**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Rapid Camp Ltd. v. Dalhousie University*, 2024 NSSC 53

**Date:** 20240223
**Docket:** 509991
**Registry:** Halifax

**Between:**

Rapid Camp Ltd., a body corporate

*Plaintiff*

v.

Dalhousie University, Lukas Swan, Jeff Dahn,
Nova Scotia Power Inc., and David McGregor

*Defendants*

## DECISION ON MOTION FOR SECURITY FOR COSTS

**Judge:** The Honourable Justice Scott C. Norton

**Heard:** February 6, 2024, in Halifax, Nova Scotia

**Decision:** February 23, 2024

**Counsel:** Jasmine Ghosn, for the Plaintiff
Michael Scott, for the Defendants Dalhousie and Swan
Stewart Hayne and Matt McEwan, for the Defendants NSPI and McGregor

**By the Court:**

**Introduction**

[1] Rapid Camp Ltd. claims against the Defendants for breach of fiduciary duty, negligent misrepresentation, breach of confidence, misuse and wrongful disclosure of proprietary information, and intentional interference with proprietary information, contractual relations, and economic and business interests and relations all related to technology that the principals of the Plaintiff company initially thought of in 2011 and disclosed to the Defendants in 2013.

[2] The Defendants have moved for an Order for security for costs pursuant to *Civil Procedure Rule* 45.

[3] The parties are:

(a) The Plaintiff, Rapid Camp Ltd. ("Rapid Camp"), is a company incorporated pursuant to the laws of Nova Scotia.

(b) The Defendant, Dalhousie University ("Dalhousie"), is a University located in Halifax, Nova Scotia.

(c) The Defendant, Lukas Swan ("Swan"), is a professor and researcher at Dalhousie.

(d) The Defendant, Nova Scotia Power Incorporated ("NSPI"), is a company incorporated pursuant to the laws of Nova Scotia.

(e) The Defendant, David McGregor ("McGregor"), is a former employee of NS Power. NS Power and Mr. McGregor are hereinafter referred to collectively as the NSPI Defendants.

(f) Jeff Dahan is no longer a party. Rapid Camp has discontinued its claim against Jeff Dahn.

[4] At the hearing, I granted the motion by the NSPI Defendants to strike from the affidavit of Mark Yazbek, a director of Rapid Camp, the exhibited "expert report" of David Stewart. The Plaintiff did not file an affidavit from David Stewart within the time deadlines set by the *Rules* and I denied the request by Rapid Camp to permit late filing at the hearing. His "expert report" is hearsay. He was not qualified to give opinion evidence. Opinion evidence is presumptively inadmissible. The requirements of the *Rules* and the test of admissibility set out by the Supreme

Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, have not been met.

## The *Civil Procedure Rules*

[5] *Civil Procedure Rule* 45 allows for security for costs to be ordered as a "remedy for a party who defends" a claim and who will "experience undue difficulty realizing on a judgment for costs if the defence or contest is successful." *Rule* 45 states:

> **45.01 Scope of Rule 45**
>
> (1) This Rule provides a remedy for a party who defends or contests a claim and will experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.

[6] *Rule* 45.02(1) states:

> **45.02 Grounds for ordering security**
>
> (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.

[7] In addition, *Rule* 45.02(3) applies in this case as the plaintiff is a corporation, not appearing to have sufficient assets to satisfy a judgment for costs. This creates a rebuttable presumption the defendant will have undue difficulty realizing on a judgment for costs:

> (3) Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:
>
> …

> (c) the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;

…

[8] Under *Rule* 45.02(4)(a), a judge may also order security for costs if the security is authorized by legislation. In this matter, s.152 of the *Companies Act*, RSNS 1989, c. 81 appears to address the same concept – that security for costs may be ordered when a plaintiff company will be unable to pay the costs of the defendant if successful in his defence. The *Companies Act* states:

> 152 Where a limited company is a plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.

## The Judicial Test for Security for Costs

[9] Security for costs is not meant as a penalty against a plaintiff, or as a way to prevent viable actions from proceeding. The purpose of orders for security for costs is to protect defendants who, if successful in receiving a judgment for costs, may otherwise be unable to recover those costs. If no costs are awarded against a plaintiff at the conclusion of trial, then the security is returned.

[10] Security for costs re-levels the playing field as without security, some plaintiffs may not face the risk of potential costs, should they lose at trial. For example, in *The Jeanery Limited v. Dartmouth Crossing Limited*, 2020 NSSC 297, the Court noted that the plaintiff corporation did not face "any corresponding risk of suffering financial detriment if it is unsuccessful and costs should be awarded against it." The Court held that without security for costs, the plaintiff, as noted in para. 100:

> …essentially has no stake in the process, and as a consequence is faced with no incentive to conduct itself reasonably either with respect to an assessment of the merits of its case, or the manner in which it goes about prosecuting it.

[11] From a review of the relevant authorities, the following principles apply (see *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316, aff'd 2012 NSCA 89):

(a) Ordering security for costs is discretionary;

(b) A balance must be struck between access to justice for the plaintiff, against the artificial insulation from an award of costs;

(c) Security for costs should not be used to create a 'means test' for access to justice. The discretion for security for costs should not be used to exclude persons of modest means from access to court;

(d) As a nominal plaintiff or corporation, the burden is on the plaintiff in opposing security for costs;

(e) An order for security for costs should not be made if it prevents a plaintiff from proceeding, unless the claim obviously has no merit; and,

(f) An inquiry into fairness and all of the circumstances must be undertaken.

## Analysis

*Rule 45.02(1)(a) – Has a defence been filed?*

[12] All of the Defendants have a filed a Notice of Defence and Statement of Defence. I find this factor is met.

*Rule 45.02(1)(b) – Will the Defendants have undue difficulty in realizing upon an award of costs?*

[13] The uncontested evidence establishes that Rapid Camp is not a going concern and has been dormant since at least 2014. It has no employees. It does not conduct any business, has no assets, provides no services and sells no product. Rapid Camp's registration with the Registry of Joint Stock Companies was renewed for the sole purpose of pursuing this litigation. I find that this factor is met.

*Rule 45.02(1)(c) – Does the undue difficulty not arise only from the lack of means of the party making the claim?*

[14] This factor modifies the previous factor. It must be read with *Rule* 45.02(3) that states:

> 45.02(3) Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:
>
> (a) the party making the claim is ordinarily resident outside Nova Scotia;
>
> (b) the party claimed against has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere;
>
> (c) the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;
>
> (d) the party making the claim fails to designate an address for delivery or fails to maintain the address as required by Rule 31 — Notice.

[15] I adopt with approval the following analysis by Justice Gabriel in *Royal Bank of Canada v. Colorcars Experienced Automobiles Ltd*., 2019 NSSC 283, at paras. 38-39:

> [38] The use of the word "rebuttable presumption" in *Rule* 45.02(3) means, of course, that it is open to Mr. Early and Colorcars to rebut the presumption noted. ACJ Smith (as she then was) noted in *Ocean v. Economical Mutual Insurance Company*, 2011 NSSC 408, that the rebuttal process requires provision of "detailed evidence of [their] financial position including not only [their] income, assets and liabilities, but also [with respect to their] capacity to raise security."
>
> [39] I am in respectful agreement. It is obvious that the process of "rebuttal" must be a dynamic one. Some effort must be expended by Mr. Early and Colourcars to "rebut", otherwise the word is bereft of any meaning. (See also *Armoyan v. Armoyan*, 2014 NSSC 143, at paras. 32-37).

[16] Similarly, I find that *Rule* 45.02(3)(b) applies to Rapid Camp and requires that they provide a dynamic rebuttal of the presumption. They have failed to do so. Accordingly, this factor has been met by the Defendants.

*Rule 45.02(1)(d) – In all of the circumstances, is it unfair for the claim to continue without an order for security for costs?*

[17] This factor was the focus of the motion hearing.

[18] Rapid Camp says that this case is similar to Justice Chipman's decision in *Quadrangle Holdings Ltd. v. Coady Estate*, 2018 NSSC 349, wherein he refused to exercise his discretion to order security for costs in circumstances that he found were "likened to a David and Goliath" because to grant the motion there would be a denial

of access to justice and the Plaintiff would be "impossibly stretched to come up with hundreds of thousands of dollars to continue with the litigation" (at paras. 9 and 10). I note however that in that case Justice Chipman had already granted summary judgment against one of the Defendants. That would make an order for security for costs against the other defendant, thereby denying trial to a party who had judgment against a co-defendant, a denial of access to justice. I do not take Justice Chipman's decision to mean that a wealthy defendant should always be denied security for costs on an otherwise valid claim.

[19] Rapid Camp relies on the reasoning of Justice Moir in *Ellph.com, supra*, and asserts that the court should similarly find that it would not be, in all the circumstances, unfair to for the claim to continue without an order for security for costs.

[20] Each case must be considered on its own facts. The *Ellph.com* decision is distinguishable. In that case, the Defendants' motion was to require a personal guarantee from the shareholders. Also, it was a case for breach of contract that coloured the assessment of fairness, in the reasoning of Justice Moir, because the parties could have contracted for security. Justice Moir also found delay in that the motion was brought six years into the litigation at a time when the matter was set for trial. Finally, in that case, the impecuniosity of the plaintiff was allegedly caused by the defendant. None of these concerns arise in this case.

[21] Associate Chief Justice Smith, as she then was, considered the competing principles that must be taken into account on a security for costs application in *Emmanuel v. Samson Enterprises Ltd*., 2007 NSSC 278, a para. 8:

> [8] Courts have long struggled with the competing principles that must be taken into account on a security for costs application. On the one hand, the Court strives to ensure that people of modest means are not prevented from having access to the court as a result of their financial status. On the other hand, the Court recognizes that the interests of justice are not served if a Plaintiff is artificially insulated from the risk of a costs award as a result, for example, of being outside of the Court's jurisdiction. The Court must balance these competing principles when deciding whether to award security for costs.

[22] These considerations, while written in the context of the previous rule allowing for security for costs, remain valid.

[23] In *The Jeanery, supra*, Justice Gabriel stated, at para. 100:

> [100] Whether or not it was his primary objective to do so, Mr. Fullerton has set up his affairs so that the corporate Applicant, as the Assignee of the cause of action in this matter, is poised to retain the proceeds of this litigation (if any) without any corresponding risk of suffering financial detriment if it is unsuccessful and costs should be awarded against it. It essentially has no stake in the process, and as a consequence is faced with no incentive to conduct itself reasonably either with respect to an assessment of the merits of its case, or the manner in which it goes about prosecuting it.
>
> [Emphasis added]

[24] The Defendants submit that the Plaintiff's intention to continue this litigation, despite near-certain failure, is emblematic of the conduct cautioned against in *The Jeanery, supra,* at para. 100 (as above).

[25] This is not a summary judgment motion. I am not called upon to make a determination of the claim. I am required to consider the merits of the claim in the context of deciding the fair and just balance between access to justice and artificial insulation from an award of costs.

[26] Having considered all of the evidence on the motion before me and the submissions of the parties, in conducting the balancing exercise described by the former Associate Chief Justice, I find that wherein Rapid Camp has no assets, no income, and no active business, its corporate status was only reinstated for the exclusive purpose of pursuing this litigation, and its failure to rebut the presumption, it would be unfair that the Plaintiff should be artificially insulated from the risks of a costs award.

[27] Accordingly, I find that it is appropriate and in the interests of justice that an order for security of costs be granted before the matter proceeds further.

**Amount of Security**

[28] The appropriate amount of security is guided by *Rule* 77, Tariff A, which states that the costs to which each successful Defendant may be entitled are $2,000 for each day of trial plus the table amount.

[29] Dalhousie and Swan estimate the time needed for trial would be 10 days and the "amount involved" for the purpose of fixing costs as $1 million. They say that equates to a Scale 3 award under Tariff "A" of $81,250 plus the $20,000 for the time of trial for a total of $101,250.

[30] NSPI and McGregor estimate 15 days for trial and quantify the “amount involved” for the purpose of setting costs as $500,000. NSPI and McGregor say they would each be entitled to $80,000 in costs and suggest a combined amount of $125,000.

[31] I do not agree that each of the named Defendants is entitled to a separate award for security for costs. Each of the two groups of Defendants (Dalhousie and Swan) and (NSPI and McGregor) are aligned in interest and share legal counsel. I will order a sum for security for costs for each group.

[32] The Plaintiff, when asked, was not able to provide a submission for the “amount involved”. The Statement of Claim indicates that the claim is outside of *Rule* 57.

[33] For the purposes of setting an amount for security for costs, I would set the amount involved at $500,000 which would equate to basic costs on Scale 2 of Tarriff “A” of $49,750 together with $20,000 for 10 days of trial.

[34] I order that the Plaintiff provide each of the two groups of Defendants with security for costs in the amount of $50,000 (total $100,000).

[35] The parties may agree on the form of security. If the parties cannot agree, the Plaintiff shall pay the amount of security into court on or before May 15, 2024.

[36] There will be no additional award of costs on the motion.

[37] Order accordingly.

Norton, J.