

IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES

BETWEEN:

CANADIAN EGG MARKETING AGENCY

Plaintiff  
(Respondent)

- and -

FRANK RICHARDSON operating as NORTHERN POULTRY

Defendant  
(Applicant)

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES  
AS REPRESENTED BY THE ATTORNEY GENERAL FOR THE  
NORTHWEST TERRITORIES

Intervenor

AND BETWEEN:

CANADIAN EGG MARKETING AGENCY

Plaintiff  
(Respondent)

- and -

PINEVIEW POULTRY PRODUCTS LTD.

Defendant  
(Applicant)

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES  
AS REPRESENTED BY THE ATTORNEY GENERAL FOR THE  
NORTHWEST TERRITORIES

Intervenor

---

MEMORANDUM OF DECISION  
OF THE HONOURABLE ALLAN H. WACHOWICH  
ASSOCIATE CHIEF JUSTICE

---

[1] In a decision of this Court dated November 1, 1996 costs were awarded to the applicants. Since then a Bill of Costs was delivered to the respondent. The

respondent, CEMA (Canadian Egg Marketing Agency) has agreed in its written submission that there remains four items in dispute with respect to the applicants' (Egg Producers) draft Bill of Costs which required resolution and which are as follows:

**ITEM 35: SET-OFF**

[2] This item refers to two applications:

- (a) Egg Producers' application to stay CEMA's injunction proceedings on the grounds of *forum non conveniens*.
- (b) CEMA's application for an interlocutory injunction to restrain the egg producers from marketing outside of the NWT.

Both applications were dismissed and in each instance, de Weerd J. held that costs could be spoken to.

Issue #1: Discretion to Allow Set-off

[3] The *Rules of Court* give the court authority to set-off costs:

- 643(1) Notwithstanding anything else in this Part, the Court has discretion as to awarding of the costs of the parties...to an action or proceeding, the amount of costs,...and the Court may...
  - (a) award a gross sum in lieu of, or in addition to, any taxed costs;
  - (b) allow costs to be taxed to one or more parties on one scale and to another or other parties on the same or another scale, or
  - (c) direct whether or not any costs are to be set off.
- 647 The Court may allow a set-off for damages or costs between parties to an action or proceeding notwithstanding that a

solicitor may have a lien for costs in the action or proceeding.

Orkin in The Law of Costs (2d ed.) states (at p. 2-89):

The power is a discretionary one, to be exercised on equitable principles, there being no strict right to a set-off.

[4] Additionally, in *Allman et al v. Commissioner of Northwest Territories* (1983), 46 A.R. 61 (N.W.T.Q.B.), de Weerd, J. (at 62) in quoting Viscount Cave L.C. in *Donald Campbell & Co. v. Pollak*, [1927] A.C. 732, added that while the Court has an "absolute and unfettered discretion" in awarding costs, that discretion must be exercised judicially and ought not be exercised against the successful party "except for some reason connected with the case".

Issue #2: CEMA Entitled to Interlocutory Application Costs?

[5] Under Rule 649, unless ordered otherwise, interlocutory application costs are "costs in the cause" and are taxed on same scale as general costs of action. This is a default rule and does not bind the court: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1994), 149 A.R. 233 (C.A.)

[6] In *Northern Trusts Company v. Coleman*, [1923] 1 W.W.R. 802 (Alta.S.C.), Walsh J. at 804, in determining what pre-Statement of Claim costs were allowable, defined "costs in the cause" as:

...the costs of any step necessarily taken before action to give regularity to the statement of claim when issued are costs in the cause, unless otherwise ordered.

This definition was refined to add that costs in the cause are "...taxable and become payable only after Judgment": *Justik v. Brosseau* (1979), Alta.L.R. (2d) 89 at 90 (C.A.).

[7] However, an application for an interlocutory injunction is an extraordinary equitable remedy and this should be considered when determining this issue. In my Memorandum of Decision I was somewhat critical of CEMA's attempts to obtain an injunction against the Egg Producers. In this vein, I found the following of assistance:

- (a) In *Kitchen Tire and Bradd Automotive (1989) Ltd. v. Mikula Investments Inc.* (1994), (Full Text Unreported), 50 A.C.W.S. (3d) 381 (Ont.Gen.Div.), the court reserved costs until trial when it would then be known "whether the defendants were responsible for creating circumstances upon which relief might ultimately be granted".
- (b) In *Can-Rad Beauty Ltd. v. Lester et al* (1992), 41 C.P.R. (3d) 454 (Ont. Gen. Div.), the court refused to grant costs until the matter of conflicting evidence was resolved at trial.
- (c) Orkin cited a number of cases where costs were granted against the unsuccessful applicant because:
  - (i) the claim was without merit, the grounds were tenuous and allegations of fraud and deceit were advanced; or
  - (iii) the applicant's motive for seeking the injunction were improper and the claim lacked legal merit.

[8] Accordingly, I deny the request for set-off and allow the Applicants to claim costs for the injunction application. Costs to the successful litigant should not be denied unless the circumstances of the case merit such action. Since the Applicants were ultimately successful in this action, they should be granted their costs for successfully defending the Respondent's application for an interlocutory injunction. Furthermore, I have already commented that the conduct of the CEMA in attempting to obtain an injunction against the Egg Producers may have involved some degree of improper motivation which, in my view, warrants the awarding of costs to the Applicants.

**ITEM 36: SEPARATE COSTS FOR MOTIONS BROUGHT DURING TRIAL?**

[9] This item refers to the Egg Producers' application (originally returnable February 3rd but heard at trial) for a declaration that CEMA was not entitled to raise the standing issue.

[10] The Applicants submit that this application was heard via telephone conference call with de Weerd, J. on February 3rd, at which time he held that a decision regarding the standing issue should be reserved until trial. The Applicants submit that this, however, does not negate their claim for costs with respect to this item.

[11] In contrast, CEMA submits that, since this motion was brought during and in the context of the trial, the Applicants are not entitled to costs for these specific items. It also argues that in light of my decision to allow per diem counsel fees, allowing this item would result in double recovery.

[12] Rule 648(2) gives the Court the authority to award proportionate costs for those items which were begun but not completed. I therefore allow 1/3 costs of this item for preparation, filing and service of the Notice of Motion and Affidavits and for time spent preparing for the February 3rd conference call application (at which time de Weerd, J. put the matter over for further argument at trial).

### **ITEM 37: PRE-HEARING TELEPHONE CONFERENCES**

[13] In dispute are the Applicants' claim for two Prehearing Telephone Conferences, which are claimed under the heading of "Consent Orders". The Respondent disputes whether the nature of the claim falls within the meaning of "consent order". Other than putting forth their bare arguments, neither counsel addresses this issue any further in their written submissions.

[14] "Consent Order" has been defined as an order which constitutes a "bargain" between the parties, and not simply an acceptance of an offer put forth by the court: *Kitchen v. Crown Coal Co. Ltd.*, [1932] 2 D.L.R. 268 (Alta.C.A.).

[15] It appears that this matter could be resolved in 3 ways:

- (1) If Orders resulted from the conferences, then costs should be allowed under this item pursuant to the appropriate headings (Consent, Simple, Complex, Opposed and Unopposed).
- (2) If the conferences were an extension of later hearings for which the Applicants have already claimed costs, this Item may be denied or only proportionate costs awarded on the authority of Rule 648(2):
 

648(2) Each item in Schedule A includes all instructions, documents, attendances, letters and other services necessary or convenient to be taken, prepared, made, written, read, performed or had for the purpose of fully completing the step referred to or implied in the item, and if any step was begun but only partially completed, an appropriate proportion of the relevant amount in Schedule A may be allowed.
- (3) If the Court determines that an allowance for costs are in order for these items (for example, if a case management judge orders the telephone conferences as part of the on-going preparations for trial), it has the discretion to order costs for specific items. However, this discretion should be reserved for occasions where there is no corresponding item in the tariff schedule: *Eileen's Quality Catering Ltd. v. Depaoli et al* (1985), 1 C.P.C. (2d) 152 (B.C.S.C.).

Rule 648(5) also authorizes the court to award costs for a service performed by a solicitor which is not listed in Schedule A.

[16] As neither counsel provided specific information regarding this item, and since there is no evidence that the results of the conferences resulted in a

"bargain" between the parties (which resulted in the filing of Orders), or that there were any special circumstances under which I should exercise my discretion in this regard, I deny costs for this item.

### **DISBURSEMENTS - AGENTS' FEES**

[17] The Respondent has requested from the Applicants' counsel confirmation (preferably by way of copies of invoices) that the agents' fees claimed are, in fact, associated only with the constitutional issues and not with any of the other ongoing litigation.

[18] The Applicants' Affidavit of Disbursements, in support of the Applicants' Bill of Costs, simply states:

8. The disbursement shown above for agent's fees are the charges of Johnson, Gullberg, Weist and McPherson, our agents in Yellowknife.

However, in her May 7, 1997, Ms. Hurlburt confirms that all disbursements (assumably including the Agents' fees) until the end of 1996 were incurred in relation to the constitutional issue.

[19] The Respondent argues that, without supporting documentary evidence, the Court is free to draw an adverse inference, thereby limiting this item to the amount of \$1,228.63.



[20] In *Gotaverken Energy Systems Ltd. v. Cariboo Pulp & Paper Co.*, [1996] 45 C.P.C. (3d) 78 (B.C.S.C., Aff'd. B.C.C.A. June 17, 1994 - Van.#CA016816)

Vickers J. held that a party was only entitled to disbursements which:

- (a) were related to issues on which it succeeded;
- (b) related to the discrete issue upon which the party succeeded;
- (c) if not possible to isolate or quantify an item with respect to that discrete issue, then the whole amount (if properly claimed) was allowable; and
- (d) the party must justify them before a taxing officer, if requested.

[21] Arguably, the Egg Producers should be, at minimum, required to confirm that the items charged for the agents' fees relate solely to the issue resolved in its favor. I therefore allow this disbursement as claimed, on the condition that Applicants' counsel file a Supplementary Affidavit of Disbursements confirming that the Agents' fees relate only to the constitutional issue.

[22] While the Respondent may wish to vet the invoices prior to the Bill of Costs being taxed, and while it may be within the Taxing Officer's discretion to determine what disbursements are allowable, this seems like the most reasonable way to ensure that the items claimed are legitimate while at the same time ensuring that the matter does not come up for further dispute before the taxing officer.

---

D.J.S.C.N.W.T.

Dated at Edmonton, Alberta

this \_\_\_\_ day of September 1997.

Counsel:

Francois Lemieux,  
Osler, Hoskin & Harcourt,  
for Canadian Egg Marketing Agency

Graham McLennan  
McLennan Ross  
for Frank Richardson operating as Northern Poultry

IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES

CV04167/CV04168

BETWEEN:

CANADIAN EGG MARKETING AGENCY

Plaintiff

(Respondent)

- and -

FRANK RICHARDSON operating as NORTHERN POULTRY

Defendant

(Applicant)

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES  
AS REPRESENTED BY THE ATTORNEY GENERAL FOR THE  
NORTHWEST TERRITORIES

Intervenor

AND BETWEEN:

CANADIAN EGG MARKETING AGENCY

Plaintiff

(Respondent)

- and -

PINEVIEW POULTRY PRODUCTS LTD.

Defendant

(Applicant)

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES  
AS REPRESENTED BY THE ATTORNEY GENERAL FOR THE  
NORTHWEST TERRITORIES

Intervenor

---

MEMORANDUM OF DECISION

---

