and must be held accountable. Individuals caught up in the justice system must be protected from abuses of power. In part, this accountability is achieved through the availability of a civil action for malicious prosecution." (at 234)

threshold for Crown liability is set very high to capture only those exceptional circumstances where power is abused through a malicious prosecution.

In summary, the reference in *Dunedin* to "the developing jurisprudence" hints that this will not be the last word on the test for costs under the *Charter*. There is a wide range for development between the minimum of a marked departure from reasonable standards, and flagrant violations.

(iii) *Procedure for applying the test*

In criminal proceedings, incidental *Charter* issues are routinely resolved at the trial stage without recourse to other proceedings. The procedure has been repeatedly endorsed by the Supreme Court of Canada as desirable and is once again affirmed in the context of a trial in the provincial offences court.[39] If one steps back for a moment, and imagines a costs application in a typical provincial offences trial, several complexities emerge.

The trial Court must determine the level of fault inherent in the violation. In many cases, this involves an inquiry into the relation between the police and Crown, which is collateral to the criminal trial. The test is not easy to apply in practice, as it really requires that there be evidence adduced about the reasonable standard of Crown practice, before a determination can be made as to whether there has been a marked departure from such practice. If the Crown Attorney at trial is implicated in the failure to make disclosure, this raises the difficult threshold question of whether the Crown must be recused, which will be automatic if the Crown Attorney chooses to give evidence. This may create more procedural layers than anticipated. There are some procedural questions regarding costs orders left unanswered by the decision in *Dunedin*. One question is the appropriate scale of costs. The Court leaves this task to trial and appellate Courts who have been developing guidelines to curb the potential for arbitrary or unfair awards. There is authority for ordering costs on a solicitor and client basis in criminal cases, where there is serious misconduct giving rise to Charter violations.[40]

It is submitted that, in an ideal world without jurisdictional constraints, it would have been much more efficient to permit procedural costs to be awarded on a "no fault basis". It is suggested later in this paper, that one solution to the procedural morass would be to use criminal practice courts to resolve collateral issues such as costs awards. Judges in these Courts would develop some expertise as to the appropriate amounts and scale of costs. This leads to a discussion of the relationship between costs and the function of a remedy.

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[39] *Dunedin*, *supra* note 1 at 358.

[40] *The Queen* v. *Pinnacle Transport Ltd. and Gillies*, 2000 Carswell Ont. 3551 (Ont. Ct. J.) at para. 46. In this case, costs were awarded on a solicitor and client scale to remedy gross misconduct of the police in misleading a judicial officer to obtain a search warrant, and the tunnel vision of the Crown in failing to make timely disclosure; *R* v. *Axiom Designs Inc.*, [2001] O.J. 312 (Ont. S.C.J.), where the cost award was $230,000.00.

(iv) *Function of the remedy*

With respect to the function of the remedy, the Court in *Dunedin* leans towards deterrence, with compensation playing only a secondary role:

> Such awards, while not without a compensatory element, are integrally connected to the court's control of its trial process, and intended as a means of disciplining and discouraging flagrant and unjustified incidents of non-disclosure. Deprived of this remedy, a provincial offences court may be confined to two extreme options for relief —a stay of proceedings or a mere adjournment—neither of which may be appropriate and just in the circumstances.[41]

The primary role of deterrence reflects a classic criminal law approach, and is consistent with the test requiring at least reckless behavior. The civil parallel contains both elements of discipline and compensation, but the priority of these goals is reversed. The basic principle on which costs are awarded is as *compensation* for the successful party, not in order to punish a barrister. The scale of costs may reflect conduct, and solicitor-client costs will be awarded where there has been reprehensible, scandalous or outrageous conduct. These general principles were enunciated by Justice McLachlin (as she then was) in *Young* v.*Young*:

> The basic principle on which costs are awarded is as *compensation* for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute, and in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court.[42]

In other contexts, criminal courts have granted very significant remedies on the basis of compensation. Perhaps the best example of this is the exclusion of evidence that is conscripted against the accused in violation of his rights. The essence of the Supreme Court ruling in *Stillman* v. *R.* is that if conscriptive evidence would not have been discovered but for the violation, its admission will render the trial unfair, which will generally result in the exclusion of evidence.[43] Although it is not explicit, a restorative principle can be gleaned from the application of the discoverability rules in *Stillman*. The only way to restore the accused to the position that he would have been in had his rights been respected, is to exclude the evidence.[44] Applying the same logic to costs, one must ask: what is it about money that seems to scare us? If we can exclude

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[41] *Supra* note 1 at 354.

[42] *Young* v. *Young* (1993), 108 D.L.R. (4th) 193 at 284 (S.C.C.).

[43] *Stillman* v. *The Queen* (1997), 113 C.C.C (3d) 321 at 365 ("*Stillman*").

[44] The exclusion of evidence to correct a violation was philosophically supported in U.S. academic literature, although it has become a dissenting position in the federal courts. See Roach, *supra* note 21 at s.10.30, A.: Exclusion of Evidence to Correct a Violation.

evidence in serious crimes as part of a remedy for breach of rights, why are we so afraid of paying a few dollars to enforce these same rights? Perhaps what scares us is that a costs order contemplates a fiscal transfer of money, which Courts have traditionally been loath to sanction in the absence of legislative direction. The jurisdictional split between criminal and civil spheres clouds the analysis of the function of a remedy.

The theory of deterrence is divided into specific and general categories. Translating this theory into operational reality in the costs context, may be problematic. One problem relates to the deterrent effect of a penalty that is only assessed in remarkable cases of flagrant conduct. Using the analogy of fines for speeding, there may be a low general deterrent effect if drivers are only penalized in remarkable cases. Another problem relates to the issue of organizations and accountability. Costs will be paid by the State, and not by the individual officer or Crown Attorney responsible.[45] Unless internal mechanisms are created, the specific deterrent value may be minimal. Statistics are not kept concerning the incidence of non-disclosure or other procedural violations of rules by the police or Crown Attorneys. In Canada, there is a paucity of literature on this issue.[46] On an anecdotal level, it appears that most failures by the police to disclose relevant evidence reflect the old way of doing things. As for Crown Attorneys, again on a purely anecdotal level, it appears that failures to disclose most often occur in cases where there is no assigned Crown Attorney, and hence the issue of disclosure falls to a duty Crown who is often overburdened with cases. It is a rare case where defence counsel can argue that the Crown Attorney has flagrantly refused to disclose relevant material in a marked and unacceptable departure from reasonable standards expected of a prosecutor. In fact, to make such an allegation is close to alleging professional misconduct by a fellow member of the bar, and at least one case has so found.[47]

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[45] In the civil context, a solicitor who has caused costs to be incurred without reasonable cause may have personal cost consequences imposed. See, for example, Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 57.07(1). In Young, *supra* note 42 at 284 the Supreme Court held that "courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes".

[46] For an interesting analysis of pressures on prosecutors in the United States, see Notes, "Breathing new life into prosecutorial vindictiveness doctrine" (2001) 114 Harv. L. R. 2074. The Note argues that changes over the last two decades have expanded prosecutor's incentives and opportunities to act vindictively and this has increased the incidence of such conduct. This is related to the increasing complexity of criminal law and prosecutor's often limited resources. For example, the Note uses the example of a reaction to defence procedural motions: "Thus, one need not assume any inherent malice to explain why a prosecutor might find procedural motions 'irritating'–and why it may be perfectly rational for him to seek to deter them by acting vindictively" (at 2081). Theses same pressures apply less in Canada, as the office is less politicized. With respect to public accountability of Crowns, see B. MacFarlane, "Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency" (2001) 45 Crim. L. Q. 272.

[47] *Re Cunliffe and the Law Society of British Columbia; Re Bledso and Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560 (B.C.C.A.).

An anomaly is created by the functional characterization in *Dunedin,* when compared to the various Code provisions for costs. Mere inadvertence by a Crown Attorney may result in the need for an amendment to an information, and a costs order under section 601(5). Yet if an adjournment is required to permit the defence to review material not disclosed due to inadvertence, the decision in *Dunedin* clearly rules out a similar costs order. A further anomaly created by the decision in *Dunedin* is highlighted by a comparison with costs issues in *Charter* litigation outside of the criminal paradigm. As Kent Roach argues, an applicant for a Charter remedy in a civil court has, at least, made the decision to bring an affirmative claim against the State, while an applicant in a criminal trial has been brought to court by the State and forced to retain counsel.[48] A purposive approach to remedies, such as the one articulated by Roach in his book, *Constitutional Remedies in Canada*, operates outside of the criminal versus non-criminal tension. Leaving aside punitive remedies, a remedy's primary purpose ought to restore the applicant to the position that they would have been in, had the breach of a given standard not occurred. Roach advocates a focus on the accused's corrective claims to the exclusion of the question of the Crown misconduct.[49] This approach would be more consistent with the civil focus on costs awarded primarily as compensation.

(v) *A hidden fine against those presumed innocent*

Most persons accused of a regulatory offence will not qualify for legal aid. A failure to provide adequate disclosure will lead to additional appearances and preparation by counsel, who must bill for these services. The accused should not be put to such additional cost through no fault of his or her own. Such additional cost might be described as a hidden "fine" levied against those who are presumed innocent. A pre-*Dunedin* example of late disclosure, provided on the eve of trial, rendered meaningless most of the defence preparations for trial, resulting in a costs order of $116,086. In ordering costs, Justice Stayshyn commented that the justice system cannot countenance careless or reckless behavior, even recognizing that prosecutors are overburdened and partly dependent upon the candour of the police.[50] An media interview with the accused in this case underlines the practical reality of the costs of criminal litigation:

> Mr. Greganti spent eight months in jail before being granted bail. Yesterday, he credited Mr. Greenspan and co-counsel Jane Kelly with ferreting out the documents that led Judge Stayshyn to throw out the charges. In the end, Mr. Greganti said, the justice system worked for him — but only because he and his extended family managed to scrape together enough money to afford top-flight lawyers and then encountered an insightful judge. "If anything, it has restored my faith that somebody

[48] *Supra* note 21 at s. 11.870.

[49] *Supra* note 21 at s.11- 46.6. Roach was counsel in *Dunedin*, *supra* note 1, for the intervenor, Criminal Lawyers' Association (Ontario).

[50] *R.* v. *Greganti,* reported by Kirk Makin, *Globe and Mail* (22 January 2000) A5.

> in the justice system saw through it all," Mr. Greganti said. "But how many people are in jail because they didn't have the right help?"[51]

Few individuals can raise over $100,000 to pay for legal expenses, and yet these costs are not out of line with modern legal fees for complex matters that go to trial. To the accused who is put to *additional* costs as a result of late disclosure, it doesn't make one difference whether the Crown was acting improperly or negligently or inadvertently made an error. It still cost an additional amount of approximately $100,000 to get to the point where a Court could rule that the matter could not go forward because of disclosure issues. In a case where additional costs are in the $100,000 range, it would be financially feasible for the accused to proceed against the Crown in a different Court. After *Dunedin*, this route may now be closed unless the higher test is met.

In the future, is to be hoped that disclosure problems will be reduced to a minority of cases. There is a general trend, however, to expand the complexity of criminal procedure rules. In the "old days" before the proclamation of the *Charter*, criminal law was not paper intensive and rules of procedure were something that civil practitioners had to worry about. Now, each level of criminal court has rules of practice, with time periods of compliance and requirements for factums in certain motions that seek *Charter* remedies such as a stay of proceedings.[52] The new layers of procedure add expense to the defence of a criminal case. These new criminal rules of practice mirror their civil cousins, with the exception of a cost rule. Failure to comply with the various rules of criminal procedure are generally dealt with under a separate rule concerning non-compliance.[53] These rules of Court cannot confer statutory jurisdiction, and are therefore quite limited in their scope.[54]

The above discussion has dealt primarily with costs relating to procedure. The evolution of regulatory offences raises the issue of costs relating to the verdict.

III. *The Evolution of the Regulatory Offence: a Criminal/Civil Chameleon*

(a) *The Rise of the Regulatory Offence*

The early vision of public welfare offences contemplated a speedy and efficient administrative scheme. In *Sault Ste. Marie*, Justice Dickson traced the

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[51] *Ibid.*, covering the case of Sauro Greganti. The costs order is separate from civil damages that may be the subject of a separate civil action in this case.

[52] For example, see *Rules of the Ontario Court of Justice in Criminal Proceedings*, SI/97-133, amended SI/98-102, Rule 27.

[53] For example, see *ibid.*, R. 2, providing that a failure to comply is an irregularity and not a nullity.

[54] See R. Libman, *Rules of the Ontario Court of Justice in Criminal Proceedings*, (Earlscourt: Saltspring Island, British Columbia, 2001). As an example, R. 2 deals with non-compliance; the Courts have held that this rule does not confer jurisdiction separate and apart from the *Charter*. See *R.* v. *Stekar* (1999), 41 WCB (2d) 365 (Ont. Gen. Div.).

evolution of public welfare offences as a judicial creation, founded on expediency, to do away with the requirement of *mens rea* for petty police offences:

> Although enforced as penal laws through the utilization of the machinery of the criminal law, *the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application.* They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.[55] [emphasis added]

Justice Dickson did not continue the civil motif, for had he done so, we might well have a costs rule. One gets the sense from reading the judgment that Justice Dickson viewed regulatory offences as being relatively simple "everyday" administrative matters that would not require lengthy trials to resolve.

The middle ground or "halfway house"[56] developed by Justice Dickson contemplated that the accused could avoid liability by showing what the reasonable person would have done in the circumstances: "The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event".[57] The wording of the test suggests that a defendant might establish the defence by simply taking the stand and talking about preventive steps that were taken, but had regrettably failed. The doctrine developed by the Court in *Sault Ste Marie* owed part of its heritage to the work of the Law Reform Commission of Canada, which was cited in the judgment. This early work reflected analytical clarity. The classic criminal model of procedure was not envisioned by the Commission as applying to regulatory offences; they were to be completely removed from the *Criminal Code*.[58]

In 1990, the Ontario Law Reform Commission had recommended that in strict liability offences, the accused should only have an evidentiary burden to satisfy, rather than a legal burden.[59] This laid the battleground for the constitutional attack on strict liability offences in *Wholesale Travel*. The Supreme Court's decision in *Wholesale Travel* put the constitutional "seal of

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[55] *Supra* note 4 at 357.

[56] Glanville Williams was cited by Dickson J. for identifying a "half-way house between *mens rea* and strict responsibility which has not yet been properly utilized, and that is responsibility for negligence". *Supra* note 4 at 365.

[57] *Supra* note 4 at 374.

[58] The Commission's report on *Our Criminal Law* articulated a philosophy of restraint in the use of the criminal law: "we should restrict our use of the full traditional criminal trial, keep the full solemn ritual for graver cases and divert less serious ones outside the ordinary system." Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa, Ont.: Queen's Printer for Canada, 1976) at 31 ["*Our Criminal Law*"]. Most importantly, less stigma would be involved in a conviction for a regulatory offence and "prison should not be in general a permissible penalty for such offences". *Ibid.* at 34-36.

[59] Cited by Lamer J. in *R.* v. *Wholesale Travel Group Inc.*(1992), 67 C.C.C. (3d) 193 at 224 (S.C.C.) ("*Wholesale*").

approval" on the division between regulatory offences and "true crimes".[60] The key analytical concept underlying the distinction is summarized by Cory J. when he states: "The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care".[61]

It is ironic that the offence of misleading advertising, at the heart of *Wholesale*, has now been moved to a "civil track" of reviewable practices. The Competition Bureau shifted its focus away from a punitive one to quick and effective compliance. In a background paper, the Bureau noted that the "inability to stop the offensive advertising until guilt has been proven through the court process is expensive, cumbersome and time-consuming".[62] The Bureau preserved the true criminal model for serious cases, creating a new criminal offence of misleading advertising that adds an explicit *mens rea* requirement. If one reflects upon the changes in the *Competition* scheme, we have come absolutely full circle to the Law Reform Commission's recommendations reserving the true criminal system for serious cases, and *excluding regulatory offences* from the *Criminal Code*.

The latest chapter in the evolution is *Dunedin*, where the Chief Justice describes the public penal nature of such prosecutions as being more criminal than civil in nature:

> The function of a provincial court operating under the POA is to provincial offences. While the majority of these offenses involve minor regulatory infractions, they also concern important matters like environmental protection and, as here, workplace

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[60] Clay Ruby and I are critical of this distinction, which we say is analytically unworkable. Our preferred focus would be on the penalty sought by the State, and we would draw the dividing line at imprisonment. Where the Crown seriously seeks imprisonment (which may be appropriate in serious cases), the Crown should elect to do so and prove its case beyond a reasonable doubt, assisted only by an evidentiary burden on the accused in certain situations. See C. Ruby and K. Jull, "The Charter and Regulatory Offences: a Wholesale Revision" (1992), 14 C.R. (4th) 226.

[61] *Supra* note 59 at 238. This looked like the Law Reform Commission model, and indeed, the Court cited the Commission's work in support of its decision. The missing piece of the puzzle was the elimination of jail. A breach of the offence of misleading advertising could, on indictment, carry a penitentiary sentence of 5 years. Justice La Forest, who had previously been a Commissioner (having signed the 1976 Report on *Our Criminal Law*) dissented in *Wholesale Travel*, writing that a requirement that the accused prove due diligence, where there could be a serious deprivation of liberty went too far. *Supra* note 59 at 231. After the decision in *Wholesale*, the lines continued to blur between criminal and regulatory. Storage of a firearm contrary to regulation, which is prohibited by the *Code*, has been held to be a "quasi-regulatory" offence (although the accused may raise a doubt about due diligence, so the standard is not exactly the same). *R.* v. *Smillie* (1998), 129 C.C.C. (3d) 414 (B.C.C.A.); See J. Stribopoulos, "The Constitutionalization of 'Fault in Canada': A Normative Critique" 42 Crim. L.Q. 227.

[62] Competition Bureau, Backgrounder "Proposed Amendments to the Competition Act: Bill C-20, March 31, 1998 cited in L. Hunter and H. Chandler, "The Year in Review: Civil, Criminal & Administrative/Legislative Developments in 1997/98" (Canadian Bar Association, Annual Fall Conference on Competition Law, 1998) at 37.

> health and safety. These offences carry penalties ranging from significant fines to terms of imprisonment. The public and penal nature of such prosecutions suggests they are more criminal than civil in nature: see W. D. Drinkwalter and J. D. Ewart, Ontario Provincial Offences Procedure (1980), at pp.4-7. Provincial offenses courts are, for practical purposes, quasi-criminal courts, determining guilt and innocence and imposing commensurate criminal penalties.[63]

The criminal side of regulatory offences is supplemented by personal liabilities of corporate officers.[64] Like a chameleon, it all depends upon what the background is.

(b) *Search Warrants and Reciprocal Fairness*

The last major case on regulatory offences prior to *Dunedin* was the decision of the Supreme Court in *Canadian Oxy* v. *Canada (Attorney General)*.[65] This decision tilted the balance back toward the civil model by permitting a search warrant in anticipation of due diligence defences. The Court did not endorse the particular warrant in issue in *Canadian Oxy*, but it underscored the value of truth in litigation, which is reminiscent of the rationale underlying disclosure obligations in civil law. In particular, the Court imports the notion of "reciprocal fairness":

> In addition, as pointed out by the intervener Attorney General of Ontario, denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system. In order to be fair, the criminal process must "enable the trier of fact to 'get at the truth and properly and fairly dispose of the case' while at the same time providing th accused with the opportunity to make a full defence"; *R.* v. *Levogiannis,* [1993] 4 S.C.R. 475, at p. 486, 85 C.C.C. (3d) 327. This reciprocal fairness demand that the Crown be able to fairly seek and obtain evidence rebutting the accused's defences. If the respondents' submission on the interpretation of s. 487 (1) were accepted, a search warrant would never be available for this purpose. This narrow interpretation would frustrate the basic imperative of trial fairness and the search for truth in the criminal process.[66]

Some might argue that *Canadian Oxy* is a "double whammy" for the accused. *Wholesale* shifted the legal burden on the basis that only the *defence* could

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[63] *Supra* note 1 at 352-53.

[64] See the *Ontario Environmental Protection Act*, R.S.O. 1990, c. E-19 , s.194(a)(*E.P.A.*). For another example, see the *Ontario Securities Act*, R.S.O. 1990, c. S-5, s.122(3), which provides for fines up to $1,000,000. Every director or officer of a company who authorizes, permits or acquiesces in the commission of an offence relating to misleading statements is guilty of an offence. This operates whether or not a charge has been laid or a finding of guilt has been made against the company. See Groia and Adams, "Searching for a Soul to Damn and a Body to Kick: The Liability of Corporate Officers and Directors" (Meredith Memorial Lectures, 1990).

[65] *Canadian Oxy Chemicals* v. *Canada (Attorney General)* (1999), 133 C.C.C. (3d) 426 (S.C.C.) ("*Canadian Oxy*").

[66] *Ibid.* at 436.

produce the evidence of due diligence; now *Canadian Oxy* gives the State a window of access to that very evidence.[67] In light of the scope of due diligence, a search authorized under the *Canadian Oxy* doctrine may cut a very wide swath to include documents such as personal records and incident reports. While it is true that there is no voluntary disclosure or exchange of documents between the parties, it is arguable that the doctrine in *Canadian Oxy* is more intrusive than the civil model. To take the obvious example, it is more difficult to assert privilege in the context of the execution of a criminal search warrant. The Crown will have access to critical documents before it drafts the charge document, which is a step ahead of the civil plaintiff who only has access to discovery after drafting the statement of claim.

Other commentators have argued that the case will actually assist the accused in some circumstances, by creating a burden upon the Crown to preserve due diligence evidence and ensure its disclosure to all accused, including co-accused. This new obligation may have cost consequences for the authorities if they fail in their new obligations.[68] This brings us back to *Dunedin*.

(c) *Pre-trial Dynamics*

A recent and informal study of the use of the "Special" courts at the Old City Hall in Toronto found that regulatory trials are an increasing presence on the provincial docket and they are often the longer trials.[69] Lengthy trials raise the very real economic stakes, as legal fees increase. An accused who is facing a trial predicted to last several months, must have sufficient resources to fund the case. The unique element in regulatory matters is that the expense of a defence may be significant, as due diligence is expanding in its scope, discussed below. Regulatory proceedings may resemble a "zero-sum game". In the absence of

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[67] One of the reasons for shifting the onus onto the regulated participant was that, "[t]he means of proof of reasonable care will be peculiarly within the knowledge and ability of the regulated accused. Only the accused will be in a position to bring forward evidence relevant to the question of due diligence". *Supra* note 59 at 257. Now, after *Canadian Oxy*, the Crown has some tools and the means to obtain this information.

[68] Justice R. Libman, "*Canadian Oxy Chemicals Ltd.* v. *AG Canada*: Searching for Evidence of Negligence in Strict Liability Cases – But what to do with it?" (Seminar on Regulatory Offences, Osgoode Hall Law School, Professional Development Program, 18 January 2001).

[69] See Justice P. Reinhardt, "A Judicial Perspective on Managing Complex Regulatory Trials", (Seminar on Regulatory Offences, Osgoode Hall Law School, Professional Development Program, 18 January 2001). Justice Reinhardt conducted an informal survey of the "Special" Courts at the Old City Hall that were dealing with regulatory trials, in the Provincial Court (not including trials before Justices of the Peace). "The data suggests that regulatory offence trials are an increasing presence in the Old City Hall "Special" courts, and are becoming some of the longest trials. They are not overwhelming us, but their presence is being felt." *Ibid.* at 3.

reciprocal disclosure obligations,[70] it is difficult for the Crown to screen out cases which have a valid due diligence defence. The defence takes a risk making early disclosure. If the Crown does not withdraw the charge, they are now aware of defence strategy.

Pre-trial plea discussions may place tremendous pressure upon the accused, particularly if the penalty sought by the Crown is a fine. If the expense of the defence may eclipse a fine offered by the Crown in plea discussions, the scenario becomes one of "lose/lose": even a win, with all the attendant risks of a trial, represents a financial loss above what is offered in the plea deal. This dynamic creates tremendous pressures upon defence counsel, who must be ever vigilant in ensuring that a plea of guilty only be offered where this is ethically permissible.

In a parallel civil case, the expansion of mediation encourages settlement, but underlying much of this process is the threat of costs against the loser in a trial.[71] Offers to settle, with costs consequences, make the permutations complex. In a civil case, the defence could have made an offer to settle on the basis that it would go out without costs, if the plaintiff withdrew its case prior to trial. A victory by the defence would likely result in a cost order made from the date of the offer, awarding costs on a solicitor-client scale.

(d) *The Crown's First Burden Beyond a Reasonable Doubt*

A Crown Attorney might respond to the civil parallels drawn in this paper, by saying; "you forget that we must prove the basic violation beyond a reasonable doubt." The height of the hurdle that the Crown must jump will vary with the type of offence. Regulatory prescriptions are often drafted in a pro-active fashion to prevent harm, and have more to do with failures to meet standards than the classic model of a criminal offence. For example, environmental legislation[72] uses words such as "causes or is likely to cause an adverse effect,"[73] or "may impair the quality of the water".[74] Slight impairment, beyond the trivial, may give rise to successful prosecution.[75] Admittedly, the prosecution must prove the violation beyond a reasonable doubt almost to a point of absolute certainty. In a complex regulatory matter, it may be a seriously

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[70] There has been some talk about requiring reciprocal disclosure in criminal or quasi-criminal cases. It is likely that the Charter protections against self-incrimination would prevail.

[71] A fertile area for research would be a comparison of the Canadian costs rule, and the American rule of no costs shifting, combined with heavy use of contingency fees. See K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 298.

[72] See the *E.P.A., supra* note 64.

[73] *Ibid.*, s.14.

[74] *Ontario Water Resources Act*, R.S.O. 1990, c. O- 40, s. 30 ("*OWRA*").

[75] *Canadian Pacific Ltd.* v. *The Queen* (1995), 17 C.E.L.R. (N.S.) 129 (S.C.C.).

contested issue as to whether or not there is a violation. For example, the issue of capacity to impair water may require evidence about the nature and circumstance of the discharge, including it quantity and concentration, as well as the time frame over which the discharge took place.[76]

The dual burdens of proof create awkward procedural steps that may increase costs. The Court will only rule on the two burdens at the end of the trial. This means that the defence must adduce evidence of due diligence, without knowing whether or not the prosecution has actually succeeded in proving the initial violation beyond a reasonable doubt. In a complex case, this may take several weeks. This may be a waste of time and effort if it turns out that the prosecution has failed to prove its case on some of the counts. The only mechanism available to the defence to test the Crown's case prior to putting in evidence, is to bring a motion for a directed verdict. The threshold for such a verdict is so high,[77] that it is a rare case indeed that is stopped at this stage. The only other peremptory strike available is a defence motion charging that the prosecution is an abuse of process. Again, the threshold for success on such a motion is so high, that only the rarest cases are stopped by this method.[78]

Ideally, a ruling on whether or not a violation had been proven would assist all parties in knowing the parameters of the due diligence issue, if there is to be one. It is submitted that the rule concerning directed verdicts ought to be relaxed in regulatory trials where there is no chance of a jury. A motion ought to be permissible, (with the assumption that the Crown witnesses are believed absolutely, at this stage), as to whether the prosecution has proved the violation beyond a reasonable doubt?[79] If the answer in no, the case cannot get any stronger and ought to be dismissed.[80] The old formula of whether there is any evidence that could go to the jury should be jettisoned for regulatory offences triable without a jury.

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[76] *R.* v. *Inco Limited* (2001), 54 O.R. (3d) 495 (C.A.).

[77] S. Berger, *The Prosecution and Defence of Environmental Offences*, (Toronto: Canada Law Book, 2000) s. 4.664: "Non-suits". The well known test is whether there is any evidence, direct or indirect, on which a properly instructed jury would reasonably convict, without weighing credibility. Reasonable doubt is not to be considered on a motion for a non-suit. It can only be raised when the defence has either elected to call no evidence or has called all of its witnesses. *R.* v. *Morabito*, [1949] S.C.R. 172. This creates an impossibility for the defence in a regulatory trial, if it wishes to call no evidence on the *actus reus*, but must call evidence on due diligence.

[78] Abuse of process requires overwhelming evidence that the proceedings are unfair to the point that they are contrary to the interests of justice. See *Boise Cascade Canada Ltd.* v. *R.* (1995), 24 O.R. (3d) 483 (re: the effect of compliance with a permit) and K. Roach, "The Attorney General and the Charter Revisited" (2000) 50 U.T.L.J. 1 at 11.

[79] Justice Reinhardt, in his paper "A Judicial Perspective on Managing Complex Regulatory Trials", comments that Judges ought not to be put in the position of ruling on credibility issues mid-way through a trial. *Supra* note 69.

[80] The presumption of innocence operates such that the defence ought not to be obligated to adduced evidence on the due diligence phase that would be used by the prosecution on the reasonable doubt phase.

(e) *Due Diligence: the Shopping List of Factors Expands Towards a Civil Model*

The defence of "due diligence" has evolved into a complex subject which has its own jurisprudence. At least 14 factors or signposts of due diligence have been identified. The shopping list or signposts include technical matters such as industry standards, technological limitations, and the complexities involved.[81] Due diligence usually requires demonstrated reasonable, though unsuccessful efforts to comply, or an inability to comply because of extraordinary conditions or lack of resources.[82] Recent cases have pushed the edge of the envelope to require sophisticated defendants to be sensitive to the local environment, which may preclude simple delegation or reliance upon a third party supplier.[83] Although due diligence must be proved only in relation to the charge period, pre-charge history sets the context within which it is evaluated. Time frame is particularly relevant in cases of contaminated lands.[84]

The trier of fact will not usually have a specialized training in the sector that is the subject of industry standards. The defendant who has the legal onus of proving due diligence and who does not call expert evidence, does so at its peril. The practical requirement of retaining experts is now complicated by the new gatekeeper function assigned to trial Judges by the Supreme Court's most recent ruling on experts and junk science. In order to pass through the gate, a certain level of methodological rigor is required.[85] Due diligence evolves with technological limitations, and novel science cannot be ignored in this quest. This will have the effect of raising costs, both with respect to the scope of any expert's field work and in the time required in court to pass the gatekeeper test.

(f) *Civil Consequences*

There is an increasing trend for plaintiffs to "piggyback" onto the verdicts in regulatory trials. For a plaintiff, it is potentially a "win-win" scenario. If the defendant is convicted of the regulatory offence, the *Demeter* line of cases suggests that the verdict is *prima facie* admissible to prove the violation. The finding that the defendant failed to exercise due diligence is perhaps admissible,

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[81] *R.* v. *Woolworth Canada Inc.* (2000), 3 B.L.R. (3d) 174 (Ont. C.J.); *R.* v. *Hen-Sieg Holdings Ltd.* (1996), 21 C.E.L.R. (N.S.) 57 (Ont. (Prov. Div.)) ("*Hen-Sieg*").; *R.* v. *Amoco Fabrics* (1992), 73 C.C.C. (3d) 558 (Ont. (Prov. Div.)) ("*Amoco*").

[82] Laskin JA. in *R.* v. *Consolidated Maybrun Mines Ltd.* (upheld in the Supreme Court for slightly different reasons) as cited in *Hen-Sieg, supra* note 81 at 63.

[83] *R.* v. *Imperial Oil Ltd,* 2000 Carswell BC 2068 (B.C.C.A.) ("*Imperial Oil*").

[84] *Amoco, supra* note 81. *Her Majesty the Queen* v. *Her Majesty the Queen in Right of Ontario (as represented by The Ministry of the Environment)* (27 June 2001), (Ont.Ct. J.) [unreported] Dorval, J.

[85] *R.* v. *J. (J-L),* [2000] 2 S.C.R. 600.

although the law is not clear on this point.[86] Conversely, if the defendant succeeds in winning the regulatory trial, the plaintiff can attempt to distance itself from the verdict: the plaintiff was not a party to the criminal proceedings, and clearly is not bound by a failure to meet the high initial onus of proof beyond a reasonable doubt. The defendant might be permitted to adduce evidence of the finding of due diligence, but this would be likely open to challenge on the basis of no privity of parties.[87] Finally, now sounding like a broken record, it must be pointed out that the piggybacking Plaintiff is not liable for costs and nor is the prosecutor. The temptation to piggyback makes the costs issue in regulatory trials all that more acute. Fine "splitting" is an added incentive under regimes such as the *Fisheries Act* whereby a private complainant is entitled to 50% of any fine received, but not liable in any regard should the case fail.[88]

An interesting parallel could be made to the treatment of allegations of "true crimes" within civil proceedings. A defendant who is civilly sued for fraud or for alleged criminal conduct (such as receiving a secret commission) may be entitled to costs on a solicitor-and-client scale, if these allegations are unfounded. The rationale for this higher scale is a mix of deterrence and compensation, as described by Justice Brokenshire in the following passage:

> The nature of an award of solicitor-client costs is to increase the punishment as the improper conduct continues, and to encourage others to avoid such conduct. If a discontinuance after defence were held to disentitle the offending party to full costs, would it not send a message that outrageous and unfounded allegations could be made in pleadings with relative impunity?
>
> Would it not also send the message that *completely innocent persons are obliged to fund investigations and defenses, without hope of full redress?*[89] [emphasis added].

It is trite to state that the regulatory defendant must also "fund investigations and defences", with no hope of any redress for costs, on any scale. In contrast, solicitor — and — client costs make the civil defendant completely whole, and also adds a punitive element to discourage such conduct. This is particularly so where allegations are made against professional persons in the course of carrying out their duties.[90] A critic might respond that a

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[86] The slight difference in the burdens of proof create the problem for the plaintiff. The convicted defendant in the regulatory trial has failed to prove it more probable than not that it exercised due diligence. This is not equivalent to the plaintiff's onus of proof that it is more probable than not that the defendant was negligent. It is a subtle but important difference. See L. Price, "Regulatory Prosecutions and Civil Litigation: Implications for Counsel for the Defence" (Seminar on Regulatory Offences, Osgoode Hall Law School, Professional Development Program, 18 January 2001).

[87] If the Plaintiff pleads the regulatory charges and they are then dismissed, it will have a harder time arguing that the verdict is not legally relevant and admissible.

[88] *Fisheries Act*, Fishery (General) Regulations, 62 SOR/93-53.

[89] Brokenshire J., in *Goulin* v. *Goulin* (1995), 26 O.R. (3d) 472 at 475-76, adopted in *Mele* v. *Thorne Riddell* (1997), 32 O.R. (3d) 674 at 678 (Gen. Div.).

[90] A recent decision has hit a plaintiff (who unsuccessfully alleged that two Vancouver lawyers had committed fraud) with punitive "special" costs. *Okanagan-Sililkameen* v. *Blackwell* reported in *The Lawyers Weekly* (17 November 2000) at 3.

regulatory offence such as misleading advertising, does not have the same stigma as an allegation of fraud. Indeed such lack of stigma was central to the decision in *Wholesale Travel*. While there may be significantly lower stigma, that does not mean that there is no harm done to the reputation of a regulatory defendant who is not guilty, particularly if the industry in question is closely knit.

In summary, notions such as reciprocal fairness and technological due diligence bring the criminal and civil systems closer together in the form of regulatory offence, but costs rules remain very separate in the two systems. As the regulatory offence moves closer towards the civil system, we should consider reform of the costs rule in this direction.

IV. *Proposals for Reform*

Costs rules, by their nature, should reflect economic reality and enhance access to justice. The Supreme Court's decision in *Dunedin* calls attention to the jurisdictional limits of criminal courts, and implicitly invites a dialogue with the legislature.[91] It must not be forgotten that the judiciary, had a hand in creating the modern concept of the regulatory offence. Recall the words of Justice Dickson in *Sault Ste. Marie:*

> It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that the concept of absolute liability and the creation of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature. The development to date of this defence, in the numerous decisions I have referred to, of Courts in this country as well as in Australia and New Zealand, has also been the work of Judges. The present case offers the opportunity of consolidating and clarifying the doctrine.[92]

A good starting point for this dialogue would be a pilot project to test out alternate ways of making the system more efficient and fair. The project could be modelled after the experimental projects utilized by the Law Reform Commission of Canada in its work on disclosure.[93]

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[91] The concept of a dialogue between the Courts and legislature is borrowed from K. Roach, "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures", (2001), 80 Can. Bar. Rev. 481, P. Hogg and A. Bushnell, "The Charter dialogue between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75. Hogg argues that the Supreme Court should "do its best to write opinions that leave room for the competent legislative body to enact remedial legislation, so that the democratic process, admittedly influenced by the Court, has the last word." P. Hogg, "The Law Making Role of the Supreme Court of Canada" (2001) 80 Can. Bar. Rev. 171 at 180.

[92] *Supra* note 4 at 373.

[93] Law Reform Commission of Canada, Report 22, *Disclosure by the Prosecution* (Minister of Supply and Services Canada 1984), at 6-9.

Canada's Law Reform Commission was abolished by Brian Mulroney's government in 1992,[94] ostensibly to save money.[95] The former Commission was studying the issue of remedies, in criminal proceedings at the time it was abolished. The Commission flirted with the idea of costs in criminal proceedings, (in a study paper in 1973) but never formally adopted the idea. The Commission had produced Volume One on *Recodifying Criminal Procedure*,[96] observing that the old *Code* was archaic, poorly organized and contained many gaps filled by the judiciary. In 1995, legislation for a new and improved Law Commission was introduced by Justice Minister Allan Rock.[97] The new Commission was designed to encourage a response from government to its recommendations.[98] It is time to revisit the former Commission's work in this area.

(a) *General Principles of Remedies for Procedural Violations*

The former Law Reform Commission of Canada set out its principled approach toward remedies in *Report 32, Our Criminal Procedure*:

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[94] The Commission was a statutory institution, governed by the *Law Reform Commission Act*, R.S.C. 1985, c. L-7. It was abolished, along with a number of other bodies, by Bill C-63, *An Act to Dissolve or Terminate Certain Corporations and Other Bodies*, 3d Sess., 34th Parl., Canada, 1991-92. The abolition of the Commission was opposed by various groups, including the Canadian Bar Association and the Criminal Lawyers Association. See Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-63*, (9 June 1992). The author personally presented a brief endorsed by the Criminal Lawyers Association.

[95] In an editorial, Professor J. Zeigel, Editorial (1993), 22 *Can. Bus. L.J.* 161, described the law reform movement as one under seige:

> How do we explain this generally depressing picture? The economic recession is undoubtedly a factor but not, in our view, the most important. The recession has been as severe in the United Kingdom and Australia but it has not led to the demise of their national law reform commissions. In any event, compared with most other government expenditures, the budgets allocated to law reform bodies is minuscule.
>
> The real reasons, we believe, lie elsewhere. Law reform commissions have low visibility and no natural constituencies. Their elimination sets off no hue and cry.

[96] Law Reform Commission of Canada, *Recodifying Criminal Procedure: Police Powers, Search and Related Matters* (Ottawa, Ont.: Queen's Printer for Canada, 1991). A background paper was prepared in 1973 entitled, "A proposal for Costs in Criminal Cases". This was not elevated to the status of a Working Paper. The paper was critical of the present law, and recommended a rule similar to the New Zealand system of compensating the "innocent" accused. See Humphrey, *supra* note 8 at 40.

[97] Bill C-106, 35th Parl., 42-43-44, Elizabeth II, 1994-95. This Bill was replaced and slightly amended in the following session by Bill C-9. S.C. 1996, C. 9, assented to 29 May 1996, 2d Sess., 35th Parl., 45 Elizabeth II, 1996. Earlier proposals were drafted by the Liberal Party. See House of Commons, Office of the Leader of the Opposition, April 22, 1993, per Liberal Leader Jean Chrétien, and "A Liberal Perspective on Crime and Justice Issues", April 1993.

[98] Under s. 5(2), the Minister of Justice shall respond to the Commission with respect to any report. Secondly, under s. 25, the Minister shall cause a copy of the Minister's response to any report to be tabled in each House of Parliament.

> The Commission has made recommendations concerning the enforcement of various procedural schemes such as *Electronic Surveillance* (Working Paper 47), and investigative powers such as *Questioning Suspects* (Report 23) or *Obtaining Forensic Evidence* (Report 25). The Commission , in a forthcoming Working Paper on *Remedies in Criminal Proceedings* will provide a more general treatment of the subject of remedies to assist in the enforcement of its proposed rules.
>
> The proposed scheme will attempt to promote compliance with the rules, and where this is not possible, will attempt to restore the parties to the positions they occupied prior to the violation of the rules. The *Remedies* Working Paper proposes that a residual rule should be enacted in order to close any gaps in the system that may remain if the other more specific remedy sections are inapplicable. Also, where judicial balancing of competing factors is required when determining whether the granting of a remedy is appropriate, the proposals cautiously attempt to set the parameters of the discretion or the appropriate tests to be applied. In essence the Working paper seeks to establish an accountability mechanism and framework for the enforcement of the Commission's proposed rules of criminal procedure.[99]

A sophisticated analysis of any type of violation, examines the range of cause for such violations along a spectrum, from inadvertence to wilful malice. This scale applies as much to violations by agents of the State, as it does to regulated defendants. Depending upon one's view of human nature, it is fair to say that the majority of violations are the result of inadvertence, negligence or carelessness. At this end of the spectrum, there is a controversial debate concerning the role of deterrence. Would a costs order made against the State serve to deter a police officer who inadvertently failed to provide additional disclosure? It is submitted that at this end of the spectrum, the more appropriate search is for the remedy that compensates. Compensation should be the primary role of a remedy, with deterrence as a secondary function. Compensation first, would be in accordance with the Law Reform Commission's focus on restoring the parties to the positions they occupied prior to the violation of the rules.[100]

(b) *Costs to Redress Procedural Problems*

The experimental projects on disclosure for the Law Reform Commission were conducted in several cities across the country. The foundation for the

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[99] The Law Reform Commission of Canada, *Our Criminal Procedure* [Report 32] (Ottawa: Queen's Printer, 1988) at 44-45.

[100] The Law Reform Commission's draft paper on Remedies stated its general framework under the umbrella of redressing the wrong: The general principle of accountability entitles a party whose rights have been infringed to effective redress. Where full compliance is no longer possible, a remedy should attempt to provide an adequate substitute to the fullest extent possible. The benchmark for measurement is the position that the parties would have been in *had the rules been complied with*, insofar as this can be predicted with any degree to certainty. Redress of a wrong can be subdivided into three categories: (a) restoration; (b) compensation; and (c) recognition of the injustice. (The Remedies Paper, on which the author was the Prime Consultant, was never formally published by the Commission as it was abolished. Various drafts of the paper were the subject of public consultations, the last one being June 13, 1989. The quotes in this article are derived from that draft).

project was the consent of the criminal bar and the judiciary. As participation was voluntary, it was understood that defence counsel maintained the right to request a preliminary inquiry.[101] In the same way, an experiment on costs would require voluntary consent of the participants.

Applying the principle of compensation first, deterrence second, one experiment would be to test a "no-fault" system of costs for procedural errors. Costs for procedural errors should be value neutral, unshackled from historic anachronisms and more in line with the civil bar counterpart. If the prosecution inadvertently fails to disclose, or seeks an amendment, or anything else which requires a re-attendance of defence counsel, a no-fault system would compensate the defence for costs "thrown-away". If there is an allegation of bad faith, this could go to the issue of the *scale of costs*, which reflects the secondary deterrence functions. The principle of compensation first, deterrence second, would avoid the hidden punishment of those presumed innocent, and recognize the economic reality of legal fees.

With respect to operational details, civil rules are enforced often through pre-trial motions brought to civil practice Courts. Criminal courts have used practice courts much less, partly because of the doctrine that has reserved many decisions to the ultimate trial Judge.[102] A practice court would be an ideal venue for the experimental project. The expansion of Practice courts could overcome some of the traditional arguments against costs, such as the potential diversion of criminal trials away from the issue of guilt or innocence.

In civil cases, on procedural motions, there are a series of permutations and combinations of costs orders that every articling student must master. Jurisprudence has developed dealing with the discrete topic of costs on motions.[103] Recall that on the facts in *Dunedin*, the Justice of the Peace ordered the Crown to disclose a prosecution approval form, and to pay the costs of the disclosure motion. The matter was remitted to determine whether the conduct of the prosecution warranted an order for legal costs on the facts of the case, applying the new test set out by the Supreme Court. It is interesting to draw a parallel to civil law. The equivalent motion might be an order for production of documents or a re-attendance on a discovery, which probably would result in an order for costs in the cause.[104] In some jurisdictions, such as Ontario, it is the policy of the Court to award and fix costs at the end of a motion and order that they be paid forthwith unless

[101] Report 22, *supra* note 91 at 6.

[102] Criminal practice courts presently spend a majority of time dealing with bail reviews, pleas, and scheduling matters. Depending on the jurisdiction, some criminal practice courts have been devoted to *Charter* relief, such as section 11(b) stays for unreasonable delay.

[103] Orkin, *supra* note 20 at c.4 "Costs of Motions". In general, when a motion is properly brought costs should be awarded to the moving party, if successful, otherwise to the responding party. Some jurisdictions are moving towards a costs grid. See O. Reg. 284/01, s. 38, and Orkin, s. 705.

[104] *Ibid.* at ss. 408.11(3) and 408.22.

there is good reason not to do so. If one party takes an unreasonable position, it may be sanctioned by solicitor-client costs of the motion.[105] In short, costs would be awarded without requiring a remarkable event, or flagrant conduct on the other side.

The major objection to the above proposal in criminal or quasi-criminal proceedings is the lack of reciprocity.[106] Defense tactics or inadvertence may lead to adjournments of the Crown's case, often at the last minute and resulting in serious inconvenience to Crown witness and victims. Why should the State be forced to pay costs for procedural errors, when the accused is not liable for similar costs? The answer lies with the structure of obligations in criminal courts. Unlike civil litigation, the accused is not in court voluntarily. The majority of procedural obligations, such as making disclosure and seeking amendments to the charge document, rest with the Crown. Where the defence fails to comply with procedural rules, the sanction may be denial of the motion or remedy sought. While the State can always use the money, unlike civil cases, interim costs orders for procedural matters are not necessary to provide the State with the necessary resources to continue with the litigation. In the end, if there is a conviction, the Court may review the conduct of the defence in determining levels of remorse.

In summary, procedural costs ought not be become hidden fines in a system that prides itself in protecting the presumption of innocence.

(c) *Substantive Costs where Due Diligence is Proved*

An experimental project could test the impact of rewarding success on the standard of proof on a balance of probabilities, similar to the civil model. The proposal only seeks to grant the defence its costs of preparing the due diligence defence, as this is the part of the case that mirrors civil cases.[107] The proposed rule would apply only where there was voluntary defence disclosure of its case, reflecting the civil parallel. Details would have to be worked out concerning the definition of full disclosure in this context.[108] Perhaps the initial experiment might be applied only where the Crown was not seeking a jail term, or where the accused is a corporation. One of the side-effects of this costs rule would be to provide an incentive for the defence to voluntarily disclose its defence, including any expert reports that it relies upon. Some defence counsel might

[105] *Ibid.* at s. 402.1. When costs payable.

[106] Humphrey, *supra* note 8 at 51.

[107] If the Crown fails to prove the violation beyond a reasonable doubt, this mirrors the classic criminal model. The question arises as to what the costs situation should be if the Crown fails at a directed verdict stage. Upon reflection, it seems that a discretionary costs rule might be more appropriate and would only apply of the defence had disclosed its defence evidence on the issue of the violation itself. In this case, the Court could then consider costs.

[108] Reinhardt, *supra* note 69 at 7.

choose to not make defence disclosure, and would not be entitled to apply for a costs award after the verdict.

In civil procedure, the general rule is that costs follow the event, and are awarded to the successful party on a party and party scale.[109] New terminology is now being introduced which better reflects the reality: costs are divided into "partial indemnity costs" and "substantial indemnity costs".[110] In the experiment, costs "in the cause" would be determined after the final verdict. The scale of costs might also incorporate consideration of offers to settle, made at the pre-trial.[111] Conversely, if the prosecution achieved a conviction, any fine assessed could take into account the same factors. The Court could consider various factors such as the complexity of the proceeding, general conduct of the case that lengthened or shortened the case, and the type of other factors now provided for in the structured discretion set out in Rule 57.01 of the Ontario Rules of Civil Procedure. Solicitor-and-client costs might be awarded based upon positions taken at the pre-trial.

The discretionary aspect of the costs rule would take account of the type of offence and height of the hurdle jumped by the Crown in proving the case beyond a reasonable doubt (to trigger the due diligence defence). For example, where the defence made factual admissions that assisted the Crown, this would act in its favour. Conversely, where the Crown spent considerable time and resources in proving the offence beyond a reasonable doubt, this might look more like a "split decision". In calculating costs, the relative time spent by both sides would be considered by the Court. The defence would be entitled to costs only with respect to the portion of time spend proving due diligence, and this might be reduced if the Crown was forced to spend equal time proving the violation itself beyond a reasonable doubt. All in all, both sides would have financial incentive to adopt reasonable positions.

A true mirror of the civil practice would be reciprocal costs in the cause: in other words, the Crown would be entitled to costs if the defence failed to prove due diligence.[112] Upon reflection, a costs order against the accused, separate and apart from a fine in regulatory offences, is an added layer of complexity that

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[109] The rule is not absolute; the Court may award costs against a successful party in the proper case. See Orkin, *supra* note 20 at s. 205.2: Successful party entitled to costs and R. 57.01(2).

[110] Amendments to R. 57, in force January 1, 2002.

[111] See Ont. R. 49. The rule imposes serious cost consequences for failure to accept a realistic offer. The intent of the rule is to induce settlements and avoid trials. Orkin, *supra* note 20 at s.214: Offer to Settle.

[112] In such a case, the Crown would arguably be entitled to costs throughout the entire trial, having met the higher burden of proof with respect to the violation itself. This would require a statutory amendment to existing provisions (such as summary conviction proceedings under section 809 of the *Code*) to permit costs payable on an updated scale and to the State in addition to the informant.

is not necessary.[113] A Court must conduct an inquiry into the means of any accused, corporate or otherwise, before imposing a fine, to ensure that the accused has sufficient means to pay such a fine.[114] It would be duplicitous to conduct a similar inquiry under a costs order. In light of the fact that a fine goes to the State, as would a costs order, the extra layer of complexity is not warranted.

An experimental costs rule in regulatory proceedings would admittedly be controversial. The tradition that Crowns ought not to win or lose is antithetic to the notion of winning inherent in a substantive costs order.[115] While this is a nice platitude, it simply ignores the fiscal reality of due diligence defences. As further argument that might be made by prosecutors, is that there are some reverse onus provisions which have withstood *Charter* scrutiny, and no costs consequences flow.[116] This argument fails to consider, however, that such reverse onus provision can be easily met by relatively simple evidence, such as the accused offering an innocent explanation for occupying the seat of a car while intoxicated. These type of provisions bear no resemblance to the detailed type of evidence required on a due diligence defence.

From the Crown's perspective, there might be an increased number of cases that would settle after due diligence evidence was disclosed. This could have the salutary benefit of freeing up resources to pursue more worthwhile cases. The downside would be that taxpayers would pay for legal costs associated with a loss, which might inhibit prosecutors from proceeding with cases close to the line, or where a precedent ought to be set. The threat of costs might be problematic for sectors which were the subject of restricted resources or government cutbacks.[117] Assuming for the moment that a costs rule might impact upon government budgets, the present alternative is that government departments are getting a free ride when they make mistakes or use poor judgment. This is an unfair method of fiscal policy as it spreads the cost unevenly.

With respect to the impact upon the defence, the incentive to make pre-trial disclosure would lead to increased scrutiny at the pre-trial stage, particularly if

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[113] Justice Reinhardt, *supra* note 69, sets out several arguments against ordering costs against accused persons. In the professional disciplinary context, the Ontario College of Physicians and Surgeons has recently ordered a psychiatrist to pay $82,000 to cover the costs of prosecuting him. G. Abbate, "MD ordered to cover costs of discipline" *The Globe and Mail*, (3 December 2001) A16. The College's disciplinary committee wrote that the doctor's "...disregard both for the welfare of his patient and the ethics of his profession meets the necessary test in this case to justify an award of costs". The decision is being appealed.

[114] Code sentencing provisions, s. 734(2).

[115] Humphrey, *supra* note 8 at 41.

[116] *Ibid.* at 61, uses the example of the reverse onus provision of care and control in the driving cases.

[117] See O'Connor, *supra* note 6 at Chapter 11, "The Ministry of the Environment Budget Reductions".

conducted with the judiciary. Mediation might even be a possibility. The Crown might respond to defence expert reports by serving rebuttal reports, which might also increase the chances of an earlier settlement. Most importantly, those defendants who have a legitimate due diligence defence would be free to pursue this defence in the knowledge that there would be some compensation to lessen the financial blow of the effort. (This of course only covers legal and experts fees, and in no way compensates for lost time and opportunity cost). The playing field for due diligence would be a more even one. One concern that some defence counsel might have with the proposal is that a court might be more reluctant to acquit in the basis of due diligence, knowing that costs consequences will flow from this.[118] Yet, this same argument could be applied to civil defendants, and the reality is that the Court is not appraised of costs issues until the completion of trial.

Access to justice is one of the most important challenges to the legal system today. In the civil system, access to justice has been enhanced by mediation, costs rules, and class action legislation. Regulatory proceedings, which mirror civil proceedings in many respects, are lagging behind. This is not to suggest that we fall into the trap of thinking that more regulation or rules governing costs will solve all of our problems in post modern-society.[119] We can only take pride in our system of justice, however, when all can afford to enter the Courtroom door.

[118] Humphrey, *supra* note 8 at 48, refers to the concern with influencing a jury verdict. In regulatory proceedings, this is less of a concern.

[119] There is skepticism about the ability of law, the bureaucracy and the state, to control an increasingly complex, global society, where scientific knowledge is rapidly expanding. See D. Fiorino, "Re-thinking Environmental Regulations : Perspectives on Law and Goverance" (1999), 23 Harv.Envtl.L.Rev. 441. For an interesting discussion of the definition of post-modernism, see M. Eichner, "On Post-modern feminist legal theory" (2001) 36 Harv.C.R. – C.L.L.Rev. 1.

A-737-01

2003 FCA 119

The M.V. "African Cape", Her Owners, Bonaveria Shipping Co. Ltd., Her Manager, DIMKO International Company S.A. (*Appellants*) (*Defendants*)

v.

Francosteel Canada Inc. (*Respondent*) (*Plaintiff*)

Indexed as: Francosteel Canada Inc. v. *African Cape* (The) (C.A.)

Court of Appeal, Desjardins, Létourneau and Nadon JJ.A --Montréal, February 4; Ottawa, March 6, 2003.

Practice -- Costs -- Plaintiff, at arbitration, awarded much less than amount claimed, less than defendants' settlement offer -- Settlement offer, made at early stage of litigation, withdrawn during course of arbitration hearing -- Parties having reserved costs issue for F.C.T.D. -- Prothonotary, affirmed by Motions Judge, awarding successful plaintiff costs -- Federal Court Rules, 1998, r. 400 misapplied by failure to consider relevant factors in r. 400(3) -- That respondent successful as to liability not conclusive of costs issue -- Improper exercise of discretion to restrict consideration of settlement offer to quantum of costs -- R. 420(2)(a) unfair to defendants, not promoting purpose of encouraging early settlements for cost-efficient justice administration -- Rule should be reviewed -- Comparable Ontario Rule having potential of forcing early settlements.

This was an appeal from the decision of a motions judge dismissing an appeal against the decision of a prothonotary awarding respondent a lump sum of $40,000. in lieu of assessed costs. At issue is whether the Prothonotary properly applied rule 400 of the *Federal Court Rules, 1998* in the exercise of his discretion to award costs.

The respondent's claim was for $5,000,000 as damages for breach of contract to carry steel from Lithuania to Montréal. This was later reduced to $485,117.99. Prior to filing their statement of defence, the appellants made an all-inclusive settlement offer of $125,000, but that was rejected. Prior to trial, the parties agreed that the matter go to arbitration with the costs issue reserved for adjudication by the Trial Division. The appellants again put forward the $125,000 settlement offer, which was again rejected and finally withdrawn during the arbitration hearing. The arbitrator's award was for $85,879.44 plus interest for a total of $108,887.75.

Held, the appeal should be allowed.

There could be no doubt that the Prothonotary had misapplied rule 400 by failing to consider two factors: (1) the amounts claimed and recovered and (2) the written settlement offer. The Prothonotary's view was that respondent was entitled to costs, having succeeded at arbitration on the issue of liability. The Prothonatory did concede that the quantum of costs should be reduced

in that the amount recovered was much less than that claimed. He accordingly reduced the costs award by some $15,000. The settlement offer, made early on in the proceedings, was greater than the sum ultimately recovered. Both sides would have saved substantial amounts in costs had it been accepted. On weighing all of the relevant factors, appellants should have their costs.

Per Létourneau J.A. (concurring): Paragraph 420(2)(*a*) of the Rules, relied upon by appellants before the Prothonotary, has a serious potential for unfairness. If a settlement offer is revoked--even the day before judgment is rendered--the defendant loses the benefit of the rule and can rely only upon the unfettered exercise of jurisdiction under rule 400. If the offer is left open, plaintiff can accept it--even well into a lengthy trial at which the witnesses for the defence have proven convincing. Paragraph 420(2)(*a*) unfairly tips the scales in the plaintiff's favour and defeats the purposes of promoting early settlements thereby allowing for a cost-efficient administration of justice and the preservation of limited judicial resources. By comparison, the comparable Ontario Rule encourages early settlement as a plaintiff runs the risk of responsibility for all the subsequent costs incurred by the defendant if the offer be not accepted prior to commencement of trial. Rule 420 is in need of review.

statutes and regulations judicially

considered

Federal Court Rules, 1998, SOR/98-106, rr. 400, 420(2), Tariff B, Column III.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 49.10(2) (as am. by O. Reg. 284/-01, s. 11).

cases judicially considered

applied:

Reza v. Canada, 1994 CanLII 91 (S.C.C.), [1994] 2 S.C.R. 394; (1994), 116 D.L.R. (4th) 61; 21 C.R.R. (2d) 236; 24 Imm. L.R. (2d) 117; 167 N.R. 282; 72 O.A.C. 348.

APPEAL from the decision of a motions judge 2001 FCT 1363 (CanLII), (2001 FCT 1363; [2001] F.C.J. No. 1866 (T.D.) (QL)) dismissing an appeal from the decision of a prothonotary, reported at (2001), 213 F.T.R. 130, awarding the respondent a lump sum for costs. Appeal allowed.

appearances:

Victor DeMarco for appellants (defendants).

Richard L. Desgagnés for respondent (plaintiff).

solicitors of record:

Brisset Bishop, Montréal, for appellants (defendants).

Ogilvy Renaud, Montréal, for respondent (plaintiff).

The following are the reasons for judgment rendered in English by

[1]Nadon J.A.: This is an appeal from a decision of a motions judge dated December 11, 2001 2001 FCT 1363 (CanLII), [2001 FCT 1363; [2001] F.C.J. No. 1866 (T.D.) (QL)], which dismissed the appellants' appeal of a decision of Prothonotary Richard Morneau dated November 6, 2001 [(2001), 213 F.T.R. 130 (F.C.T.D.).

[2]Before the Prothonotary was a joint motion presented by the parties for an order for costs pursuant to rule 400 of the *Federal Court Rules, 1998* [SOR/98-106]. By his order, the Prothonotary awarded the respondent, in lieu of assessed costs, a lump sum of $40,000.

[3]At issue before us is whether the Motions Judge erred in concluding that the Prothonotary had properly applied rule 400 in the exercise of his discretion to award costs to the respondent.

[4]A brief summary of the facts will place this appeal in its proper context.

[5]On April 4, 1997, the respondent commenced legal proceedings in this Court against the appellants seeking damages for breach of a contract of carriage to carry sheets of steel from Lithuania to Montréal. In its statement of claim, the respondent claimed a sum in excess of $5,000,000. In due course, this sum was reduced to $485,117.99.

[6]By a letter dated September 29, 1997, prior to filing their statement of defence, the appellants made an offer to the respondent to settle the claim for the all-inclusive sum of $125,000. On October 17, 1997, the respondent rejected the appellants' offer to settle.

[7]Before the matter reached trial, the parties agreed to have their dispute resolved by a sole arbitrator, who was to decide both liability and quantum. The parties further agreed that the issue of costs would be withheld from the arbitrator and would, following his decision, be brought before the Trial Division for adjudication.

[8]I should point out, before going any further, that in March 2000, the appellants reiterated their all-inclusive offer of $125,000, which offer was again rejected by the respondent. Ultimately, on November 9, 2000, at the commencement of the fourth day of the arbitration hearing, the appellants withdrew their offer.

[9]The arbitrator rendered his award on December 21, 2000. He held that the respondent was entitled to compensation in the sum of $85,879.44 with simple interest at 7% from April 3, 1997 to the date of payment. On January 30, 1998, the appellants paid to the respondent the sum of $108,887.75, inclusive of capital and interest, thereby satisfying in full the arbitration award.

[10]By an order dated March 2, 2001, the Prothonotary homologated the arbitration award. In April 2001, the parties filed a joint motion requesting a special hearing on costs and by order dated May 3, 2001, the Prothonotary directed that the issue of costs be dealt with at a special hearing in Montréal on September 26, 2001.

[11]At the hearing of the joint motion for costs, the respondent argued that as it had succeeded before the arbitrator on the issue of liability, it was thus entitled to its costs. The appellants took a different view and argued that they were entitled to their costs, primarily on the ground that the sum of $125,000 which they had offered in settlement of the respondent's action exceeded the amount of the award obtained by the respondent.

[12]The Prothonotary held in favour of the respondent and awarded it costs in the sum of $40,000. By way of a motion dated November 16, 2001, the appellants appealed the Prothonotary's order to the Trial Division. Because of her view that the Prothonotary had not misapplied rule 400, the Motions Judge dismissed the appeal.

[13]The thrust of the appellants' argument is that the Prothonotary was clearly wrong in applying rule 400 as he did and hence, that the Motions Judge erred in concluding that the Prothonotary had not misapplied the rule. In my view, that submission is well founded.

[14]The relevant parts of rule 400 are as follows:

> **400.** (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.
>
> . . .
>
> (3) In exercising its discretion under subsection (1), the Court may consider
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> (*a*) the result of the proceeding;
>
> (*b*) the amounts claimed and the amounts recovered;
>
> . . .
>
> (*e*) any written offer to settle;

[15]Subsection 400(1) provides that the Court is to have full discretion with respect to the amount and allocation of costs and the determination of by whom such costs are to be paid. In exercising this discretion, a judge or prothonotary may consider any of the 14 factors which are listed in subsection 400(3). Thus, for the purpose of making a determination under the rule, the Court will have regard to all of the relevant factors.

[16]There can be no doubt whatsoever that the Prothonotary misapplied rule 400, in that he failed to consider two of the relevant factors listed in subsection 400(3), namely factors (*b*) and (*e*). After concluding that paragraph 420(2)(*a*) could not be considered because the appellants' offer had been revoked during the course of the arbitration hearing, he turned his mind to rule 400. He stated his view that only factor (*a*) of subsection 400(3), i.e. the result of the proceeding, was relevant for the purpose of determining which of the parties should bear the costs of the proceeding. At paragraphs 17 and 18 of his reasons, the Prothonotary states:

> In terms of the award of costs to either party, the other factor which merits consideration--and which in my opinion should govern the award of costs--is the result of the proceeding within the meaning of paragraph 400(3)(*a*).
>
> In this connection, it seems to me that in this case it is the plaintiff who should be considered the victor. The arbitrator determined the liability factor in its favour. And liability was clearly the matter of most concern in the dispute leading up to and during the arbitration. [Underlining added.]

[17]Because the respondent had succeeded before the arbitrator on the issue of liability, which issue in his view was crucial, the Prothonotary concluded that the respondent had won and thus, factor (*a*) favoured the respondent. Consequently, the respondent was entitled to its costs.

[18]Although he did not consider factors (*b*) and (*e*) in determining which of the parties had to pay costs, the Prothonotary did consider those factors in determining the quantum payable by the appellants. This appears quite clearly from paragraph 19 of his reasons, where he states:

> Furthermore, a portion of the damages the plaintiff was seeking was awarded to it. That the amount obtained by the plaintiff was much less than the amount claimed may be of some relevance as to the quantum of costs to be allowed to the plaintiff, as is the fact that there was a written offer.

[19]Although he was of the view that the respondent's costs amounted to $55,137.02, he reduced this sum to $40,000 because the appellants had made a written offer of settlement and because the amount recovered by the respondent was inferior to the amount claimed.

[20]It is clear from rule 400 that all of the relevant factors must be considered in deciding, not only the quantum of costs, but also their allocation and the determination of by whom such costs should be paid. Thus, in restricting his consideration of the relevant factors to factor (*a*) in his determination of which party should pay the costs, the Prothonotary misapplied rule 400.

[21]There can be no doubt that factors (*b*) and (*e*) were highly relevant considerations in the circumstances of this case and, more particularly, factor (*e*), the offer to settle made by the appellants. These factors had to be considered by the Prothonotary in the exercise of his discretion as to whether the respondent or the appellants ought to bear the costs. This, the Prothonotary clearly failed to do.

[22]In holding that the Prothonotary had not misapplied rule 400, the Motions Judge was clearly wrong. The Judge, like the Prothonotary, was of the view that it was a proper exercise of discretion under rule 400 to restrict consideration of the appellants' offer to settle to the quantum of the costs. In my respectful view, the Motions Judge made the same error as the Prothonotary, and thus she misapplied rule 400. This error is clearly apparent from a reading of paragraphs 8 to 11 of her reasons, which I now reproduce:

> The general rule is that costs are normally awarded to the successful party, (*Merck & Co. v. Novopharm Ltd.* (1998), 152 F.T.R. 74 (F.C.T.D.); *Ticketnet Corp. v. Canada* (1999), 99 D.T.C. 5429). In the case at bar, Prothonotary Morneau determined that the plaintiff was the successful party and thus awarded it costs.
>
> Rule 400 gives a wide discretion to the Court in relation to costs. Rule 400(3) lists a number of factors that the Court may wish to consider in the exercise of its discretion. However, I also note that it is not restrictive and that the Court may consider any other matter that it considers relevant (Rule 400(3)(*o*)). The amount of the award of damages is only one factor in consideration of costs. (*Doyle v. Sparrow* (1979), 106 D.L.R. (3d) 551 (Ontario C.A.)).
>
> Furthermore, the Prothonotary did not state that an out-of-court settlement offer had no bearing on the determination as to entitlement of costs. Rather, he said that it had no bearing on his discretionary consideration of the "result of the proceeding". In fact, Prothonotary Morneau took into consideration the offer to settle in determining the quantum of costs (see paragraphs 16, 19 and 28 of his order).
>
> For these reasons, I reject the defendants' submission that the Prothonotary misapplied Rule 400 and consequently, the appeal is dismissed.

[23]As the Prothonotary failed to give sufficient weight to all of the relevant considerations, the Motions Judge ought to have reviewed his decision (see *Reza v. Canada*, 1994 CanLII 91 (S.C.C.), [1994] 2 S.C.R. 394, at page 404).

[24]I am satisfied that had the Prothonotary given proper consideration, as he ought to have, to factors (*b*) and (*e*), he would have come to a different conclusion as to which of the parties should bear the costs of the proceedings.

[25]Firstly, as he himself noted in regard to his determination of the amount of costs to which the respondent was entitled, the amount of damages obtained by the respondent as a result of the arbitration award falls dramatically short of the amount claimed in the statement of claim. Secondly, the offer of settlement made by the appellants was in excess of the amount ultimately recovered by the respondent. That offer was unequivocal and was made early on in the proceedings; had it been accepted by the respondent, the parties would not have incurred the substantial costs which were ultimately incurred. Thirdly, bearing in mind that the offer of settlement exceeded the arbitrator's award, it cannot be said that the respondent improved its position by proceeding to the arbitration hearing. In the end, the respondent would have been better off had it accepted the settlement offer.

[26]I am therefore of the view that on a proper consideration and weighing of all of the relevant factors, the appellants ought to have their costs. I might add that the effect of depriving the appellants of their costs, in the circumstances of this case, would render the offer to settle meaningless.

[27]For these reasons, I would allow the appeal with costs in this Court and in the Trial Division, set aside the order made by the Motions Judge on December 11, 2001 and, rendering the judgment that the Motions Judge ought to have rendered, I would allow the appellants' appeal from the Prothonotary's order and award the appellants their costs, to be assessed in accordance with Column III of Tariff B.

Desjardins J.A.: I concur.

* * *

The following are the reasons for judgment rendered in English by

[28]Létourneau J.A.: I agree with my colleague and would dispose of the appeal as he proposes. I would like to add a short comment on paragraph 420(2)(*a*) which was relied upon by the defendants [appellants herein] before the Prothonotary. The rule reads as follows:

> **420.** . . .
>
> (2) Unless otherwise ordered by the Court, where a defendant makes a written offer to settle that is not revoked,
>
> (*a*) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to double such costs, excluding disbursements, from that date to the date of judgment. . . .

[29]In his argument before the Prothonotary, counsel for the defendants submitted that paragraph 420(2)(*a*) should be interpreted by reading in, at least implicitly, the following prescriptions found in rule 49.10(2) [as am. by O. Reg. 284/01, s. 11] of the Ontario *Rules of Civil Procedure* [R.R.O. 1990, Reg. 194]:

> **49.10** . . .
>
> (2) Where an offer to settle,
>
> (*a*) is made by a defendant at least seven days before the commencement of the hearing;
>
> (*b*) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (*c*) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer

was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

The Prothonotary properly refused to follow counsel's submission and concluded that paragraph 420(2)(*a*), as it reads, did not apply in the circumstances because the written offer made by the defendants was revoked on the fourth day of the hearing before the arbitrator. The defendants decided to withdraw their firm offer a third of the way through the hearing for a number of reasons. First, the offer had been made early in the process to avoid a trial. Second, the defendants had already incurred enormous costs in defending the claim to that point. Third, as the evidence was evolving, the defendants thought that their offer was too generous: they were afraid that it might be accepted at the end of the arbitration hearing, leaving them with irretrievable significant costs.

[30]As drafted, paragraph 420(2)(*a*) has a serious potential for unfairness. As the present instance shows, if the offer is revoked, even if only a day before the case is taken under advisement or before judgment is rendered, a defendant loses the benefit of the rule and is left to rely upon an almost unfettered exercise of jurisdiction under rule 400. As I can see in the case at bar, there is no guarantee that, even with the best of intents, the discretion will be exercised judicially. In addition, a respondent bears the heavy and difficult burden of proving an improper exercise of jurisdiction.

[31]The situation for a defendant is not any better if he leaves the offer open as requested by paragraph 420(2)(*a*). After nine days of trial, a plaintiff who realizes that the defence witnesses have been convincing and, therefore, that the prospect of winning is not as bright as it once was may move to accept the unrevoked offer. A defendant then finds itself in an invidious position. On the one hand, he cannot claim double costs as allowed by the rule because no judgment will be rendered. He will never know if the offer would have been equal or superior to what would have been allowed. He might be doubly penalized if his offer was inclusive of costs to the plaintiff that he might not have had to pay if a judgment had been rendered. On the other hand, because of a late acceptance of the offer, he then incurs substantial defence costs although his offer, as in the present case, may have been made long before the hearing started. Such hearing costs generated by a plaintiff's failure to accept the offer in a timely fashion cannot then be recovered by a defendant.

[32]Paragraph 420(2)(*a*), as it exists, unfairly tips the scale in favour of a plaintiff and against a defendant who bears all the risks of an unrevoked offer. It fails to achieve, indeed it defeats, the very purpose of achieving early settlements of cases for a proper and cost-efficient administration of justice and of limited judicial resources. In comparison, the Ontario Rule has the potential and advantage of forcing an early settlement of a case pursuant to an offer: a plaintiff has to make a decision before the beginning of the hearing, otherwise he bears the risk of all subsequent costs incurred by a defendant if he fails to accept the offer when he should have. In addition, the Ontario Rule appears to be better and more fairly structures the exercise of discretion in the best and efficient interest of justice.

[33]In conclusion, the present case which has generated extensive and costly litigation on the sole issue of costs, in my opinion, illustrates the need for a review of rule 420.

Date: 20051026
Docket: A-568-04
Citation: 2005 FCA 350
CORAM: NADON J.A., SEXTON J.A., SHARLOW J.A.

BETWEEN:

DR. ABDUR-RASHID BALOGUN

Appellant

And

HER MAJESTY THE QUEEN
MINISTER OF NATIONAL DEFENCE

Respondents

Heard at Toronto, Ontario, on October 26, 2005.
Judgment delivered from the bench at Toronto, Ontario, on October 26, 2005.

REASONS FOR JUDGMENT OF THE COURT BY: NADON J.A.

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench in Toronto, Ontario on October 26, 2005)

NADON J.A.

[1] In dismissing the appellant's judicial review application, the learned judge of the Federal Court made an award of costs in favour of the respondents.

[2] We all agreed that in doing so, the judge plainly erred since the respondents did not, either in their written submissions or in their *viva voce* submissions before the judge, request that they be granted costs. In these circumstances, we are of the view that the judge should not have made an award of costs.

[3] The appellant having abandoned all other grounds of his appeal, the appeal will therefore be allowed, in part, so as to strike the words "with costs to the respondents" from the judge's Order of September 23, 2004.

[4] With respect to the costs of this appeal, no order will be made.

"Marc Nadon" J.A.