SUPREME COURT OF NOVA SCOTIA

Citation: *Gallagher Holdings Limited v. Unison Resources Incorporated*, 2019 NSSC 104

Date: 20190327
Docket: Hfx No. 451310
Registry: Halifax

Between:

Gallagher Holdings Limited, Aldamad Investments Limited, Andrew Armstrong, James Williams, Michael Williams, Bruce Barteaux, Bonnie Barteaux, Michael Lund, and Blaise Wilson

Applicants

v.

Unison Resources Incorporated, UWGC Limited, Stephen Patterson, and Genevieve Paquin

Respondents

Decision on Costs

Judge: The Honourable Justice Gerald R.P. Moir

Heard: January 31, 2019, in Halifax, Nova Scotia

Counsel: John Keith Q.C. and Caitlin Regan-Cottreau, for the Applicants
Stephen Patterson, Respondent, on his own
Genevieve Paquin, Respondent, on her own
Christopher Robinson, formerly counsel for the Respondents

Moir, J. :

Introduction

[1] Last August, I signed a decision determining this proceeding. It is reported as *Gallagher Holdings Limited v. Unison Resources Incorporated*, 2018 NSSC 251. The applicants were successful. They seek costs.

[2] Against Unison Resources Incorporated and Stephen Patterson, the applicants seek solicitor and client costs of about $530,000 or a substantial lump sum. Against Genevieve Paquin, they seek solicitor and client costs or a lump sum of $200,000. The applicants seek a contribution by solicitor Robinson of $80,000 towards expenses they say were caused by his misconduct.

Against Unison and Mr. Patterson

[3] "Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young*, [1993] S.C.J. 112 at para. 251. For our Court of Appeal, Justice Pugsley wrote at para. 94 of *Brown v. Metropolitan Authority*, [1996] N.S.J. 146:

> While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the Court's disapproval of the conduct of one of the parties in the litigation….

See also, *Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.*, 2010 NSCA 17 at para. 38 to 47. Justice Oland wrote for the Court.

[4] Even a finding of reprehensible conduct does not necessarily lead to a solicitor and client award. See *Brown* at para. 95 to 98. Thus, even a finding of fraud does not always lead to such an award. See Justice Warner's decision in *Geophysical Service Incorporated v. Sable Mary Services Incorporated*, 2010 NSSC 357 at para. 13 to 16.

[5] The scope provisions in Rule 77 – Costs distinguish between party and party costs and solicitor and client costs: Rules 77.01(1)(a) and (6). The later refers to the requirement for "exceptional circumstances". And, Rule 77.03(2) qualifies that further: "exceptional circumstances recognized by law".

[6] Mr. Patterson agrees with a lump sum award. He says this was his first encounter with a suit, and counsel lead him to believe he would win. Counsel was

not advising Mr. Patterson and Unison when they defrauded the applicants. The frauds were extensive. They were designed to extract money from people. And, they had that effect.

[7] I discuss the frauds at para. 372 to 296 of the main decision and sum up in para. 397:

> They made false representations to the applicants about the proprietary technology, contracts with the oil and gas producer, and impending approval and testing. They knew the statements to be false. They intended the applicants should act in reliance on these, and numerous other, misrepresentations made in the promotion of shares. The applicants acted on the three major representations, and on the lesser ones, when they subscribed for shares. They lost the amounts they invested.

The behaviour was greedy and immoral. It leads me to order costs on a solicitor and client basis, which I tax at $536,296 inclusive of disbursements.

Against Ms. Paquin

[8] There was no finding of fraud against Ms. Paquin. She says her only involvement with the litigation was "my discovery and affidavit". There was no affidavit. She signed a document that pretended to be an affidavit.

[9] She says, "The contents and exhibits of my affidavit were true and accurate…". To the contrary, her evidence on discovery was that she knew almost nothing about the subjects to which she had pretended to swear.

[10] Ms. Paquin's liability was for shareholder oppression. Oppression often leads to solicitor and client costs: *Minas Basin Holdings* at para. 45. She had some part in the facts that lead to the finding of oppression. She accepted $74,500 from the funds raised by fraud and did nothing to earn it. That amount formed the basis for the judgement against Ms. Paquin.

[11] I am not prepared to order solicitor and client costs against Ms. Paquin. Her behaviour was not so reprehensible as to deserve that, and she was not so much involved in the oppression.

[12] I calculate tariff costs using $74,500 as the amount involved, at $38,188.

[13] The time wasted studying Ms. Paquin's pretended affidavit, preparing for her discovery, and discovering her leads me to round the award up to $42,000. Disbursements were $15,125. She should pay $2,117.

[14] Judgement for costs against Ms. Paquin will be $44,117. The last $44,117 recovered from Unison or Mr. Patterson will be offset and any costs, in the meantime, recovered from Ms. Paquin will be credited against the Unison and Patterson cost awards.

Against Mr. Robinson

Applicants' Claim

[15] I discussed procedural abuses at para. 332 to 368 of the main decision. I also regard the respondents' treatment of the settlement agreement to have been abusive (para 407 to 428). The costs hearing brought out more evidence of abuses.

[16] The applicants say that respondents' counsel bears responsibility, often primary responsibility, for some of the abuses. They seek an extremely rare remedy, costs against counsel.

Law of Costs Against Counsel

[17] The applicants submit that awards of costs against a party's solicitor are distinctly authorized by the inherent jurisdiction and the Civil Procedure Rules. On the inherent jurisdiction, they refer to *Myers v. Elman*, [1940] A.C. 282 (H.L.). On the Rules, they refer to *Nova Scotia Civil Procedure* Rule 77.12(2) and *Young v. Young*, [1993] S.C.J. 112, which dealt with a similar Rule in Ontario.

[18] The applicants submit that compensation is the object of an award against counsel under the Rules and punishment may be the object under the inherent jurisdiction.

[19] Rule 77.12(2) reads:

> A judge who determines that expenses are caused by the improper or negligent conduct of counsel may order any of the following:
>
> a) counsel not recover fees from the clients;
>
> b) counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
>
> c) counsel personally pay costs.

Ontario Rule 57.07(1) is similar.

[20] In *Young v. Young*, a majority agreed with then Justice McLachlin's reasons on costs against counsel. Her reasons on that issue are found at para 263.

[21] She begins by emphasising the compensatory nature of an award of costs. "The basic principle on which costs are awarded is as *compensation* for the successful party, not in order to punish a barrister".

[22] Justice McLachlin suggests a combination of abusive proceedings and bad faith on the part of counsel may lead to an award against counsel:

> 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.

She found no such fault in the record before her, and concluded with a call for extreme caution:

> Moreover, 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. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

[23] The Ontario Court of Appeal dealt with various issues about costs coming out of the *Young* decision. The case is *Glaganov v. Russell Township*, 2012 ONCA 410. At para. 14 to 16, Justice Weiler endorsed the view that an award under the inherent jurisdiction is distinct from an award under the Rule. The Rule is restricted to compensatory awards, where the inherent jurisdiction may support the award as punishment for contempt or to control court officers.

[24] Justice Weiler called for a two-step inquiry: "The first step is to inquire whether the lawyer's conduct falls within Rule 57.07(1) in the sense that it caused costs to be incurred unnecessarily." (para. 18)

[25] On that first step, the Ontario Court of Appeal (para. 20) reiterated its reasons in *Rand Estate v Lenton*, 2009 ONCA 251 at para. 5: "[R]ule 57.07(1) requires an examination of 'the entire course of litigation that went on before the application judge so that the application judge can put in proper context the specific actions and conduct of counsel.'" Justice Weiler referred to the first step as a "holistic examination of the lawyer's conduct" intended to produce "an accurate tempered assessment" (also, para. 22).

[26] At para. 22, Justice Weiler said, "The second step is to consider, as a matter of discretion and applying the extreme caution principle indicated in *Young*, whether, in the circumstances, the imposition of costs against the lawyer personally is warranted."

[27] At home, we have the decision of Justice Pickup in *Rowe v Lee*, 2007 NSSC 31. It was decided under Rule 63.15(2) of the *Nova Scotia Civil Procedure Rules* (1972), which applied when "costs are incurred improperly or without reasonable cause, or arise because of undue delay, neglect or other default".

[28] Justice Pickup wrote about both the inherent jurisdiction for awards of costs against counsel and the Rule. He concluded that the Rule did not require proof of bad faith or reprehensible conduct. He made an award that partly compensated the other parties' wasted fees.

[29] A partial award is one way to give effect to the principle of extreme caution in light of counsel's duties of confidentiality and vigour.

[30] Mr. Robinson submits that Rule 77.12(2) is about compensation, not punishment. He disputes the applicability of the inherent jurisdiction award of costs against counsel outside of proceedings under Rule 88 – Abuse of Process and Rule 89 – Contempt. He emphasizes "in rare cases for contempt or to control its officers" at para. 15 of *Glaganov*.

[31] Mr. Robinson refers to para. 21 of Justice Weiler's decision in *Glaganov*:

> Although the conduct as a whole must be considered, a court must consider specific incidents of conduct in determining whether the conduct falls within rule 57.07(1). In *Carleton*, the court confirmed, at para. 20, that a general observation "does not permit identification of what conduct may have contributed to delay and unnecessary costs." Further, the absence of specific evidence or circumstances considered in making a general observation precludes meaningful appellate review of the criteria of rule 57.07(1). Above all, the legal test under rule 57.70(1) is not concerned with a lawyer's professional conduct generally, but whether such conduct, including the conduct of the litigation, caused unreasonable costs to be incurred: *Carleton*, at para. 18.

He submits that this means, "specific conduct on the part of the lawyer must be found to meet the test under Rule 77.12(2) which necessarily includes the 'extreme caution' principle". I agree.

[32] Mr. Robinson goes further saying: "…it must be demonstrated that because of the impugned conduct, specific expenses were incurred…". That goes too far. Once causation is established, the loss is not assessed as if costs were a claim for

special damages. Rather, the award must be made in light of the wasted expenses reasonably assessed.

[33] Mr. Robinson also submits that I am confined to the hearing over which I presided and motions that come before are not to be considered by me: "…a Court cannot…use hindsight to review a previous motion or appearance and the decision of another judge, and then revise or add to the judge's cost award, if any."

[34] He describes a motion made before trial or final hearing as "a discrete interlocutory matter". A party to a motion has the opportunity to make an argument for costs against counsel to the motions judge. As the judge who heard the application, I am "in no position to revisit a cost award of another jurist, with an eye to altering it in any way."

> And certainly, as regards the conduct of a lawyer during the motion, said conduct ought not to be revisited by a judge who had no involvement in the mater at issue as Justice McGarry determined and as the Appeal Court agreed.

Mr. Robinson is referring to *Rand Estate v. Lenton*, [2007] O.J. 831 (S.C.J.) and 2009 ONCA 251.

[35] The firm of Carrel & Partners represented respondents in the course of several motions in an application. After succeeding on a default motion that covered "virtually all of the outstanding matters" (O.S.C.J. para. 20) and having been put through several more motions, the Rand Estate requested costs against Carrel.

[36] Justice McGarry found professional misconduct in Carrel's carriage of the case for the respondents (para. 18 and 19). He made awards separately for eleven motions "with supporting reasons" (para. 20). The supporting reasons are brief. They "should be read in the context of and in addition to the above noted ongoing professional misconduct" (also, para. 20).

[37] The judge ordered no costs against counsel in six of the eleven motions, two for one reason and four for another. Justice McGarry took management of the proceeding after other judges heard the first two motions. He wrote, "Having no involvement in that motion, I refrain from making an additional cost ruling". (para. 20). On the other four motions for which costs against counsel was declined, Justice McGarry found that the misconduct did not cause expense.

[38] The judge ordered a total of $42,150.67 against counsel on the other five motions. There is nothing to suggest that he had not already ordered costs against

the principal respondents on some, or all, of these. They were discrete. They were heard at different times between 2003 and 2006. It is unlikely that costs went undetermined as against the unsuccessful respondents.

[39] Mr. Robinson relies on para. 5 of the Ontario Court of Appeal decision in *Rand Estate*. It needs to be read with para. 4:

> 4. Mr. Slaght also submits that while a trial judge may have jurisdiction under Rule 57.07 to go back after litigation is finished and revisit costs orders made against a party with a view to imposing additional costs obligation on solicitors personally, there is a real danger in taking that path. He submits that trial judges who revisit costs orders run the risk of unfairly judging the conduct of the solicitors through the lens of hindsight.
>
> 5. We accept that hindsight has no place in the evaluation required by Rule 57.07. We, however, distinguish hindsight from the process of examining the entire course of litigation that went on before the application judge so that the application judge can put in proper context the specific actions and conduct of counsel. In our view, this holistic after-the-fact examination of the solicitors' conduct can have advantages. First, it is more likely to produce an accurate tempered assessment and, second, it could provide a less intimidating method of approaching this kind of problem. In our view, it could be more intimidating if solicitors were met at each step in a piece of litigation with claims for costs and the kinds of assessments that those claims can necessitate. The timing of the Rule 57.07 application will depend on the circumstances of the particular case.

[40] Mr. Robinson emphasizes "that went on before the application judge" in support of his argument, which he describes alternatively: "Put another way, an application judge may not function as an informal 'appeal' of an award of costs made by a motions judge." I reject this argument.

[41] First, an observation. Then, the refutations.

[42] When Ontario courts speak of an application or an application judge, they are not necessarily referring to the same process as we have under Rule 5 – Application. Ontario still has the restricted application, resembling the application (inter parties) of our 1972 Rules.

[43] Particularly, the application in court has no equivalent in Ontario. It was created under the influence of British Columbia Rule 9-7 "Summary Trial". It is "a flexible and speedy alternative to an action": Rule 5.01(4). For the purposes of the present motion, the application judge is the same as a trial judge.

[44] "Application" and "motion" are words sometimes used interchangeably in Ontario. Not here: see Rules 5.01(1) and 22.01(1). For example, the reporter of the Ontario Superior Court of Justice decision in *Rand Estate* described the proceeding as "APPLICATION by estate for award of costs payable by respondents' solicitor", Justice McGarry described it as "this application by the Rand Estate" (para. 1), and the Ontario Court of Appeal consistently referred to him as the "application judge" (para 1). However, the Ontario Rule about costs against counsel provides that such an award may be made "on the motion of any party": Rule 57.07(2).

[45] The proposition that the judge who sets costs after finally determining a proceeding must ignore interlocutory proceedings in which other judges have determined costs for and against parties is firstly refuted by the *Civil Procedure Rules*. The ancient and broad discretion continued by Rule 77.02 does not allow for constraining a trial judge from surveying all motions leading up to a trial to determine if they collectively show abuse. Nor does the discretion to increase tariff costs in light of "conduct of a party affecting the speed or expense of the proceeding", "a step in the proceeding that is dealt with improperly, abusively, through excess caution, by neglect or mistake, or unnecessarily", or "a step in a proceeding a party is required to take because the other party unnecessarily withheld consent": Rules 77.07(2), (f), and (g). Nor does Rule 77.12(1): "A judge may award, assess, and provide for payment of costs for any act or omission of a person in relation to a proceeding or an order."

[46] I cannot substitute an award of costs by a motion judge in an interlocutory proceeding, but when called upon to order final costs I cannot ignore misconduct related to motions. Often the judge who presides at a trial or the hearing of an application in court must survey the proceeding as a whole to determine costs of the proceeding as a whole.

[47] The second refutation is in the proposition that no motion judge was asked to order costs of the motion against counsel. Taking account of counsel's behaviour in connection with a motion for which party and party costs have been awarded, but in which costs against counsel were not considered, is not a review of the motion judge's award.

[48] Thirdly, *Rand Estate* says the opposite of Mr. Robinson's interpretation. Timing of a motion for costs against counsel "will depend on the circumstances of the particular case" (OCA, para. 5). There is an advantage in avoiding situations in which "solicitors were met at each step in a piece of litigation with claims for costs and the kinds of assessment that those claims can necessitate" (also, para. 5).

[49] How is one to determine "excessive motions and applications" (*Young*, para. 263) if motions with awards of party and party costs are to be ignored? I take the Ontario Court of Appeal's call for "a holistic after-the-fact examination of the solicitors' conduct" (*Rand*, para. 5) to require examination of "the entire course of litigation" (also, para. 5). I take "that went on before the application judge" in para.5 to refer to the proceeding the judge determined. For a trial judge or an application judge, that encompasses everything that went on in the action or application.

[50] Assessing some parts of the case and ignoring others would not make for a holistic approach to a claim for costs against counsel. We cannot leave out motions heard by another judge, or motions for which costs have been awarded as between parties, and achieve an assessment of counsel's conduct of the case as a whole.

[51] I am not required in the circumstance of this case to determine whether an award of costs against counsel is still available as a punitive remedy under the inherent jurisdiction. As will be seen, the applicants have proved losses attributed to respondents' counsel that exceed their claim for $80,000.

[52] I will apply the compensatory approach and the law governing it to the facts of this case.

Step One, Conduct Causing Cost

[53] As I said, the first step under *Glaganov* is to determine "whether the lawyer's conduct falls within [the Rule] in the sense that it caused costs to be incurred unnecessarily" (see para. 38 above).

[54] *Obstructing Discovery* - The respondents produced numerous inconsistent financial statements (main decision, para. 449 to para. 462). The last set was signed by an accounting firm, and the statements were sponsored at trial by Brendan Horning, CA.

[55] In the end, I found that the financial statements, including the "notice to reader" statements sponsored by Mr. Horning, were nearly useless (para. 462). Instead, the misappropriations were calculated by the applicants using bank statements (para. 466 and 467).

[56] The notice to reader financial statements were prepared by Mr. Horning's partner, who was no advised they were for litigation. Mr. Horning conducted a

second review. At discovery of Mr. Horning, Mr. Keith tried to get the details of his engagement. He was stopped:

> Q. How did you find out? Who did you find out from that these documents were going to be used in connection with litigation?
>
> A. I found out from Chris.
>
> Q. Chris Robinson?
>
> A. Yeah.
>
> Q. Okay, did he call you?
>
> A. Yeah.
>
> Q. Okay, what did he say to you?
>
> MR. ROBINSON: Don't answer that question.
>
> MR. KEITH: Were you his lawyer at the time?
>
> MR. ROBINSON: It's not relevant.
>
> MR. KEITH:
>
> Q. Okay, what did he say to you about these financial statements?
>
> MR. ROBINSON: Don't answer the questions.
>
> MR. KEITH: Why?
>
> MR. ROBINSON: It's irrelevant.
>
> MR. KEITH: What you said to him about why do you need financial statements is irrelevant?
>
> MR. ROBINSON: They're completed.
>
> MR. KEITH: Completed under the wrong proposition.
>
> MR. ROBINSON: Excuse me?
>
> MR. KEITH: Completed thinking they were for tax returns and not for litigation purposes.
>
> MR. ROBINSON: That's your assertion and that has no relevance either.
>
> MR. KEITH: Okay.

The obstructed question obviously called for relevant evidence. As with any expert, a professional accountant who prepares financial statements for use in court owes a duty o the court. The terms of engagement are obviously relevant.

[57] Unilateral discussions about a case between a party and a witness is obviously a subject for inquiry. That is especially so when the witness is an expert. Here is what happened when Mr. Keith tried to explore that subject:

Q. Did you prepare for today?

A As I needed to, yeah.

Q. Okay, who did you meet with to prepare for today?

A. Today?

Q. Yeah.

A. I met with Chris.

Q. Anyone else?

A. I met with Steve.

Q. Steve who?

A. Patterson.

Q. Okay, when did you meet with him?

A. All at the same time, maybe an hour ago.

Q. Okay, did you get ready for today?

A. Sure.

Q. Okay, tell me what was said.

MR. ROBINSON: Don't answer that question.

MR. KEITH: Is it privileged?

MR. ROBINSON: Yeah.

MR. KEITH: Okay, you're his lawyer?

MR ROBINSON: Yeah.

MR. KEITH:

Q. Okay, who else did you meet with to prepare for today?

A. I didn't meet with anyone else.

Q. When is the last time you talked to Mr. Patterson other than today?

A. Oh….

MR. ROBINSON: Don't answer that question.

MR. KEITH: Why? Is that privileged? Is it privileged?

MR. ROBINSON: How is it relevant?

MR. KEITH: I want to know what Mr. Patterson said to him about this litigation.

MR. ROBINSON: How is that relevant?

MR. KEITH: How is it relevant what he said about the litigation?

MR. ROBINSON: He's here being dis…

MR. KEITH Are you refusing it because of relevance?

MR. ROBINSON: He's here….

MR. KEITH: Are you refusing it because of relevance?

MR. ROBINSON: Yes.

MR. KEITH: Okay, thank you.

The attempted questioning was relevant for assessing the witness' work and, given the accusations against him, for knowing Mr. Patterson's attitude toward the case.

[58] The discovery came to a frustrated end after this:

MR. ROBINSON: Are you suggesting there's a different review standard and work would be done differently?

MR. KEITH:

Q. That's true, isn't it, Mr. Horning? No? So under your accounting standards when a document is prepared for Court, it's the same standard?

A. We only follow one standard.

Q. Yeah?

A. That's the PEM for notice [to readers].

Q. You don't follow a different standard when something is being prepared for Court?

A. We're responsible to follow the PEM, Professional Engagement Manual.

Q. Is it your evidence that you would have done – that nobody at RGH that touched this file would have done anything different had they known it was for litigation? Is that you evidence?

A. Speaking on other people, I have no idea.

Q. Okay, would you have done anything different if you'd know it was for litigation or would you have done things exactly the same way?

MR. ROBINSON: Do you understand what he means by "known this was for litigation"? Because I'm not sure that that's been explained.

MR. HORNING: No, not really.

BY MR. KEITH:

Q. You didn't understand what that meant until he told you that, eh?

A. I don't understand what half of your questions are really getting on about to be quite honest with you.

Q. Is that right?

A. Yes.

Q. Would you have done things exactly the same way? Would you have changed the method in which you prepared this document had you known it was for litigation?

MR. ROBINSON: What do you mean by "had you known it was for litigation?"

BY MR. KEITH:

Q. I mean "had you known it was for litigation". If someone had told you these documents were needed for litigation, would you have changed any of your processes or done anything different?

MR. ROBINSON: That doesn't' explain what you mean by "for litigation."

BY MR. KEITH:

Q. If you had known these documents were intended to be used in the litigation process, wold you have done anything differently in terms of your preparation of these documents?

MR. ROBINSON: Just so we're not confusing the witness, these documents have been appended to an affidavit that's been filed with the Court.

BY MR. KEITH:

Q. I'm going to ask one last time. I'm going to ask one last time and then I'm going to move on. If you had known, and had been told that these documents were going to be used in connection with the litigation process, would you have done anything different?

MR. ROBINSON: By "these documents" you're referring to the financial statements that have been filed?

BY MR. KEITH:

Q. The documents they prepared, would you have done anything different?

A. On the financial statements?

Q. Any of the documents; would your processes have changed at all?

MR. ROBINSON: That's not the question that you asked.

MR. KEITH: I said…

MR. ROBINSON: There are only thee documents that are in litigation.

MR. KEITH: You know what? We're going to Court. I'd like a transcript as soon as possible and I'd like to – and we're going to sort this out in Court in terms of what he has to answer and what he doesn't have to answer and then we'll come back. When are you free? Get your schedule out.

MR. ROBINSON: No.

MR. KEITH: Why not?

MR. ROBINSON: What are you talking about?

MR. KEITH: I'm dropping it. I'm not going to put up with this anymore. I'm going to go to Court. I'm going to look and I'm going to ask for a transcript and I'm going to ask for how this thing has transpired and I'm going to ask the Court to direct this witness to answer some of these questions. That's where I'm going.

MR. ROBINSON: Which questions would you like answered?

MR. KEITH: Every single one I've asked where you've refused. When are you free?

MR. ROBINSON: I don't know.

MR. KEITH: Where's your schedule?

MR. ROBINSON: John, I don't appreciate your methods.

MR. KEITH: Yeah, I know.

MR. ROBINSON: You send me an email with some dates and I'll have a look.

MR. KEITH: Do you have you schedule here right now?

MR. ROBINSON: I don't have my schedule here right now.

The question, "Okay would you have done anything different if you'd [known] it was for litigation…?" was perfectly intelligible. The inquiry was obstructed.

[59] There was more obstruction by Mr. Robertson when Ms. Paquin was discovered. The applicants were eventually able to prove that Mr. Patterson took $45,000 from Unison and paid it to Ms. Paquin and $30,000 of that was paid when Unison had no hope of making money. With that in mind, the following from her discovery shows the obstruction:

Q. Okay. Could you provide me with copies of your income taxes for the years when you were receiving income or when you were receiving money from the company?

MR. ROBINSON: What years are those?

MR. KEITH: Just a second. So, it wold be from 2013 and 2014.

MR. ROBINSON: Okay, I'll take that under advisement.

BY MR. KEITH:

Q. Sitting here today do you know how much money you did receive from the company Unison?

A. No.

Q. Did you make any enquiries about how much money you received from the company?

A. No.

Q. So, do you still stand by the statement that you did not receive any compensation from the company?

A. Yes.

Q. Okay.

MR. ROBINSON: Just so it's clear on the record, the statement you refer to is Para. 19 of the affidavit which says,

> During my brief tenure as a director and officer of Unison I was not compensated financially or otherwise for holding those positions.

MR. KEITH: Yeah, Chris, I know what you're trying to do, I don't need you to read into the record evidence on behalf of this witness.

MR. ROBINSON: Your question…

MR. KEITH: I didn't ask her about that.

MR. ROBINSON: …was misleading…

MR. KEITH: No, it wasn't.

MR. ROBINSON: …and we just clarified it.

BY MR. KEITH:

Q. How did you – you clarified it. Ms. Paquin, did you receive any compensation, at all, from the company?

A. For my position, no.

Q. Did you receive any compensation at all for any reason from the company?

MR. ROBINSON: That has been asked and answered.

MR. KEITH: And she said no and then you wanted to clarify it.

MR. ROBINSON: It's been asked and answered.

MR. KEITH: Did you receive any…

MR. ROBINSON: Don't answer it.

MR. KEITH: Okay.

MR. ROBINSON: Try not to badger the witness okay?

MR. KEITH: Try not to give evidence for the witness.

MR. ROBINSON: I'm not giving evidence, it's right in her affidavit.

MR. KEITH: I wasn't referring to the Para. 19, Chris.

MR. ROBINSON: Yes you did refer to it.

BY MR. KEITH: No, I didn't. I referred to it a while ago and then I asked her another question and it was a clear question.

Justice Gabriel ordered Ms. Paquin and Mr. Sousanna to produce their income tax returns. His reasons show that relevance was obvious: *Gallagher Holdings Ltd. v. Unison Resources Inc.*, 2017 NSSC 248 at par. 33 to 44.

[60] Mr. Robinson similarly torpedoed a line of questioning for Mr. Sousanna about the extent of his involvement in raising funds for Unison. Mr. Robinson told counsel, "But as regards to fundraising, which you've tied your little rope around…" and "Why don't you make this productive…". This attitude continued when Mr. Patterson was discovered "…you've only got so much time. I suggest you want to spend it productively."

[61] Eventually, the applicants were able to prove that Mr. Patterson and Mr. Sousanna hid Mr. Sousanna's substantial involvement with Unison from the investors, and that the secrecy was motivated by Mr. Sousanna's conviction for stock fraud. (See main decision, para. 322 to 331). Mr. Robinson thwarted inquiries on that subject. Mr. Keith asked why Mr. Sousanna was not put on the board of Unison. "Mr. Robinson: There is no relevance to the question of why someone wasn't a director of a company…". Mr. Keith tried again after a while. "Mr. Robinson: Don't answer that question."

[62] In oral submissions, Mr. Robinson argued, "This is how it is done." Counsel for a party objects to a question and, if both counsel could not resolve the issue, they go to court.

[63] Emphatically, Mr. Robinson's approach is not how discovery is to be conducted in this province. Inventing far-fetched objections undermines his client's obligations to make disclosure and wastes time. Efforts at preparation are wasted. The expense of extracting answers by court intervention is incurred, unless the questioning party gives up and goes to trial knowing full disclosure has not been made.

[64] *Evading Disclosure, Even to Disobeying Court Orders* - There are few cases in which the dates and duration of telephone conversations between the protagonists would be irrelevant. So would records of the dates and duration of calls between the party, and key independent witnesses.

[65] Justice Gabriel ordered Mr. Patterson to disclose: "Copies of phone records for Mr. Patterson and anyone at the company Twin Butte Energy Ltd. between August 1, 2013 – June 30, 2014." Mr. Patterson failed to do so. His excuse was that his cellphone records do not itemize calls within Canada. (He never suggested

he lacked control over his cellphone provider or ever requested the records from that source.)

[66] Once again, the applicants were compelled to go to chambers. Justice Wood ordered Mr. Patterson to provide information about his telephone accounts, and he ordered his telephone company to send all records associated with those accounts to Mr. Robinson "to review for relevance". Mr. Robinson personally was ordered to deliver relevant records to the applicants.

[67] We now know that Mr. Robinson and his associate reviewed the records on November 3 and 9, 2017. Before their eyes were records of telephone conversations with applicants, with the investment firm Mr. Patterson involved, with Mr. Sousanna, and who knows how many other relevant people. None of this got disclosed. During the hearing, Mr. Robinson pulled out one of the records in order to cross-examine an applicant on the length of a call she had had with Mr. Patterson.

[68] In frustration, Mr. Keith gave up asking for relevant documents. He requested these be no further "disclosure", so we could get the hearing over. Again, we saw Mr. Robinson obstructing fairness with far-fetched arguments about what Justice Wood meant to order and what relevancy means.

[69] Mr. Robinson forced needless expense by requiring the applicants to go to chambers. On this occasion, he caused waste by failing to comply with part of an order directed to him personally.

[70] The applicants demonstrated Mr. Robinson's evasion of disclosure in several other instances. An email withheld until after Mr. Muise testified, a refusal to set a new mutual deadline after the respondents failed to make disclosure, agreeing to a deadline only after the applicants prepared a motion, making far-fetched excuses for Unison's failure to provide financial records are further examples of Mr. Robinson encouraging non-disclosure.

[71] *Making Pretended Affidavits* - I discussed this subject at para. 360 to 364 of the main decision. More evidence is available to me now.

[72] According to his invoices, Mr. Robinson drafted the respondents' affidavits in November and December of 2016. Ms. Paquin's affidavit was prepared on December 12, 2016, after conversations with Mr. Sousanna. The two "affidavits" were revised on December 14, 2016.

[73] At some point, Mr. Sousanna signed pages that contained no text besides a signature line and a jurat. On December 16, 2016, Mr. Robinson falsely signed the jurat under "Sworn to before me at Halifax, Nova Scotia, on December 16, 2016". He also made changes to the text. He filed the documents as if they were affidavits.

[74] After needlessly protracted negotiations, Mr. Sousanna and Ms. Paquin were discovered on February 23, 2017. The applicants prepared for the discoveries thinking the pretended affidavits were real. They only found out otherwise at the discoveries. Obviously, time got wasted.

[75] Justice Gabriel put "the most benign interpretation upon it that I can" (para.19). Taking that stance at an interlocutory stage, he referred to "some errors in and around the time that Ms. Paquin's and Mr. Sousanna's affidavits were prepared" (also, para. 19). He permitted withdrawal and replacement.

[76] When all the evidence was in, I could not adopt a benign interpretation of the pretended affidavits. I found the documents were not affidavits at all. "On the contrary, a document was made to look like it got sworn, like it provided evidence, like it was subject to the laws of perjury." (Main decision, para. 363).

[77] *Knowingly Using an In-complete Affidavit of a Critical Witness* - The respondent's notice of contest named Bruce Hall as a witness. He was the executive at Twin Butte with whom Mr. Patterson and Mr. Sousanna dealt, and he had evidence to give about arrangements, or the lack of them, for implementing Unison's plan for approval and production.

[78] Mr. Robinson drafted Mr. Hall's affidavit. If the billing records are complete, there was no discussion between them. Mr. Hall had some important evidence to give about the failure of Unison's prospects, but that evidence did not make it into the affidavit.

[79] In early 2017, Mr. Robinson revealed that Mr. Sousanna had surreptitiously recorded telephone calls with Mr. Hall. Mr. Patterson and Mr. Sousanna concealed the recording, until then.

[80] As far as I know, Mr. Robinson had nothing to do with the concealment. However, Mr. Robinson knew about the recordings when he filed Mr. Hall's affidavit. He did not tell Mr. Hall about the recorded calls. They turned out to be material.

[81] Mr. Robinson says he would have advised Mr. Hall eventually. He ought to have consulted him before filing the inadequate affidavit. Instead he did nothing. Mr. Hall found out about the calls when Mr. Keith contacted him long after the inadequate affidavit had been filed.

[82] The filing of a comprehensive affidavit would have saved much time. Mr. Hall's evidence on the deterioration of Unison's prospects, frustration with Unison's failures, and the ultimate demise of Unison's proposal would have put much of Mr. Patterson's and Mr. Sousanna's evidence under a severe light. Instead, Mr. Hall's significant evidence only came out at the very end of the hearing, and after lengthy adjournments.

[83] Common sense tells us that failing to provide an affidavit from Mr. Hall that covered the truths revealed by the recordings, and the further significant truths, made the hearing, and preparations for it, far less efficient. To expose the witness to cross examination on the concealed recordings was also seriously abusive.

[84] *Settlement Agreement* - The parties reached a settlement. The terms were set by counsel. They were clear, as far as I read them. See, para. 407 to 427 of the main decision.

[85] When Mr. Patterson could not perform, Mr. Robinson came up with a far-fetched interpretation of the very terms he had created. He said it was a forbearance agreement. His billing records show even he, himself, knew it was a settlement agreement.

[86] Again, Mr. Robinson encouraged waste. The applicants had to endure a series of stories made up to explain the delay in payment, then a costly defence of the agreement just to prove it was an agreement.

Step Two, Extreme Caution

[87] Note that the subjects discussed on the first step (production, discovery, evading disclosure, pretended affidavits, the uninformative Hall affidavit, and the settlement agreement) are several abuses. This is not a case of counsel going off limits on one subject, but on many distinct subjects. As such, they support an inference of disrespect for the court's process.

[88] There is plenty of other evidence of that disrespect.

[89] My colleague, Justice Lynch, heard one of the many motions in this case. She struck an ineffective pleading from the notice of contest, one that should have been withdrawn on first objection.

[90] On the subject of costs, Justice Lynch said Mr. Robinson's response to Mr. Keith's request for the meaning of the pleading was put "in terms that were not very professional." She said of the response to a reasonable request for costs that Mr. Robinson responded "in a less than professional manner." (Justice Lynch ordered twice as much.)

[91] I noted less than professional references to counsel opposite during the hearing. Just one example.

[92] Mr. Robinson has an objectionable habit of making statements of his own assessments before posing a question in cross-examination. Ms. Regan-Cottreau cross-examined Mr. Bruce Hall. I permitted Mr. Robinson to ask leading questions because so much had come out during cross that was not covered in the inadequate affidavit of Mr. Hall.

[93] Mr. Robinson's very first question started with him saying that, more times then he could count, Ms. Regan-Cottreau asked "long, rambling questions" to which Mr. Hall just answered "Sure". Ms. Regan-Cottreau never rambled. The witness provided important evidence that Mr. Robinson left out of the affidavit. He did not just say "Sure". It would have been unprofessional for counsel to provide his assessment to the witness, even if the assessment was correct instead of being simply insulting.

[94] I infer pervasive disrespect for counsel opposite, the court, and ultimately the process. It is good to have written confirmation of that disrespect. A statement by Mr. Robinson in the beginning of this litigation, and statements that came to light in the end, help explain the wastefully combative way he conducted the defence.

[95] The first statement came when Mr. Patterson and Unison defaulted on the settlement agreement. Mr. Robinson made this threat:

> In the event that your clients [lose] their patience and file suit, please let them know that there will no funds available to repurchase their shares – the 'bell' will have been rung, and they can look forward to nothing but a protracted legal fight and substantial legal fees.

Mr. Robinson helped the respondents to deliver a needlessly protracted and wastefully expensive defence. The threat makes it clear that Mr. Robinson intended the waste.

[96] After the hearing, Mr. Robinson taxed his outstanding fees and sued Mr. Patterson. Copies of some emails from Mr. Robinson to his clients were introduced at the taxation hearing.

[97] I will not repeat the vile names by which Mr. Robinson referred to Mr. Keith in the correspondence. I will not repeat the vile expressions by which Mr. Robinson denigrated judges of this court. The substance is of importance: abject disrespect for counsel opposite and the judges.

[98] In the many circumstances discussed under stage one and the instances of disrespect discussed in this stage two, this is a case where an award of costs against counsel is warranted despite the need for extreme caution. It is more than warranted. It is necessary.

Conclusion about Mr. Robinson

[99] The Indo-European root words for the verb to understand are sta and nader, in that order: Calvert Watkins edition *The America Dictionary of Indo-European Roots* 2nd ed. (2000, Houghton Mifflin, Boston) p. 84. Stand under.

[100] Trial lawyers have to understand the law, both substantive and adjectival. When law school, articles, bar admission, personal efforts, one's practice, one's colleagues, and the courts fail to teach the need for understanding, including the sense of humility that goes with it, the power of a trial lawyer causes harm.

[101] I am satisfied Mr. Robinson caused more pecuniary harm than the applicants are asking to be compensated for.

[102] Even at this point, I am mindful of the need for extreme caution. Following Justice Pickup in *Rowe v. Lee,* I will order a substantial contribution to the expenses occasioned by Mr. Robinson's misconduct. $35,000.

Conclusion

[103] The applicants will have judgements for costs of $536,296 against Unison and Mr. Patterson, $44,117 against Ms. Paquin, and $35,000 against Mr. Robinson. Consents to form are not necessary.

J.