**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***Aliant Inc. v. Ellph.com Solutions Inc.,*** 2012 NSCA 89

**Date:** 20120823
**Docket:** CA 356044
**Registry:** Halifax

**Between:**

Aliant Inc., Aliant Telecom Inc. and Aliant Telecom Inc./Telecommunications Aliant Inc.

Appellants

v.

Ellph.com Solutions Inc. and Ellph.com Technologies Incorporated

Respondents

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| **Judges:** | Saunders, Fichaud and Beveridge, JJ.A. |
| **Appeal Heard:** | April 16, 2012, in Halifax, Nova Scotia |
| **Held:** | Leave to appeal granted; appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Beveridge, JJ.A. concurring. |
| **Counsel:** | Michael E. Dunphy, Q.C. and Michelle Kelly, for the appellants<br>David Hutt and Alan V. Parish, Q.C., for the respondents |

**Reasons for Judgment:**

[1] This is an appeal by Aliant from a discretionary, interlocutory order of a judge in Chambers declining to compel Ellph to put up security for costs in the lead-up to trial.

[2] The motions judge refused to oblige Ellph's two individual shareholders to post personal undertakings to be jointly and severally liable for costs at trial. Exercising his discretion under **Civil Procedure Rule** 45.02, the judge determined that it would not be unfair to allow the claim to proceed without such a security for costs order in place. In doing so he undertook an extensive analysis of the new **Rule** and its antecedents, together with jurisprudence from this province related to their application. He also interpreted case law from other jurisdictions dealing with subjects touching upon the law of contract and business corporations.

[3] Aliant says the judge erred in law in the exercise of his discretion. It asks that his order be set aside, and that we issue a new order requiring Ellph's two shareholders to personally assume joint and several liability for any costs ordered payable to Aliant in the litigation.

[4] For the reasons that follow I would grant leave but would dismiss the appeal. In doing so it is enough for me to uphold the result without necessarily endorsing all of the judge's reasoning and commentary which led to it.

**Background**

[5] In 1996-97 Mr. Cameron Kelly and Mr. Andrew Barnes developed a software application that would later become known as eWare. Around that time Aliant, through one of its predecessors, offered a service called "Software on Demand" to its internet customers. Their existing program was licensed through one provider, but Aliant became interested in acquiring a different system to improve delivery of the service.

[6] Mr. Kelly, with whom Aliant contracted as an independent consultant, learned of Aliant's interest in switching systems. He thought the eWare program

that he and Mr. Barnes had developed for another party, could be adapted to satisfy Aliant's needs.

[7] On July 31, 1999, Messrs. Kelly and Barnes demonstrated the eWare program to Aliant's representatives, who expressed their attraction for the product in delivering Software on Demand. Further discussions led the parties to conclude that it would be necessary for Messrs. Kelly and Barnes to incorporate in order to pursue a business relationship with Aliant.

[8] Ellph.com Solutions Inc. was incorporated under the Nova Scotia **Companies Act**, R.S.N.S. 1989, c. 81 and Messrs. Kelly and Barnes conveyed eWare to it. They subsequently incorporated Ellph.com Technologies Incorporated under the **Canada Business Corporations Act**, R.S.C. 1985, c. C-44 which was then licensed by Ellph.com Solutions Inc. to distribute eWare to internet service providers by way of sublicenses.

[9] Unless the context otherwise requires, I will refer to the respondent corporations, Ellph.com Solutions Inc. and Ellph.com Technologies Incorporated collectively as "the respondents" or "Ellph.com".

[10] Similarly, I will refer to the various iterations of the appellant companies joined in this litigation collectively as "the appellant" or "Aliant".

[11] Ellph.com continued to improve eWare and gave Aliant opportunities to test it. After a year of discussions, demonstrations, further development and assessment, Ellph.com and Aliant signed a contract dated March 9, 2000 entitled "Sublicense Agreement".

[12] The agreement gave Aliant exclusive use of eWare in the Atlantic provinces for a three year term, at a rate of $4.00 per month per residential and commercial end-user of Aliant's high speed internet services.

[13] Not long after the agreement was signed Aliant asked to terminate it. Negotiations failed. Ellph.com says Aliant then engaged in bad faith tactics to create apparent grounds for termination. In correspondence dated December 7, 2000, Aliant purported to terminate the agreement for deficiencies.

[14] Messrs. Kelly and Barnes were the only two directors and shareholders of Ellph.com. Their companies have not operated, held any assets or generated any income since 2001and have been insolvent since then.

[15] In December, 2005 Ellph.com commenced this action against Aliant based on the alleged breach of the software sublicense agreement dated March 9, 2000.

[16] In its amended originating notice (action) and statement of claim filed September 22, 2011, the respondents seek recovery of all fees payable during the term of the sublicense agreement, estimated to exceed $21M, together with special damages, general damages, aggravated, exemplary and punitive damages, pre-judgment interest and costs.

[17] Aliant defended the action and counterclaimed. In its amended defence and counterclaim filed October 11, 2011, Aliant says the respondents breached contractual, fiduciary, tortious and other legal duties for which Aliant seeks to recover $433,000 representing payments previously made, together with other damages for lost profits, lost opportunity and expenses incurred, as well as punitive damages, general damages, pre-judgment interest and costs calculated on a solicitor-and-client basis.

[18] Trial dates have been scheduled. Thirty days have been set aside in September and October, 2013 for trial.

[19] On February 28, 2011, Aliant (as the defendants and plaintiffs by counterclaim in the underlying action) brought a motion to be heard in Supreme Court Chambers pursuant to **Civil Procedure Rule** 45:

> … for an order that the Plaintiffs, Ellph.com Solutions Inc. and Ellph.com Technologies Incorporated, be required to post security in the form of requiring their two directors, Cameron Kelly and Andrew Barnes, to provide personal undertakings to be jointly and severally responsible for any cost award made against the Plaintiffs.

[20] In its submissions at the Chambers hearing Aliant said Ellph.com had been insolvent for ten years and that the current litigation was being financed solely by Messrs. Kelly and Barnes personally. As such, Aliant said these men would stand

to recoup the fruits of the litigation, virtually risk-free, if they were successful at trial. They should not be able to immunize themselves against exposure to a significant costs order by hiding behind the corporate shell of their companies.

[21] In attempting to estimate potential costs after trial, Aliant applied the basic scale under Tariff A to the sum of $21M claimed by the respondents as damages in their amended statement of claim, such that party and party costs alone would amount to $1,365,000, and which would not take into account additional claims for non-pecuniary, aggravated and punitive damages. Using the lesser damage figure of $8,940,000 initially claimed by the respondents in their original statement of claim, party and party costs, after applying the basic scale in Tariff A, would come to $581,100. Thus Aliant projected a potential costs award ranging from half a million to 1.3 million dollars. Neither provisional estimate for potential costs took into account anticipated disbursements which Aliant conservatively calculated to be in the $100,000 range.

[22] Using these projections, Aliant asked the court to order both Cameron Kelly and Andrew Barnes to post a personal undertaking in the amount of $1,500,000.

[23] The motion came on for hearing before Nova Scotia Supreme Court Justice Gerald R.P. Moir on June 20, 2011. In a written decision dated August 8, 2011, Moir, J. (reported at 2011 NSSC 316) dismissed Aliant's motion and awarded costs of $2,000 plus disbursements to Ellph.com.

[24] Aliant now appeals that decision and confirmatory order.

**Issues**

[25] Aliant's notice of appeal lists the following grounds:

> 1. Justice Moir committed an error of law when, in assessing the fairness component of an order for security for costs, he failed to look at what would be fair and just for both sides and failed to properly assess and balance the two competing interests of the parties. More specifically, Justice Moir committed the following two errors:

a) He failed to look at the interests of the Appellants, failed to consider the effect if they were to be successful in their defence, and failed to compare and balance those against the interests of the Respondents when assessing whether it would be fair to order security for costs;

b) He erred in finding that the shareholders refusals to post an undertaking was akin to them not being able to proceed thereby improperly creating an "access to justice" issue for the Respondents;

2. He erred in applying principles of the Respondents' contractual liability to the Appellants for breach of contract to the application of the principles to be considered in a motion for security for costs;

3. He made erroneous statements, including that if the Respondents did not proceed with the action "Aliant will have escaped responsibility for the termination" (when this has yet to be decided) and that the Appellants intended to make full use of their financial resources and planned "to spend so much as would justify a staggering award of party and party costs," all of which had a negative effect on the balancing of interests and exercise of discretion.

## Standard of Review

[26] Justice Moir's order was discretionary, interlocutory, and had no terminating effect on the litigation. For reasons I will explain in a moment, the sole issue before the motions judge was fairness.

[27] The standard of review in matters such as this is well settled. We will only intervene if we are persuaded that wrong principles of law have been applied, or that failing to intervene would produce an obvious injustice. The threshold for overturning a discretionary order is considerable and is not easily displaced. As this Court said in **A.B. v. Bragg Communications**, 2011 NSCA 26:

> [31] … Clear error of law or a substantial injustice must be established. …
>
> [33] … appellate courts are restrained in choosing to intervene. Absent an error in law or a manifest injustice we will decline to do so. The threshold for seeking reversal is high. It is not a soft or casual target. Any party seeking to set aside an

> interlocutory discretionary order has a heavy onus. Litigants should be reminded that it is not a burden which will be satisfied easily. …

[28] Thus, in the absence of a clear error of law or a substantial injustice we will refuse to intervene. Appeals from interlocutory matters create delay, run up costs for the parties, and tie up the court's own resources while other proceedings in the system wait to be tried. A judge hearing motions in Chambers develops a well-honed proficiency in the exercise of discretion, especially in cases where he or she has heard the witnesses being examined first hand. These are some of the reasons why the standard of review is strictly applied where any party attempts to set aside a discretionary, interlocutory order.

[29] In its written and oral submissions Aliant confined itself to complaints that the motions judge had erred in principle in refusing to order the respondents to put up security for costs. In other words, Aliant does not rely upon the second branch of the test, which would invite our intervention so as to prevent a patent injustice. Consequently, this appeal is limited to alleged flaws in the judge's decision which Aliant says amount to errors in law.

[30] As will become apparent, the thrust of Aliant's appeal in this case is based on the assertion that the motions judge erred in principle by the way in which he considered (or ignored) the appellant's interests when ultimately refusing to order security for costs. Given the appellant's arguments I want to address what is meant by the concepts, "error in principle" and "exercise of discretion". For it is an examination of that discretion and its intersection with the boundaries of appellate review that lie at the heart of this appeal.

[31] The case law is replete with examples of judicial efforts to describe what is meant by the phrase "error in principle". Justice Chipman of this Court provided oft-quoted guidance in **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143, where at ¶ 10-11 he set out the rule governing appellate review of interlocutory discretionary orders:

> At the outset, it is proper to remind ourselves that this Court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. …

> Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. … [underlining mine]

[32] We see similar pronouncements in countless other cases. See for example: **Haldorson v. Coquitlam (City)**, 2000 BCCA 484; **Pike v. Cook**, [2005] O.J. No. 4529 (C.A.); **Williamson v. Gillis**, 2011 NBCA 53.

[33] In **Friends of Oldman River Society v. Canada (Minister of Transport)**, [1992] 1 S.C.R. 3, the Supreme Court of Canada at ¶ 104 cited the following statement of Viscount Simon L.C. in **Charles Osenton & Co. v. Johnston**, [1942] A.C. 130 at 138, [1941] 2 All E.R. 245 (H.L.) as accurately describing the principles governing appellate review of a lower court's exercise of discretion:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [underlining mine]

[34] From these and similar authorities we know that appellate intervention may be justified when important factors are ignored, or irrelevant factors emphasized; or when no or insufficient weight is given to relevant considerations. While such principles may be easily expressed, the difficulty lies in their application.

[35] Not much ink has been spilled attempting to explain how these concepts come to be applied whenever a trial judge's well recognized discretion to weigh

the evidence ("accept some, none, or all") and decide the facts, is challenged on the basis of the very weight assigned to that evidence by the judge who heard the case. In the face of settled law which has consistently held that "provided the discretion is exercised within acceptable limits, and not arbitrarily, this court will not interfere" (see for example, **Sharpe v. Wakefield et al.**, [1891] A.C. 173; **MacIsaac v. MacIsaac**, [1996] N.S.J. No. 185 (C.A.) at ¶ 18) a reasonably informed observer could not be criticized for asking – what is left of a trial judge's discretion if it can be disturbed so easily on appeal? The issues raised in this case provide an opportunity to respond to that and similar questions.

[36] For example, how do these juridical pronouncements from the past, which attempted to define the scope of appellate review, play out in the real world? What is their practical application in today's legal discourse such that when appellate intervention is required, the result will not seem arbitrary, but rather one which promotes consistency and predictability and offers precedential guidance? To me the answer lies in recognizing that certain aspects of the judge's decision on appeal will attract different standards of review. This is the starting point in conceptualizing the analytical framework to be applied when discretionary orders are the subject of appellate review.

[37] Let me begin by discussing the judge's role when faced with a motion such as this. In hearing the evidence and then deliberating to arrive at an outcome, the judge is performing several functions. First, the judge must identify and apply the proper legal test. This was a motion brought by Aliant seeking an order requiring the plaintiffs to put up security for costs. Thus, the motions judge was obliged to apply the proper legal test relevant to such a motion. This first step is a question of law, reviewable on a standard of correctness. In this part of the analysis the judge must be right. No deference is owed. Let me use a simple example to illustrate my point. Suppose the judge borrowed a principle from the legal test on a motion for a stay of proceedings, and required the moving party to prove irreparable harm before obliging the plaintiffs to post security for costs. Clearly, importing such a foreign legal concept into a security for costs case would constitute an error in principle, warranting our intervention.

[38] The second function performed by the motions judge will be to identify the relevant factors or criteria which ought to be considered when applying the legal test to the evidence adduced. In order to identify the appropriate criteria the judge

will look to the jurisprudence, statutes, rules or other basis of authority in order to identify the list of factors which ought to be taken into account. The judge will also consider the cause of action, the pleadings, and the factual and legal matrix between the parties. This examination will entail a consideration of matters that raise questions of both fact and law, but with a decided legal primacy, to be tested on a correctness standard. In this case, Moir, J. looked to the "broad discretion" given him under CPR 42.01, the circumstances giving rise to the litigation, as well as the legal principles established in cases here and in other provinces to formulate a list of factors he considered to be relevant in disposing of the motion. These factors included: the sequence of steps and rebuttal presumptions set out in the Rule; the comparative financial resources of the parties; whether corporate artifice extended insulation from costs; access to justice; delay; the nature of the business relationship between these parties; impecuniosity and whether the cause of action may have led to it; the reality surrounding this corporate "shell-dom", all of which were to be considered under the overarching criterion of fairness between the parties. Here again the motions judge would have to be right in identifying the appropriate factors engaged by the legal test applicable to a security for costs motion. I will use another simple example to illustrate my point. Suppose the judge included as a factor, the tidy, more attractive appearance of the moving parties' factum when deciding the motion in their favour. Clearly such a criterion would be completely irrelevant. Its application would amount to error in principle, warranting appellate intervention. From this we see that selecting the appropriate factors in the application of the legal test to be satisfied on the motion, is also a matter of law, reviewable on a correctness standard.

[39] Having identified and applied the proper legal test, and chosen the relevant factors to be considered, the judge's last function is to evaluate those factors in order to arrive at a just result. This evaluation has two parts: First the judge will decide the relative importance of each of the factors. This will involve prioritizing them in some fashion in a way that ranks or assigns differing weights to each criterion. Once that is done the remaining part of the judge's analysis will involve a balancing of those factors, as if they were inscribed in a ledger or placed on a scale, to resolve at the end of the analysis whether the calculus of those factors favours one party, or the other. It is in this part of the analysis that the judge's discretion is recognized. Having seen the witnesses, heard the evidence and counsel firsthand the judge is best positioned to decide the weight that ought to be accorded those factors which are relevant to the motion before the court. This is

where appellate courts recognize the wide latitude accorded trial judges in the exercise of their discretion. This Court explained the rationale for such a deferential approach in **A.B. (Litigation Guardian of) v. Bragg Communications Inc.**, 2011 NSCA 26 at ¶ 31-33.

[40] And so, when we say that we may well intervene in "… cases where no weight or insufficient weight has been given to relevant circumstances" (Minkoff, supra), this does not mean that we are free to substitute our own exercise of discretion, for the discretion already exercised by the judge, or choose to intervene simply because we would have weighted the factors differently had we been hearing the motion. We ought not concern ourselves with the minutiae of how the judge ranked or prioritized the level of importance for each of the factors taken into account. That process, that exercise is not one in which we should engage. Rather, the question we ought to ask – having regard to the wide latitude granted trial judges in exercising their discretion – is whether the weight attached to the relevant factors is sufficient to satisfy the legal test engaged by the motion before the court.

[41] Again let me use a simple example to illustrate my point. Suppose there are five factors to be considered when applying the legal test to decide the motion. I will refer to them as A, B, C, D and E. If, in assessing those factors, the judge decides that the proper weight to be attached to them is A(15), B(5), C(35), D(25) and E(20), it is not our role to disturb the judge's order simply because we would have attached greater or lesser importance to those same factors.

[42] To summarize to this point, selecting the factors that will be relevant to the analysis involves an assessment of the circumstances, the cause of action and the legal and factual matrix that joins the parties. It will require an examination of matters that raise questions of both fact and law but which are primarily focussed on issues grounded in law, and will therefore be reviewable on a correctness standard. Accordingly, in constructing the list of relevant factors, the judge must be right.

[43] As I see it, the list of relevant factors subsumed by the legal test on a motion for security for costs (or any other motion for that matter) will not be static. Some factors may vary from case-to-case, depending on the actors, the issues, and the

causes of action in play. One might also imagine a case where matters of public policy could also be a necessary and relevant consideration.

[44] During oral argument at the hearing counsel for Aliant referred us to the decision of Justice Hamilton in **Heisler v. Veinotte**, 2008 NSCA 59, and Justice Bateman in **Clarke v. O'Brien** (1995), 146 N.S.R. (2d) 135 and the English authorities cited therein. If I understood counsel's argument correctly it was to suggest that if we disagreed with the weight attached to the factors considered by the motions judge, then we could and should intervene. With respect I do not consider that submission to be a correct statement of the law.

[45] In my opinion, the appellant's reliance on these cases is misplaced. The references to the authorities quoted by Justices Hamilton and Bateman are taken out of context. Neither case considered the scope or meaning of the phrases quoted by Lord Denning in his reasons in **Ward v. James**, [1965] 1 All E.R. 563 at 570. Neither case involved a complaint as to the weight the judge attached to appropriate evaluative criteria. Rather, both **Heisler** and **Clarke** were cases where this Court intervened because the trial judge had failed to address at all a whole host of relevant and competing factors such that the discretion could not be said to have been exercised judicially.

[46] To illustrate my reasons for rejecting the appellant's submission, I will refer to the decision of Hamilton, J.A. in **Heisler, supra**. The appeal in that case was filed by a grandmother in a custody dispute who sought to overturn a family court's judge's decision which adjourned her custody application *sine die* and refused to order her seven year old grandson's return to Nova Scotia so that the grandmother's application for custody could proceed. The issue was whether the judge erred in deciding that he had no jurisdiction to hear the grandmother's application while the grandson remained outside the province. This Court allowed the appeal after finding that the judge did have jurisdiction to consider the grandmother's applications. In **obiter**, Hamilton, J.A. went on to consider the judge's exercise of discretion. At ¶ 26 of her reasons she referred to the case of **Ward v. James**, [1965] 1 All E.R. 563, (C.A.) where at p. 570 Lord Denning offered his opinion concerning the types of situations when an appeal court would be entitled to disturb a judge's exercise of discretion.

> "This brings me to the question: in what circumstances will the Court of Appeal interfere with the discretion of the judge? At one time it was said that it would interfere only if he had gone wrong in principle; but since Evans v. Bartlam, that idea has been exploded. The true proposition was stated by Lord Wright in **Charles Osenton & Co. v. Johnston**. This court can, and will, interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him. A good example is **Charles Osenton Co. v. Johnston** itself, where Tucker, J., in his discretion ordered trial by an official referee, and the House of Lords reversed the order because he had not given due weight to the fact that the professional reputation of surveyors was at stake. Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him, as in **Hennell v. Ranaboldo**. It sometimes happens that the judge has given reasons which enable this court to know the considerations which have weighed with him; but even if he has given no reasons, the court may infer from the way he has decided, that the judge must have gone wrong in one respect or the other, and will thereupon reverse his decision; see **Grimshaw v. Dunbar**." (underlining for emphasis added by Hamilton, J.A.)

[47] Justice Hamilton proceeded to list a series of important factors the trial judge failed to address "relevant to the exercise of his discretion" which then formed the basis of her intervention.

[48] But to ask ourselves on appeal whether the motions judge considered appropriate factors, and whether he gave any weight to those factors is not the same thing as inviting this Court to create its own list of factors and then re-weigh the evidence pertaining to those factors by engaging in our own assessment of their importance. To accept such a submission would be to misconstrue our role on appeal. The question is not whether Justice Moir assigned the "right" amount of weight to the relevant factors triggered by a security for costs motion (which would take on a narrow, interventionist perspective) but rather was the weight Moir, J. assigned sufficient to satisfy the legal test for security (which is a much broader, more deferential view that recognizes the latitude accorded trial judges in exercising that discretion).

[49] The approach I have taken in attempting to explain how paying deference to discretion depends on the function being performed by the judge during the decision-making process, seems to be shared by the learned authors of *Standards*

*of Review Employed by Appellate Courts*, 2d, Roger P. Kerans & Kim M. Wiley (Edmonton, Alta. Juriliber, 2006), at p. 238:

> "The general rule about appeals on interlocutory matters is that the reviewing court must review on the concurrence (correctness) standard any clear issue of law that can be isolated, but, to the extent that the task of the first court was to balance many competing factors, review is for reasonableness."

[50] I would adopt that commentary as an accurate statement of the law. Applying it to this case in the way I have explained means that we should test Justice Moir's decision based on both the correctness and the reasonableness standards. His identification of the proper legal test governing a motion for security for costs is reviewable on a correctness standard. His selection of the relevant factors to be evaluated in applying the test to the case before him is also reviewed on a standard of correctness. But his balancing of those criteria when assessing fairness "in all of the circumstances" invites considerable deference and is therefore reviewable on a reasonableness standard. In other words unreasonableness is the only entry point which allows us to intrude where otherwise we would not. It is at this stage of our inquiry where we ask ourselves whether his ultimate conclusion is reasonable.

[51] Considerations of fairness will always require an assessment and balancing of competing interests. The decision maker will decide the weight or importance to be assigned to those interests. It is not for us to second guess that discretion-driven adjudicative function or interfere with that process simply because we might have assigned a different level of importance had we heard the motion in first instance. To do so would reduce the notion of deference to hollow, meaningless rhetoric.

[52] Having set the parameters for appellate review in this case I will turn now to Aliant's complaints.

**Analysis**

[53] Before considering the appellant's grounds of appeal, it would be useful to go back to first principles and state what this case is <u>not</u> about.

[54] As explained in 29, *supra*, the appellant does not say the judge's decision produced an obvious injustice. Rather, it confines its challenge to alleged errors in principle.

[55] The motion brought before Justice Moir required him to exercise discretion. Since this is central to the issues on appeal it would be instructive to explain when and how discretion is engaged.

[56] Discretion means choosing to invoke, or not invoke, a particular action or measure. By custom, statutory authority, or inherent jurisdiction vested in the common law, judges have a recognized authority to exercise discretion in fulfilling their duties. In applying that discretion, judges are obliged to act judicially.

[57] Put simply, to say that discretion must be exercised judicially, means that it cannot ever be wielded arbitrarily or capriciously; it must only and always be exercised applying proper legal principles and in a way that assures justice to the parties, according to the evidence and the Rule of law.

[58] Sometimes the judge is said to have a broad discretion, virtually left to his or her own devices, to arrive at a fair and just result having regard to all of the circumstances. Other times the discretion may be curtailed by words intended to specify and limit the types of factors the judge will need to address in exercising the discretion. Occasionally we will see what I would describe as a hybrid scheme which seems to pair features common to the grant of a wide discretion with other criteria that tend to restrict, or at least focus, the application of that discretion.

[59] **Civil Procedure Rule** 45.02 is an example of what I would characterize as the hybrid approach. It directs that while the judge retains the discretion ("may order") to oblige a party to put up security, such an order will only be granted if certain thresholds are all met ("if all of the following are established"). The grant of discretion is paired with a list of factors meant to guide the judge in its application. Among the listed criteria is included a final basket clause which obliges the judge to ultimately consider fairness in all of the circumstances.

[60] The provisions of **CPR** 45.02 which are relevant here state:

**Grounds for ordering security**

**45.02** (1) A judge may order a party who makes a claim to put up security for the potential award of costs in favour of the party against whom the claim is made, if all of the following are established:

(a) the party who makes a motion for the order has filed a notice by which the claim is defended or contested;

(b) the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party.

(c) the undue difficulty does not arise only from the lack of means of the party making the claim;

(d) in all the circumstances, it is unfair for the claim to continue without an order for security for costs.

[61] In this case the only issue Justice Moir was asked to address was subsection (d), that is to say, whether "in all the circumstances" it would be "unfair for the claim to continue without an order for security for costs". By agreement, the parties did not base their submissions on any of the other factors in **CPR** 45.02(1). As counsel for Aliant acknowledged in his factum:

> 7. On the Motion for Security for Costs, all parties and Justice Moir appeared to acknowledge that the only question for the Court was whether "in all the circumstances, it is unfair for the claim to continue without an Order for Security for Costs".

[62] The same concession is made even more pointedly by counsel for Ellph.com in their factum:

> 37. With respect, Aliant's interests are obvious and were part of the Court's analysis throughout.
>
> 38. Aliant will incur legal costs. The ellph.com companies are insolvent. If the plaintiffs' case fails the companies will not be in a position to contribute to Aliant's costs.

> 39. This impact on Aliant was admitted at the outset. At paragraph 17 of the decision the court notes ellph.com's position that Rule 45.02(1)(d) is the only ground in question. The ellph.com companies were admitting the Rule's other criteria had been met: Aliant would have "undue difficulty realizing on a judgment for costs."
>
> 40. This admission was explicit. Nonetheless Justice Moir does in fact refer to Aliant's interests throughout the decision, by way of the principle that justice is not served if a plaintiff is artificially insulated from costs.

[63] Thus, when the motion was argued, it was conceded that all of the other factors in **CPR** 45.02(1) were satisfied, such that the only issue for the motions judge to decide was fairness. As explained, both sides conceded that the conditions found in 45.02(1)(a) through (c) were met. To understand the process that followed, a brief explanation is required. **CPR** 45.02(1)(c) says that a prerequisite to any security is that the difficulty "does not arise only from the lack of means of the party making the claim". We know from Ellph.com's factum (quoted above) their admission that their companies "are insolvent . . . (and) . . . will not be in a position to contribute to Aliant's costs". On its face, therefore, the difficulty does "arise only from the lack of means of the party making the claim" which would then suggest that security is unavailable because of the wording of 45.02(1)(c). However, that conclusion is neutered by **CPR** 45.02(3)(c) which says that when the plaintiff is a corporation there is a rebuttable presumption that the difficulty does not arise solely from the plaintiff's lack of means. Ellph.com could have sought to rebut the presumption but, with its concession, chose not to do so. Accordingly, **CPR** 45.02(1)(c) is satisfied and we are left with 45.02(1)(d) – unfairness - as the only issue.

[64] Having brought the motion, the onus was clearly on Aliant to satisfy the Chambers judge that permitting the claim to continue without requiring Messrs. Kelly and Barnes to put up security would, in all of the circumstances, be unfair.

[65] It is from this perspective that I will now consider Aliant's complaints.

[66] I would crunch the host of grounds, issues and arguments posited by the appellant into five simple, straight forward questions:

i. First, did the motions judge err in his evaluation of fairness by ignoring the interests of Aliant?

ii. Second, was he wrong to effectively treat the respondents' refusal to post security as constituting an inability to do so, such that the focus then became an access to justice issue?

iii. Third, was he wrong to consider the respondents' corporate existence and the contractual relationship between the parties when deciding the motion?

iv. Fourth, did he err in failing to consider the role of costs in the litigation process?

v. Fifth, were certain findings reflected in statements in the judge's decision "erroneous" such that they skewed a proper balancing of the interests and led to an improper exercise of discretion?

[67] Given the nature of the action and the evidence presented there will be some overlap and intersection in addressing each of these five questions.

**i. Whether the motions judge erred in his evaluation of fairness by ignoring the interests of Aliant?**

[68] With respect, there is no merit to the appellant's complaint. I would reject it summarily. A fair reading of Justice Moir's reasons as a whole makes it clear that the respective interests of Aliant and Ellph.com loomed large in the judge's consideration of the merits of the application. His decision is replete with references to the respective positions advanced by the parties, and how their interests would be affected depending upon whether the motion were granted or declined.

[69] Reading the judgment in its entirety, rather than parsing bits and pieces, it is implicit that he took both parties' interests into account before exercising his discretion in refusing Aliant's motion. This is apparent both from the structure

adopted by Moir, J. in presenting his reasons, as well as the content and substance of his analysis. I would dismiss this ground of appeal.

**ii. Whether the motions judge was wrong to effectively treat the respondents' refusal to post security as constituting an inability to do so, such that the focus then became an access to justice issue?**

[70] Here Aliant suggests that Moir, J. conflated a *refusal* by the respondents to post security for costs with an *inability* to do so, and then compounded the "error" by transposing that inability into what would amount to a forced abandonment of the litigation and thus a denial of access to justice.

[71] I see no such error. In opposing Aliant's motion Andrew Barnes and Cameron Kelly filed detailed affidavits to which were attached extensive exhibits . Each was cross-examined at the hearing before Justice Moir. In his affidavit, Mr. Barnes gave a complete account of his income, assets, liabilities and debt which showed him to have a net worth of slightly more than $4,000. He swore that:

> 71. Based on my present net worth and income I am not in a position to undertake to pay costs in the form sought by Aliant, either in the amount demanded or in any amount.
>
> 72. If ordered to provide an undertaking in the form demanded by Aliant, or in any amount, I would be bankrupt if it were ever called-in.
>
> 73. I cannot give an undertaking to pay money I do not have, or have access to.
>
> 74. An undertaking to secure Aliant's costs would prevent me from continuing to advance this proceeding for fear of the direct impact on me and my family.

[72] Mr. Barnes swore that he and Mr. Kelly had, together, borne all of the costs incurred in advancing their litigation and that given his financial situation he would not be able to secure a loan from his bank to meet any security for costs order.

[73] In his affidavit Mr. Kelly presented a similarly precarious financial situation. He explained that their legal counsel had taken the case on a contingency fee basis and had (to that point) generated unpaid fees exceeding $260,000. He concluded

his affidavit by swearing to the same four averments as had Mr. Barnes (quoted in ¶44 above).

[74] The uncontradicted evidence established that these two men have a combined net worth of less than $37,000.

[75] When cross-examined at the hearing, Messrs. Barnes and Kelly did not resile from the content of their affidavits. For example, from the transcript of Mr. Kelly's cross-examination by Aliant's counsel we see this exchange:

> Q. … So that is what was being requested. So in your affidavit … it says:
>
> > Based on my present net worth and income I am not in a position to undertake to pay costs in the form sought by Aliant, either in the amount demanded or in any amount.
>
> And that's your evidence, is it?
>
> A. That is my evidence, yes.
>
> Q. And what is being asked isn't that you agree to pay the costs. What you are being asked to is to recognize and agree that you'll be jointly liable with Ellph.com for any award of costs. Whether you can pay it or not will be another issue down the road but why are you not in a position to undertake to be liable jointly with Ellph.com?
>
> A. Why am I not?
>
> Q. Yes.
>
> A. Well to me it's the same thing. It's an undertaking to be personally liable is the same as if I don't have the money I can't make a promise to produce it.
>
> Q. Well no, you're not being asked to make a promise to pay. You're just being asked to undertake to be jointly liable for the debt if in fact there is a cost order.

A. It's still the same thing to me in that I can't give you or Aliant any sense that I'm going to be able to raise or come up with any costs to that extent. I just I would be untruthful.

Q. Well it would not be untruthful for you to undertake to be liable for the costs, subject to your ability to pay down the road, would it?

A. I don't understand your question.

Q. Well this provision in your affidavit seems to suggest that what is being asked from you is a promise to pay and you can't promise to pay because you don't have it. That's your evidence is it?

A. I can't promise something I can't deliver. …

Q. And again are you saying that if you're ordered to provide a form of undertaking in any amount you would be bankrupt if ever called on, regardless of the amount?

A. That's what I'm saying here, yeah.

Q. And when you say bankrupt do you mean that you wouldn't have the money to pay, is that what you mean?

A. Well if I were ordered to pay I would have to liquidate assets. I would have to basically declare bankruptcy to meet that cost. …

Q. Says if you're ordered to provide the undertaking in the form requested, that you be jointly and severally liable for costs awarded against Ellph if Aliant is successful. You're saying that if you're ordered to give that, you will not proceed with the litigation.

A. I would not be able to proceed with the litigation.

Q. Why not?

A. Well I would not be able to make a promise to be liable or pay at all so if I'm ordered to do so I will not be able to do that.

Q. Because in your mind you couldn't promise to pay something you don't have.

A. That's correct.

Q. And that's the basis for your statement in 104.

A. Well I'm not sure if what the basis of the statement was. It was simple to me. It was that if this motion is ordered I can't deliver, I can't promise what I can't deliver so therefore I would have to stop.

[76] The impact of this evidence was not lost on the motions judge. In his reasons he said this:

> [11] Aliant does not seek a conventional order for security for costs by which the plaintiffs would be required to post cash, or some other liquid security, in a fixed amount to respond to a judgment for costs. Rather, it seeks a stay, unless Mr. Kelly and Mr. Barnes provide their personal guarantees. Aliant gave an estimate of potential party and party costs, and it suggested a limit of $1,500,000 in its written submissions. Unlimited liability was suggested in oral submissions.
>
> [12] The shareholders of the Ellph.com companies refuse to guarantee the contingent liability for costs. They have personally financed the Ellph.com companies so the companies could pursue what the companies say is their just remedy. Mr. Kelly and Mr. Barnes do not have the assets to respond to a judgment anything near Aliant's $1,500,000 estimate. Neither want to make a promise he cannot perform.
>
> [13] Aliant distinguishes between a promise to pay and personal liability. It argues against Kelly's and Barnes' reasons. It even suggests that they might change their minds, especially if the court imposed a substantially reduced limit.
>
> [14] It is not for me to agree or disagree with the shareholder's reasons. I heard them cross-examined. Their position seems more reasonable than Aliant submits.
>
> [15] I find that Mr. Kelly and Mr. Barnes decided against providing a guarantee and that it is unlikely they will change their minds. The Ellph.com companies have no other source for securing its contingent liability. So, the stay would inevitably lead to a dismissal.

[77] To conclude, the question is not whether Messrs. Barnes and Kelly are, strictly speaking, impecunious. Rather, the single issue the judge had to decide was whether it would be unfair, having regard to all of the circumstances, to allow the case to be tried without first obliging them to provide virtually limitless security for costs, should they fail.

[78] The judge heard their evidence regarding their difficult financial circumstances. His conclusions on this issue were largely fact-driven. I am not persuaded that any of his findings were prompted by palpable and overriding error.

[79] I do not think it accurate to say that the effect of the judge's ruling is to leave the respondents "risk free". The evidence shows that they have already made considerable sacrifices to fund the litigation to date, and have and will face further sizeable outlays for disbursements, which will undoubtedly include experts in the calculation of damages.

[80] On this record it was certainly open to Justice Moir to conclude that their "refusal" to guarantee their joint and several liability for costs was, in fact, based upon a proven inability to carry on with the litigation if Aliant's motion were granted. From that perspective it was perfectly reasonable for the judge to regard this as an access to justice issue. I see nothing here which would warrant our intervention.

### iii. Was the motions judge wrong to consider the respondents' corporate existence and the contractual relationship between the parties when deciding the motion?

[81] Aliant's complaint engages aspects of contract and business corporations law. Aliant says the motions judge placed too much weight on the fact that the respondents are incorporated companies and ought, instead, to have lifted the corporate veil and seen this case for what it truly is, that is, a lawsuit of huge proportions brought by the individual plaintiffs, Messrs. Kelly and Barnes against Aliant. In urging this approach, Aliant cited jurisprudence from other jurisdictions whereby shareholders of an impoverished corporation joined in litigation might, in certain circumstances, be expected to post guarantees.

[82] It is clear to me that Moir, J. carefully considered the case law to which Aliant's counsel had referred him, but in the end was not prepared to apply those non-binding precedents to the situation as he saw it. Justice Moir said this:

> [24] Mr. Dunphy refers me to authorities from the Alberta courts holding that the plaintiff's status as a closely held, impoverished corporation is a factor in favour of security for costs and that the possibilities for security should include shareholder guarantees: *Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.*, [1995] A.J. 1159 (Q.B.) and the decisions cited in it.
>
> [25] If these authorities only say that one possible source for the security is guarantees from "the creditors or shareholders, or whoever else is pressing and might benefit from the suit" (para. 58) then I have no difficulty with them. The question remains: Is it fair to ask for the security? However, if these authorities suggest that it is always, usually, or often fair to turn to the shareholders or creditors, I respectfully disagree.
>
> [26] The cases seem to go beyond merely recognizing the possibility of calling for shareholder guarantees. They turn on the apparently compelling observation that the ultimate beneficiaries of success in the suit should pay the party and party costs of failure, an observation that is sometimes made in reference to nominal plaintiffs: *52868 Newfoundland and Labrador Ltd. v. Newfoundland and Labrador*, 2006 NLTD 102. The appearance disappears when we recognize that the alleged wrong was done to the company and compensation is due to the company for whatever uses it determines.
>
> [27] It is fundamental to company law that courts recognize the personality of a corporation distinct from its members. Commerce depends on our doing so. Mr. Dunphy speaks of shell corporations. At para. 57, *Terra Energy* says of the plaintiff's sole shareholder, "He's the real plaintiff." I suppose that it may be fair to demand a shareholder guarantee in these circumstances.
>
> [28] The Ellph.com companies are not shell corporations, except in the sense that they are shells of their former selves. They carried on a business, they held apparently valuable contracts with Aliant and between themselves, and they employed people with apparently valuable expertise.
>
> [29] People incorporate companies for reasons. Usually it is not done just to create a shell. I do not see how it is possible to find that security for costs in the form of shareholder guarantees is fair without delving into the reasons for incorporation and details about the corporate operations.

[83] I too would conclude that the application of any principles that might be extracted from those cases to the circumstances shown to exist here, would be remote at best. It seems to me unhelpful and potentially misleading in cases involving requests for security for costs, which are by their very nature, fact specific, to draw too much from the jurisprudence of other jurisdictions where the circumstances, rules and criteria called for in the exercise of discretion may be very different.

[84] For example, in **Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.,** [1995] A.J. No. 1159 (Q.L.) (Q.B.), appeal dismissed [1995] A.J. No. 305, Hart, J., observed at ¶56:

> ". . . It is also well established that where a plaintiff is a corporation, the Court should not be unmindful of the potential for injustice to defendant where the corporation is a mere shell without financial substance."

By contrast, Justice Moir found specifically that the Ellph.com companies "are not shell corporations, except in the sense that they are shells of their former selves."

[85] The result in **ABI Biotechnology Inc. v. Apotex Inc.**, [2000] M.J. No. 14, is also distinguishable. While ordering that the company in that case post security for costs, the Manitoba Court of Appeal observed:

> [45] . . . Security for costs will not be ordered against a plaintiff who has no assets if its effect is to stifle a genuine claim. However, as we have seen, the courts have applied the rule less generously when a corporative plaintiff asserts insolvency or impoverishment in response to an application for security for costs. A corporate plaintiff with "insufficient assets" must also establish that it cannot raise the security; that its shareholders are unable to advance funds to allow it to post security."

Here, Moir, J. was satisfied on the evidence presented that Ellph.com could not raise security. Neither could the shareholders secure financing to enable their companies, or themselves, to provide security.

[86] Similarly in **Biotechnik Inc. v. O'Shanter Development Co.**, [2003] O.J. No. 1633, (Q.L.) (S.Ct.J.), the modest, incremental security for costs payments

ordered by the Master were peculiar to the approach taken in construction lien cases. As Master Sandler made clear:

> [54] The concept of requiring the principal or principals of a corporate plaintiff without assets to undertake to the court to pay to a successful defendant any unpaid costs . . . is based on the idea . . . that it is "just", at least in construction lien cases, to require the principal or principals of a corporate plaintiff to put his/her or their assets "on the line" . . .
>
> [73] . . . especially since this is a construction lien action where a "level playing field" . . . is seen by at least some courts to be a desirable procedural goal.

[87] I also find it interesting that in his reasons in **Terra Energy Ltd., supra**, Hart, J., referred with approval to an earlier decision cited by the parties against whom security was sought. He said:

> [57] On the other hand it is equally clear that an order for security for costs should not be oppressive, such as to limit or restrict access to the Court by a party who is unable to comply. As stated by Mr. Justice Reid of the Ontario High Court in the case of John Wink Limited, quoted by defendants at page 6 of the written brief of the respondent, quote:
>
> > There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequences of an order for costs would be to destroy such a claim no order should be made and injustice would be even more manifest if the impoverishment of the plaintiff were caused by the very acts of which plaintiff complains in the action.

[88] That is precisely the conclusion reached by Justice Moir here. He found, on the evidence, that to force Messrs. Kelly and Barnes to put up the security demanded by Aliant would be to "destroy" their claim to damages and that such a grave injustice "would be even more manifest" if their impoverishment were later found to have been caused by the very acts of which the respondents complain.

[89] To conclude on this point, I am not persuaded that the motions judge erred in principle in taking the approach he did, nor in his assessment of the facts surrounding the respondents' corporate incarnations and business dealings with the appellant.

[90] Collateral to this complaint is the appellant's parallel submission that the judge placed too much weight on the fact that the underlying action is a case of alleged breach of contract. Aliant cites the following passages from the judge's decision:

> [41] The case is about a business relationship protected by law. It is about a contract. For me, that fact colours the assessment of fairness.
>
> [42] The fairness of security for costs in cases of alleged breach of contract involves a unique consideration. In that field, the parties define their legal obligations, often in great detail. In that field, the court usually cannot alter, or add to, the agreed terms. When a procedural discretion available in all cases is invoked in a contracts case, the judge should be mindful of fundamental policies sometimes summed up in the phrases "freedom of contract" and "sanctity of contract". That is to say, we should be cautious about exercising the discretion for a result that is inconsistent with the rights and obligations the parties freely set for themselves. …
>
> [44] Aliant chose to contract for eWare solely with Ellph.com Technologies Inc.
>
> [45] Aliant did not obtain, maybe it did not even seek to obtain, guarantees of Ellph.com's performance under the contract. Indeed, it did not even obtain security from the actual owner of eWare. It contracted with a licencee whose purpose was to insulate the owner from the internet provider. It contracted with Ellph.com Technologies Inc. without obtaining the liability of Mr. Kelly, Mr. Barnes, or Ellph.com Solutions.
>
> [46] I mean no criticism of Aliant. I mean to correctly characterize the nature of the relationship between the parties.
>
> [47] It was a relationship in which a large corporation was to pay a small, new company for technology. Security from the small, new company was not called for. If it failed to perform, Aliant only needed to stop paying and to settle accounts by agreement or in court. Indeed, it seeks to do just that by counterclaim.
>
> [48] The circumstances of Ellph.com Technologies known to Aliant when the contract was negotiated, the terms the parties contracted for, and the obligations they did not contract for are such that Aliant could never have had a reasonable expectation of recovery against shareholders of Ellph.com for liabilities of Ellph.com Technologies. In this contracts case, that is a strong reason for not

> ordering security for costs on the premise that Ellph.com must raise the security from its shareholders.
>
> [49] There would be a further injustice in ordering the Ellph.com companies to post security for costs. They had two apparently valuable assets: the technology of eWare and the sublicencing agreement with Aliant. The suit is about Aliant's termination of one of those assets. There is also evidence that Ellph.com could not market eWare after the termination.
>
> [50] The termination is a cause, perhaps the cause, of Ellph.com's poverty. The issue in Ellph.com's suit is whether Aliant wrongfully caused that poverty. Aliant concedes that Ellph.com's position has merit, in the sense that summary judgment is not available.
>
> [51] If the security requested by Aliant is granted, Mr. Kelly and Mr. Barnes will not post it. Aliant will have escaped responsibility for the termination on account of the very thing it did.

[91] Here again I am not persuaded that the motions judge erred in his approach. **CPR** 45.02(1)(d) obliged him to address "all the circumstances". Surely the judge is entitled to consider as one of the circumstances, the nature of the cause of action in which the parties are embroiled, and the way they have framed the claims, and counterclaims, against one another. I see nothing wrong in a motions judge taking those features of the case into account, as he or she would in considering any other appropriate circumstance, whenever asked to determine the overarching issue of fairness to the parties, were the demand for security to be either granted or refused.

[92] The contractual terms and the nature of the relationship between the parties was one of many circumstances examined by Justice Moir. He did not focus on that feature alone to the exclusion of all others. For example, another circumstance he considered was the question of delay. He decided that point in Aliant's favour saying:

> [36] I have been treated to much argument about delay. The case is set for trial, the possibility of a motion for security for costs was only communicated by Aliant to the Ellph.com companies during the date setting process, and the action has been outstanding for six years. On the other hand, Aliant says it only learned of the plaintiffs' impoverishment at discoveries and there was no serious delay afterwards. I accept Aliant's position.

[93] Many other factors were considered important by the motions judge and are reflected in his comprehensive reasons. They include: the fact that through financing supplied by Messrs. Kelly and Barnes personally, their companies had invested large sums of money in the litigation without ever being forced to consider the possibility of having to raise further security to cover any contingent liability for costs; whether the impugned actions by Aliant said to give rise to the respondents' entitlement to damages might well be the very cause of their impoverishment; and whether there existed a huge imbalance in resources between the litigants (a true "David vs. Goliath" situation). On this latter point, counsel for Aliant conceded during argument that the comparative financial wherewithal of the appellant and the respondents was a legitimate circumstance for the motions judge to consider. However, Aliant objected to the "too much weight" given to it by the motions judge.

[94] Again, I see no error in the judge's assessment of the circumstances he identified and considered relevant to his inquiry. In fashioning the list of factors to be evaluated, his legal analysis was correct. In assigning weight to those factors, he was best placed to make that assessment. I cannot say that his conclusions were unreasonable.

### iv. Whether the motions judge erred in failing to consider the role of costs in the litigation process?

[95] Once again I do not find the authorities relied upon by Aliant to be all that helpful. The judicial commentary in such cases typically arises in the context of deciding party and party costs after trial. They refer to the well-known objectives surrounding the grant, or refusal of costs which includes a recognition that the risk of being exposed to a costs award is meant to encourage reasonable behaviour in litigation. See for example, **Landymore v. Hardy**, [1992] N.S.J. No. 79 (Q.L.)(C.A.); **Leddicote v. Nova Scotia (Attorney General)**, 2002 NSCA 47; and **Wall v. 679927 Ontario Ltd. et al.** (1999), 176 N.S.R. (2d) 96 (C.A.). But during oral argument on appeal counsel for Aliant acknowledged that there was no suggestion in this case that Ellph.com's claim was frivolous, or that the respondents' behaviour was in any way unreasonable, or required "encouragement". In my respectful view, Moir, J. was fully aware of the role and repercussions of a costs award in this case. This submission of the appellant fails. I turn now to Aliant's last complaint.

**v. Whether certain findings reflected in statements in the judge's decision were "erroneous" such that they skewed a proper balancing of the interests and led to an improper exercise of discretion?**

[96] Finally, Aliant challenges certain factual "errors" made by the judge in his reasons. Specifically it points to these statements:

> [43] Likely, when Aliant retained Mr. Kelly as a consultant it contracted personally with him. …
>
> [51] … Aliant will have escaped responsibility for the termination on account of the very thing it did.
>
> [54] Aliant intends to make full use of its financial resources. … as would justify a staggering award of party and party costs. …

[97] On the record as I read it, it was open to the motions judge to reasonably draw such inferences from the evidence. For example, Mr. Kelly's affidavit sworn May 31, 2011, makes it clear that his initial dealings with Aliant arose through his being retained as an independent consultant.

[98] Attached as Exhibit #8 to his affidavit is Aliant's letter to him dated December 7, 2000, signed by J. David Landrigan, Aliant's legal counsel, which begins:

> Please accept this letter as Aliant Telecom Inc.'s notice of termination of the March 9, 2000 Sublicense Agreement. …

Obviously, whether that termination was justified will be central to the underlying litigation; but the act of termination at the instance of Aliant will not.

[99] Finally, the finding that party and party costs would be "staggering" comes from Aliant's own pre-hearing brief to the motions judge which pegged the figure at $1.5M.

[100] In summary, one cannot criticize the judge for these clearly established factual findings or inferences reasonably drawn from the record. There is no merit

to the suggestion that these expressions somehow skewed the proper exercise of his discretion in deciding the motion.

**Conclusion**

[101] Each case is different. The analysis and result in any given case will, of necessity, be very fact-specific.

[102] Here, Aliant did not seek security for costs in the ordinary sense. All parties acknowledged Ellph.com's impecuniosity. Aliant sought an unlimited undertaking from Messrs. Kelly and Barnes to provide a complete indemnity for trial costs, in the face of evidence that they too are impecunious. Such an order would be unprecedented in Nova Scotia.

[103] On this record it was open to the judge to conclude, as he did, that the respondents would be forced to abandon their claim and walk away from the litigation if he were to grant the motion. That finding necessarily provoked the pressing question of access to justice. Having heard the evidence, Moir, J. was well placed to decide if he should grant Aliant its motion, or whether fairness dictated otherwise.

[104] That determination called for a wise and finely tuned exercise of discretion. Justice Moir was correct in his application of the law. His weighing of the evidence in balancing the respective interests of the parties was reasonable. There is nothing here which would cause me to intervene.

[105] For all of these reasons I would grant leave but would dismiss the appeal with costs of $2,000 inclusive of disbursements payable to the respondents.

Saunders, J.A.

Concurred in:
Fichaud, J.A.
Beveridge, J.A.