Fullowka v. Royal Oak Ventures Inc., 2005 NWTSC 60

Date: 2005 07 25
Docket: CV 05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Plaintiffs

- and -

ROYAL OAK VENTURES INC., (formerly Royal Oak Mines Inc.), MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, DALE JOHNSTON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE, and RICHARD ROE NUMBER THREE

Defendants

- and -

ROYAL OAK VENTURES INC., (formerly Royal Oak Mines Inc.), HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, CANADA, AND THE MINISTER OF LABOUR, CANADA and THE ROYAL CANADIAN MOUNTED POLICE AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Third Parties

Docket: CV 07028

AND BETWEEN:

JAMES A. O'NEIL

Plaintiff

- and -

MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., ROGER WALLACE WARREN, PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVID TURNER, LLOYD GOULD, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS LOCAL 4, HARRY SEETON, CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, ROSS SLEZAK, THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, BASIL E. HARGROVE, THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA LOCAL 2304, LISA EVOY as Administrator of the Estate of the late James Milton Evoy, deceased, DALE JOHNSTON, ROBERT KOSTA, HAROLD DAVID, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, WAYNE CAMPBELL, SYLVAIN AMYOTTE, GORDON ALBERT KENDALL, EDMUND SAVAGE, JOE RANGER, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER AND TERRY LEGGE

Defendants

- and -

ROYAL OAK MINES INC., HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA, AND THE MINISTER OF LABOUR CANADA, THE ROYAL CANADIAN MOUNTED POLICE AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE, PINKERTON'S OF CANADA LIMITED

Third Parties

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE A.M. LUTZ

Heard at Yellowknife, NT: February 14-18, 2005

Counsel for the Plaintiffs:
Sheila Fullowka, Doreen Shauna Hourie, Tracey Neill, Judit Pandev, Ella May Carol Riggs, Doreen Vodnoski, Carlene Dawn Rowsell, Karen Russell and Bonnie Lou Sawler

J. Philip Warner, Q.C., Jeffrey B. Champion, W. Benjamin Russell and Lillian H. Riczu

Counsel for the Plaintiff:	
James A. O'Neil	James E. Redmond, Q.C.
Counsel for the Defendants:	
Royal Oak Ventures Inc., Margaret K. Witte and William J.V. Sheridan	Robert G. McBean, James T. Neilson and David P. Wedge
Counsel for the Defendant/Third Party:	
Pinkerton's of Canada Limited	John M. Hope, Q.C., Norma J. Mitchell and Jennifer S. Jones
Counsel for the Defendants:	
Government of the Northwest Territories, Anthony W.J. Whitford, David Turner and Lloyd Gould	Peter Gibson, Christine Pratt and Randal Carlson
Counsel for the Defendants:	
Canadian Autoworkers National and Basil E. Hargrove	Lyle S.R. Kanee and Patrick Nugent
Counsel for the Defendant:	
Timothy Alexander Bettger	S. Leonard Polsky and Heather Sanderson
Counsel for the Defendant:	
Harry Seeton	Austin F. Marshall and James Mahon
Counsel for the Defendant:	
Roger Wallace Warren	James D. Brydon and Betty Lou McIlmoyle
Allan Raymond Shearing:	Unrepresented
Counsel for the Third Parties:	
Her Majesty the Queen in Right of Canada and certain Federal Ministers	James N. Shaw and Tracy King

TABLE OF CONTENTS

INTRODUCTION

[1] This is an application to set costs following my decision in *Fullowka v. Royal Oak Ventures Inc.*, 2004 NWTSC 66, rendered December 16, 2004. Unless otherwise noted, the abbreviations and acronyms used in that decision are used in these reasons.

[2] The litigation arose in consequence of an explosion on September 18, 1992, at the Giant Mine in Yellowknife that caused the death of nine miners. The complex 88-day trial, spanning eight months, the longest civil trial in this jurisdiction to date, began on September 29, 2003. It consisted of two actions heard concurrently: CV 05408, the action launched by the families of the deceased miners pursuant to the *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3; and CV 07028, the PTSD claim of O'Neil, properly characterized as a personal injury claim. The trial involved a multitude of parties and counsel, 12,525 pages of transcript, 1,217 exhibits, 65 witnesses and numerous issues between the Plaintiffs and the Defendants and between the Defendants as cross-claimants as well as counterclaims and third party proceedings. This was followed by lengthy oral argument and voluminous written argument from near the end of May 2004 until September 2004.

[3] Liability was found and fault allocated in both actions as follows:

Party	**Allocation of Fault (Percentage)**
Royal Oak	23
Pinkerton's	15
CAW National	22
Warren	26
Bettger	1
Shearing	2
Seeton	2
GNWT	9

[4] Damages were awarded in the Fullowka action as follows:

Family	Dependency	Valuable Services	Care, Companionship, Guidance	Special Damages	Total
Fullowka	$1,865,589.00	$230,952.00	$80,000.00	$19,692.41	$2,196,233.41
Hourie	$922,974.00	$124,254.00	$70,000.00	$11,495.59	$1,128,723.59
Neill	$723,831.00	$239,238.00	$0.00	$15,402.00	$978,471.00
Pandev	$996,953.00	$196,887.00	$35,000.00	$16,308.89	$1,245,148.89
Riggs	$30,623.00	$24,007.00	$0.00	$9,574.63	$64,204.63
Vodnoski	$924,983.00	$88,896.00	$80,000.00	$21,620.34	$1,115,499.34
Rowsell	$1,265,428.00	$95,000.00	$80,000.00	$0.00	$1,440,428.00
Russell	$753,774.00	$182,345.00	$70,000.00	$7,013.47	$1,013,132.47
Sawler	$1,383,265.00	$69,772.00	$90,000.00	$6,794.61	$1,549,831.61
TOTAL	$8,867,420.00	$1,251,351.00	$505,000.00	$107,901.94	$10,731,672.94

in the O'Neil action as follows:

(a) general pecuniary damages for past loss of earnings, earning capacity, and employer-sponsored benefits in the amount of $343,075.00;

(b) reasonable expenses incurred in the amount of $195,715.89;

(c) special, out-of-pocket expenses and other losses and expenses agreed to in the amount of $2,945.58; and

(d) general non-pecuniary damages for nervous shock, pain, suffering and loss of the enjoyment of the amenities of life in the amount of $45,000.00;

and in both actions as follows:

(a) interest pursuant to the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, where applicable;

(b) Goods and Services Tax, where applicable; and
(c) costs to be spoken to.

GENERAL COSTS LAW

[5] I begin with Rule 643(1) of the *Rules of the Supreme Court of the Northwest Territories*, which gives this Court wide discretion over costs:

> 643.(1) Notwithstanding anything else in this Part, the Court has discretion as to awarding of the costs of the parties, including third parties, to an action or a proceeding, the amount of costs and the party by whom or the fund or estate out of which the costs are to be paid, 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.

[6] The discretion over costs must be exercised judicially. See *V.A.H. v. Lynch* (2001), 277 A.R. 104 at para. 5, 2001 ABCA 37.

[7] Costs are awarded on one of three bases:

(a) party-party costs, which provide partial indemnity for fees to the party to whom they are awarded;

(b) solicitor-client costs, which provide indemnity to the party to whom they are awarded for costs that are essential to and arise within the litigation; or

(c) solicitor-own-client costs, which provide complete indemnity for costs to the party to whom they are awarded.

See *Sidorsky v. CFCN Communications Ltd.* (1995), 167 A.R. 181 at para. 5 (Q.B.), rev'd on other grounds (1997), 206 A.R. 382 (C.A.).

[8] As a general rule, costs follow the event and are awarded on a party-party basis, jointly and severally payable by joint tortfeasors. See *Jackson v. Trimac Industries Ltd.* (1993), 138 A.R. 161 at para. 12 (Q.B.), aff'd (1994), 155 A.R. 42 (C.A.); *Hill v. Church of Scientology of Toronto* (1994), 18 O.R. (3d) 385 at 461-462 (C.A.), aff'd on other grounds [1995] 2 S.C.R. 1130; *Pressler v. Lethbridge*, 2001 BCSC 694 at para. 11; and Honourable William A. Stevenson and Honourable Jean E. Côté, *Civil Procedure Encyclopedia* (Edmonton: Juriliber, 2003) at 72-13.

PLAINTIFFS' POSITIONS

[9] The Plaintiffs seek fixed, not taxable, costs, jointly and severally payable by the unsuccessful Defendants.

[10] The Fullowka Plaintiffs seek party-party costs equal to two-thirds of their solicitor-client fees, plus disbursements, jointly and severally payable by the unsuccessful Defendants. In addition, at para. 11 of their Costs Brief, the Fullowka Plaintiffs claim entitlement to enhanced costs to reflect:

- Defendants' refusals to make admissions called for in Notices to Admit;
- Certain settlement offers made by the Plaintiffs, and
- Defendants' misconduct, including the refusal of the Defendants to comply with their obligations to inform themselves and to answer proper questions in examinations for discovery.

[11] At paras. 144-145 of their Costs Brief, after stating that, "[f]rom the beginning of this action, the major Defendants presented [a] common front, a stone wall against the Plaintiffs", the Fullowka Plaintiffs seek the following specific relief, revised in oral argument concerning enhanced costs as against Warren:

- Party-party costs in the sum of $4,924,436.91 (being fees of 2/3 x $5,568,909.05 = $3,712,606.03, plus disbursements of $1,211,830.88 ...), the said party-party costs to be payable jointly and severally by [the unsuccessful Defendants];
- Additional costs of $254,293.62, payable by CAW National;
- Additional costs of $31,756.92, payable by Bettger;
- Additional costs of $14,298.33, payable by Seeton;
- Additional costs of $81,401.58, payable by Warren;
- Additional costs of $152,596.86, payable by the GNWT;
- Additional costs of $79,805.31, payable by Royal Oak;
- Additional costs of $141,628.03, payable by Pinkerton's.

At paras. 16, 20 of their Costs Reply Brief, the Fullowka Plaintiffs observe that the sought enhanced costs are equal to the remaining one-third of some of their solicitor-client fees and submit that, "if the Court were to award party-party costs in amounts less than what the Plaintiffs are seeking, the amounts of the enhanced costs should be increased accordingly".

[12] Furthermore, the Fullowka Plaintiffs ask that claims for costs by the successful Defendants, namely, Witte, Sheridan, Whitford and Turner, be dismissed. In the alternative, the Fullowka Plaintiffs ask that this Court issue a Sanderson Order granting Whitford and Turner party-party costs

as against the unsuccessful Defendants, and granting Witte and Sheridan one-half of their solicitor-client costs after October 5, 1998, and February 24, 1999, respectively, against the Fullowka Plaintiffs and the remaining one-half against the unsuccessful Defendants.

[13] O'Neil seeks party-party costs equal to two-thirds of his solicitor-client fees, plus disbursements, in the sum of $942,462.40, payable jointly and severally by the unsuccessful Defendants. He also asks that claims for costs by the successful Defendants, namely, Witte, Sheridan, Whitford, Turner and Gould, be dismissed or, in the alternative, says that the issuance of a Sanderson Order granting the successful Defendants costs as against the unsuccessful Defendants would be appropriate.

DEFENDANTS' POSITIONS

[14] The unsuccessful Defendants counter that awarding the Plaintiffs party-party costs based on Column 6 of Schedule A of the *Rules of the Supreme Court of the Northwest Territories* would be reasonable. Generally, the unsuccessful Defendants contend that the Fullowka Plaintiffs should be awarded double Column 6 costs and O'Neil should be awarded either single or double Column 6 costs, with increased costs for trial briefs and circumscribed counsel fees.

[15] In its Costs Reply Brief, Pinkerton's concludes by making the following submissions, which are typical of the submissions of several of the unsuccessful Defendants:

> i) that the Plaintiffs in CV 05408 should be awarded party and party costs equal to two times the relevant amounts set out in Column 6 of Schedule A to the Rules of the Supreme Court of the Northwest Territories (the "Rules"), with a $25,000.00 fee for the preparation filing and service of their Trial Brief and a $25,000.00 fee for the submission of their Written Arguments following the Trial;
>
> ii) that the Plaintiff in CV 07028 should be awarded party and party costs equal to the relevant amounts set out in Column 6 of Schedule A to the Rules, with first counsel fee for those Trial days during which counsel for the Plaintiff entered evidence and second counsel fee for those Trial days during which counsel for the Plaintiff was simply in attendance and with a $10,000.00 fee for the preparation filing and service of his Trial Brief and a $10,000.00 fee for the submission of his Written Arguments following the Trial; ...

[16] Concerning the Plaintiffs' claim of entitlement to party-party costs equal to two-thirds of their solicitor-client fees, CAW National says at para. 15 of its Costs Reply Brief:

> [A] claim of costs based on solicitor-and-client fees in excess of $8.4 million ... is grossly excessive, way beyond the reasonable expectation of any party and out of step with cost claims for trials of similar or greater length and complexity.

At para. 18 of its Costs Reply Brief, the GNWT similarly argues that "the method proposed by the Plaintiffs for the scale of costs to use in this matter produces results which are extraordinary rather than reasonable and is procedurally impractical".

[17] Given its liability to the Rowsell, Russell and Sawler families only, Royal Oak submits in its Costs Brief that it should be liable for only 8.6% of the costs of the Fullowka Plaintiffs. However, in oral argument, Royal Oak abandoned that position.

[18] In its Costs Reply Brief, Pinkerton's asks that liability for costs be several, and, in his Costs Brief, Seeton asks that liability for shared costs be several. At the costs hearing, however, the unsuccessful Defendants conceded that their liability for costs is joint and several.

[19] Each of the unsuccessful Defendants against whom enhanced costs are sought denies any basis for such an award.

[20] Finally, Whitford, Turner and Gould collectively seek party-party costs equal to 20% of double Column 6 costs, plus 20% of reasonable disbursements, from the Fullowka Plaintiffs and from O'Neil. Witte and Sheridan collectively seek party-party costs equal to double Column 6 costs for most Schedule A items plus reasonable lump sums for certain items, plus reasonable disbursements, from the Fullowka Plaintiffs and from O'Neil. Witte and Sheridan propose two methodologies, the first awarding 100% of the pre-trial costs and 50% of the common costs related to their defence and the second awarding the incremental costs associated with their defence, including the necessity of one extra counsel. Pinkerton's argues that the Plaintiffs' requests for Sanderson Orders should be denied.

APPORTIONMENT OF COSTS

By Issue

[21] The question invariably arises in respect of trials of this magnitude as to whether costs should be awarded according to each party's success, issue by issue. I adopt the reasoning and finding of Burrows J. in *Viridian Inc. v. Dresser Canada Inc.*, 2001 ABQB 733 at paras. 26-28:

> The main question in relation to the costs of the trial is whether there should be any deviation from the general rule that the successful party is entitled to its costs. Sherritt has proposed that I deviate from this usual rule because, though I ultimately dismissed its claim, on the way to doing so I found in its favour in respect of several issues. Sherritt proposes that costs should be awarded issue by issue.
>
> That such a deviation is within the court's discretion appears clear: *Wilde v. Isfeld* (1994) 149 A.R. 237 (Alta. C.A.); *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.,* (1994) 170 A.R. 341 (Q.B.).

> I have read these and the other cases Sherritt cited in its materials on this application. I was unable to discern a clear test to be applied in determining when a court should exercise the discretion to apportion costs other than that it should be done where the court considers doing so to be just and fair.

[22] Apart from it being a logistical nightmare in respect of a trial of this magnitude to award costs issue by issue, it is, in my view, unnecessary to do so to be just and fair to the parties herein.

By Party

[23] Royal Oak submits in its Costs Brief that it should be liable for only 8.6% of the costs of the Fullowka Plaintiffs. In oral argument, Royal Oak abandoned that position, in my view correctly.

[24] Section 4 of the *Contributory Negligence Act*, R.S.N.W.T. 1988, c. C-18, concerning apportionment of costs, reads:

> 4. The liability for costs of the parties in an action under this Act is in the same proportion as their respective liability to make good the damage or loss, unless a judge otherwise directs.

I perceive no good reason to direct otherwise under s. 4.

[25] Therefore, the unsuccessful Defendants' liability for costs is in the same proportion as their respective liability to make good the damage or loss.

[26] Next, in its Costs Reply Brief, Pinkerton's asks that liability for costs be several, and, in his Costs Brief, Seeton asks that liability for shared costs be several.

[27] I note that the Fullowka Plaintiffs appropriately seek several liability for any enhanced costs ordered. In respect of all other costs awarded, I am not persuaded that there is good reason to depart from the usual practice of ordering joint and several liability for costs against joint tortfeasors. Indeed, at the costs hearing, the unsuccessful Defendants conceded that their liability for costs is joint and several. Under s. 3(2) of the *Contributory Negligence Act*, persons found at fault, here, the unsuccessful Defendants, are jointly and severally liable to make good the damage or loss, but, as between themselves, they are liable to make contribution to each other in the degree in which they are respectively found to have been at fault. Thus, there is coherence in holding the unsuccessful Defendants jointly and severally liable not only for the damage or loss but also for all costs other than enhanced costs. Moreover, any burden associated with collecting all costs other than enhanced costs should be borne by the unsuccessful Defendants, not the Plaintiffs.

[28] Therefore, the unsuccessful Defendants' liability for all costs other than enhanced costs is joint and several.

FIXED OR TAXABLE COSTS

[29] Some unsuccessful Defendants urge this Court to order taxable, not fixed, costs. I note that they do so in response to the Plaintiffs' seeking costs based on their solicitor-client fees, fees that the unsuccessful Defendants consider excessive. For example, during the costs hearing (see costs hearing transcript, p. 123, l. 5, to p. 124, l. 19), Mr. Kanee for CAW National and this Court had the following exchange:

> MR. KANEE: No, sir. What I'm building up to is to submit to you that this is not an appropriate case for you to set the costs based on the backup material relating to solicitor-client fees in part because the material is too voluminous and in order for us to go through it, we have not had sufficient time to do that, sir.
>
> And, sir, with the greatest of respect, in addition to those portions which we have objected to, which we know something about, I'm not just being asked to -- my client isn't just being asked to accept responsibility for the items that relate to the action against CAW National, the request is that we be responsible as well for those portions of the fees relating to all the defendants. How would we possibly, possibly be able to assess that material, sir, between Monday of last week and today?
> THE COURT: Well, suppose it hadn't been supplied, hadn't been given voluntarily by the plaintiffs' counsel, would you be making the same argument?
>
> MR. KANEE: Yes, sir, because the argument would be that because there is ten years' worth of entries this is not an appropriate case for you to fix the costs. That the appropriate thing to do, sir, is to say that costs will be awarded on a particular basis and then send it to a taxing officer so that the defendants, including CAW National, have the opportunity to go through those item by item and determine whether or not they're appropriate. And that's not to say, sir, that I intend on challenging every one of those items. But certainly in respect to an $8.4 million fee, that's how much the solicitor-client fees are that make up the fees against which the two-thirds is applied, with respect to $8.4 million in fees, sir, incurred over the course of ten years.
>
> THE COURT: But you're an experienced counsel, you know very well if this was sent to the taxing officer it would take you three months, five days a week to go through it.
>
> MR. KANEE: Yes.

[30] There was a similar exchange between Mr. Gibson for the GNWT and this Court (costs hearing transcript, p. 142, ll. 12-14, 19-26):

> THE COURT: -- you want it to go to a taxation officer, do you, as well as Mr. Kanee?
>
> MR. GIBSON: I would rather not....

> If these accounts were -- if these amounts and the sums involved were not so eye-poppingly huge I don't think we'd have as much of a problem. But the fact is they are extraordinary. That doesn't mean that they are improper; it means that they need to be carefully evaluated by our clients before we can just say that's fine, let's use $8 million as the basis for this.

[31] The Plaintiffs argue against the utilization of a taxing officer. Pointing to *Hardisty v. 851791 N.W.T. Ltd.*, 2005 NWTSC 3, where fixed costs were awarded to avoid further disputes on taxation, the Fullowka Plaintiffs say in their Costs Reply Brief at para. 37:

> The Plaintiffs seek an award of costs fixed by this Honourable Court so as to dispense with the need for taxation either of the Bill of Costs or of the Solicitor/Client Costs.

[32] In costs matters, this Court has more flexibility than a taxing officer. See *LSI Logic Corp. of Canada Inc. v. Logani* (2001), [2002] 4 W.W.R. 531 at para. 7, 2001 ABQB 968. Moreover, a trial judge's familiarity with a case may stand him or her in good stead to render costs rulings. In *Nova, an Alberta Corp. v. Guelph Engineering Co.* (1988), 89 A.R. 363 at para. 2 (Q.B.), Brennan J. ruled:

> I should point out at the outset that the rulings I propose to make herein relate to those issues on which I, as the trial judge, am required to exercise my discretion, such as the scale on which the costs should be taxed. The further issues which I propose to rule upon involve matters on which, generally speaking, the parties have the right to obtain rulings from the taxing officer, as well as the right of appeal therefrom. I will, nevertheless, be making such rulings, not with the intent or purpose of usurping the function of the taxing officer or to deny to the parties the rights referred to but because I, as the trial judge, have a particular familiarity or appreciation of the nature of the case and its complexities as well as of the special circumstances involved, which are not available to the taxing officer thereby making it extremely difficult, if not impossible, for him to properly exercise his discretion. The actual dollar amount as well as those matters on which he has a particular expertise and which are not peculiar to this case will be left to the taxing officer to determine.

[33] As I read the case law, awarding fixed costs for the purpose of avoiding protracted disputes on taxation is appropriate provided fairness is not sacrificed and justice is served. In my view, it is appropriate for this Court to award fixed costs in respect of this trial. To do so is undoubtedly more efficient. Moreover, to do so is neither unfair nor unjust given the bases on which I fix costs *infra* and my particular familiarity with this trial and sufficient familiarity with the pre-trial steps leading to this trial.

FULLOWKA ACTION FEES

Quantum of Party-party Costs

[34] The Fullowka Plaintiffs urge this Court to find Column 6 costs to be woefully inadequate and unsuited to large, multi-party lawsuits. To that end, they commend to this Court the reasoning of Mason J. in *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.* (1999), 251 A.R. 101 at paras. 27, 30, 1999 ABQB 801, and Fruman J., as she then was, in *LSI Logic*, *supra* at paras. 7-8, 15.

[35] In *Trizec Equities*, *supra*, in awarding party-party costs equal to 60% of that assessed to be appropriate solicitor-client fees, Mason J. set out the considerations governing the awarding of party-party costs in large lawsuits at paras. 27, 30:

> It is my opinion that, in the majority [of] cases, Schedule C, in either its present or previous form, cannot realistically achieve an appropriate level of costs in the context of complex and protracted litigation. Schedule C was instituted for the purpose of dealing with the common stream of litigation. Long trials do not fit the mould for a number of reasons which include: the time for preparing and organizing documents for the purposes of production; the preparation time required in relation to examinations for discovery; the utilization of technology and computers to prepare immediate court records; the inordinate efforts involved in collating testimony and thousands of pages of exhibit documents in order to prepare written submissions following trial; and the fact that these trials consume counsels' time for many months to the exclusion of any other work. The deficiencies created by the application of Schedule C in the context of unusually long trials was also recognized by the Court of Appeal in *Caterpillar Tractor Co.*, supra.
>
> ....
>
> I agree with the Schedule C Committee that an award for costs should, generally speaking, approach the 50% mark. However, as the Committee recognized the level of indemnity will vary in some cases, in my view the percentage of recovery should reflect the merits of the case, the respective relationship between the parties, the risks faced as a consequence of the litigation, the length and complexity of the trial and the preparation, presentation and submissions made to assist the court in its deliberations. This is not intended to be an exhaustive list, and in other circumstances the criteria may vary.

[36] Similarly, in awarding to LSI Canada party-party costs equal to two-thirds its appropriate solicitor-client fees, plus applicable disbursements and GST, Fruman J. said in *LSI Logic*, *supra* at paras. 7-8, 15:

> Party and party costs are therefore appropriate. However, Schedule C is not to be applied mechanically in every case. It is "a very crude method by which to assess costs" and "cannot realistically achieve an appropriate level of costs in the context of complex [...] litigation".... Schedule C is addressed to taxing officers.... A judge has more flexibility....

> .... [B]oth the Shareholders' and LSI Canada's calculated Schedule C costs are woefully inadequate given the complexity of the five motions, the level of research and preparation required, and the outcome achieved....
>
> ....
>
> The Shareholders challenge the reasonableness of LSI Canada's actual costs, noting that they are more than double the Shareholders' costs. The comparison is unfair, for the burdens upon plaintiffs and defendants in lawsuits are not necessarily equal.... Moreover, it is evident that LSI Canada's counsel did more work than the Shareholders' counsel in terms of the number of witnesses they presented, the documents they reviewed and assembled, and the depth of their legal research.

[37] The Fullowka Plaintiffs also endeavour to demonstrate the woeful inadequacy of Column 6 costs by comparing Column 6 costs and their actual solicitor-client fees, grouped into the eight main categories of Schedule A, at set out in their Costs Brief at para. 7:

Description	Tariff Numbers	Column 6 of the Rules	Actual Solicitor/Client Fees
1. Pleadings	NWT 1-10	$4,260.00	$49,529.25
2. Document production	NWT 14 & 15	$5,900.00	$499,685.10
3. Examinations for Discovery	NWT 16-21	$118,460.00	$1,977,454.45
4. Case Management and Interlocutory Application	NWT 22, 23, 35-37	$35,150.00	$711,853.90
5. Notices to Admit	NWT 24	$3,740.00	$107,173.55
6. Preparation for and Attendance at Trial	NWT 25, 26, 28 & 29	$185,020.00	$2,048,341.80
7. Entry of Judgment and Bill of Costs	NWT 32 & 42	$340.00	$174,871.00
SUBTOTALS		**$352,870.00**	**$5,568,909.05**
8. Correspondence	NWT 48	$450.00	$1,632,936.15
TOTALS		**$353,320.00**	**$7,201,845.20**

[38] The Fullowka Plaintiffs then note that the amounts in their costs/fees tabulation are current as of January 5, 2005, and do not include, as set out in para. 8 of their Costs Brief:

- The costs of numerous interlocutory applications where the costs were dealt with at the interlocutory stage;

- Costs for which there is no equivalent "step" under Schedule A of the Rules;

- Costs not directly related to this litigation, for example, separate proceedings taken by various Defendants connected with immunity from suit arguments, except to the extent that those proceedings became subject to judicial review proceedings for which no final award of costs has been made to date;

- Costs related to the intervention by six of the nine Plaintiff families in an appeal before the Supreme Court of Canada, which resulted in a decision reported as *Pasiechnyk v. Saskatchewan (WCB)* [1997] 2 SCR 890;

- Costs related to a second action (CV 06964), which was fully discontinued before the trial of the present action (CV 05408); and

- Costs related to the pre-trial discontinuance of this present action (CV 05408) with respect to certain Defendants.

[39] Further, at para. 9 of their Costs Brief, the Fullowka Plaintiffs note that their actual solicitor-client fees "were billed pursuant to special blended hourly rates which discount counsel's normal hourly rates by about 10%". In support of this, they refer to the filed affidavit of Michael Triggs, general counsel for the WCB. As well, the Fullowka Plaintiffs note that their claimed disbursements were approved by the WCB.

[40] I note that no unsuccessful Defendant sought leave to cross-examine Triggs on his affidavit. However, in my view, regardless of what the WCB approved for the Fullowka Plaintiffs' solicitor-client fees and disbursements, the question remains the same: what costs award as against the unsuccessful Defendants would be reasonable and proper in the circumstances?

[41] In determining a reasonable and proper costs award, I agree with the Fullowka Plaintiffs that Column 6 costs are woefully inadequate and unsuited to large, multi-party lawsuits. In my view, the reasoning of Mason J. in *Trizec Equities*, *supra*, and Fruman J. in *LSI Logic*, *supra*, is apposite not only in respect of Schedule C of the *Alberta Rules of Court* but also in respect of Schedule A of the *Rules of the Supreme Court of the Northwest Territories*. Neither *Woodley v. Yellowknife Education District*, 2000 NWTSC 62, nor *Spears v. Young*, 2001 NWTSC 8, to which the unsuccessful Defendants point, leads me to a contrary view. Those cases were, to use the words of Mason J. in *Trizec Industries*, *supra* at para. 27, within "the common stream of litigation" for which Schedule A was designed.

[42] As for departing from or adjusting Schedule A, I find guidance in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1998), 216 A.R. 304, 1998 ABCA 118, where the Court said at paras. 4, 9:

> There are different ways to adjust Schedule C when its product seems inadequate: higher column, multiples of a column, a multiplier for inflation or otherwise, extra lump sums, some fraction of solicitor-client costs, and so forth. Several modes of

> adjustment may be reasonable; indeed several different modes may amount to much the same thing. The ultimate question is whether the final total is reasonable or not.
>
> ....
>
> In an unusual case like this, one is more or less forced to calculate the proposed costs on a number of different bases, and then compare them with each other and with the solicitor-client bill to the winning client. All of those are cross-checks on reasonableness.

[43] Bearing in mind that a party-party costs award should generally approach 50% indemnity for solicitor-client fees, I then consider the factors set out by Mason J. in *Trizec Equities*, *supra* at para. 30, and those set out by him in *Pharand Ski Corp. v. Alberta* (1991), 122 A.R. 395 at para. 19 (Q.B.):

> [I]n principle, costs on a party and party scale are awarded on the basis of a reasonable apportioning of the litigation expenses incurred by the successful party, having regard to such factors as:
>
> (a) the difficulty and complexity of the issues;
>
> (b) the importance of the case between the parties and/or the community at large;
>
> (c) the length of the trial;
>
> (d) the position and relationship of the parties and their conduct prior to and during the course of the trial; and
>
> (e) other factors which may affect the fairness of an award of costs.

[44] This was complex multi-party, multi-issue, document-intensive litigation culminating in an 88-day trial, spanning eight months, the longest civil trial in this jurisdiction to date. Prior to trial, counsel for the Fullowka Plaintiffs worked tirelessly for months to secure the truth from Warren. They finally succeeded in January 2003. The Plaintiffs' work, indeed, the Fullowka Plaintiffs' work, had to be and was a collaborative effort, made efficient by the Fullowka Plaintiffs' creation of a document database that benefitted all parties.

[45] The Fullowka Plaintiffs called 38 witnesses (including six experts, one being a joint expert for the Plaintiffs) over 46 trial days and the Defendants called 19 witnesses (including three experts). (O'Neil called nine witnesses (including eight experts, one being a joint expert for the Plaintiffs).) In my view, counsel for the Fullowka Plaintiffs were neither inefficient nor extravagant at trial. They faced five times as many counsel opposite on a daily basis, that is, 15 plus counsel opposite at any given time, and had to be sufficiently prepared to address the concerted efforts of opposing counsel. In oral argument (see costs hearing transcript, p. 21, ll. 16-20), Mr. Champion for the Fullowka Plaintiffs aptly said of the Defendants:

> On every issue, they had several groups of counsel to spread the work around to. If we made one representation, there were six or seven lawyers arising in opposition. If we filed one brief, we were faced with at least six from them.

[46] Moreover, given the nature of the claims advanced by the Plaintiffs, the importance of this litigation to the parties and to the community cannot be overstated.

[47] In the circumstances, I decline to award fixed party-party costs equal to two-thirds of the Fullowka Plaintiffs' actual solicitor-client fees, namely, $3,712,606.03, for two reasons. First, I note that, in awarding party-party costs equal to two-thirds of appropriate solicitor-client fees in *LSI Logic*, *supra*, Fruman J. found, at para. 16, that "the Shareholders' litigation has a gloss of impropriety, which dictates a higher costs award". Here, the Fullowka Plaintiffs are seeking redress for any improprieties in the conduct of the litigation by way of enhanced costs from all but one of the unsuccessful Defendants.

[48] Second, in order to award party-party costs equal to a fraction or percentage of solicitor-client fees, the solicitor-client fees must be demonstrably appropriate. The unsuccessful Defendants do not question the accuracy of the time spent by counsel for the Fullowka Plaintiffs but complain of the magnitude of the Fullowka Plaintiffs' actual solicitor-client fees. I agree that they at first blush seem staggering. Indeed, in my view, they are, at least in some respects, beyond what would be considered appropriate solicitor-client fees.

[49] On the other hand, the unsuccessful Defendants do not persuade me that an award of party-party costs totalling $1,375,000.00 would be reasonable. Their submissions in oral argument to that end simply fail to recognize the complexity and challenges of this litigation.

[50] In the circumstances, I would be inclined to fix party-party costs at 60% of the Fullowka Plaintiffs' appropriate solicitor-client fees, but I am unable to do so because the Fullowka Plaintiffs' actual solicitor-client fees are not entirely appropriate.

[51] I turn, then, to the application of a multiplier. While the application of a multiplier will overcompensate the Fullowka Plaintiffs in relation to certain Schedule A items, that will be offset by their inadequate recompense in relation to other items. In my view, it is reasonable that the Fullowka Plaintiffs recover party-party costs equal to eight times their calculated Column 6 costs of $353,320.00, namely, party-party costs of $2,826,560.00, and I so order. (Their calculated Column 6 costs include 144 trial half-days for first counsel, 143 trial half-days for second counsel, 57 trial half-days for third counsel and one trial half-day for fourth counsel, which I find neither inefficient nor extravagant. I reiterate that, at trial, counsel for the Fullowka Plaintiffs faced five times as many counsel opposite on a daily basis.)

[52] As a cross-check on reasonableness, I consider that $2,826,560.00 would represent a 60% indemnity for solicitor-client fees of $4,710,933.34, the latter being, in my view, much less susceptible to attack as inappropriate solicitor-clients fees.

[53] As a further cross-check on reasonableness, I note, as did the GNWT, that the 88-day trial equates nine nine-day fatal accident trials and one nine-day personal injury trial. I further note that, had the Fullowka Plaintiffs been awarded their damages in separate actions, Column 6 would have been the applicable column in eight actions, with Column 4 being the applicable column in the ninth, subject to any necessary adjustments.

[54] In a Memorandum of Judgment dated November 27, 1998, Vertes J., the Case Management Judge, set general guidelines respecting pre-trial costs in the Fullowka action. At paras. 3-4, 9-10, 12, 15, he said:

> Case management, as everyone appreciates, is meant to facilitate the progress of an action. It provides for a continuing process whereby directions can be given expeditiously and issues can be resolved. As a matter of practice, and I think this is the same approach used in Alberta and other jurisdictions, costs are not awarded for matters arising in the normal course of case management. The reason for that approach is that costs consequences may be a disincentive for litigants to use case management. That is not to say that costs may not be awarded. Rule 287 specifically recognizes that the case management judge may make an order for costs but, in the absence of an order, costs of case management are in the discretion of the trial judge. In a long, complicated case I can understand the successful litigant making a claim for costs of case management at the end of the day.
>
> It is also evident that, even in case management, there will be the need to hear and decide motions in a more formal manner. These steps are generally no different than interlocutory applications in any other case. Rule 649 provides that, unless otherwise ordered, the costs of an interlocutory proceeding are costs in the cause. The rationale, as I understand it, for making the costs of interlocutory motions generally in the cause is presumably that an interlocutory proceeding advances the case and costs should therefore be left to be decided according to the eventual merits.
>
> ....
>
> In my opinion, if, during a case management conference, the judge gives directions or make orders resolving some point in dispute, then I would call those steps as being incidental to the case management process itself. Ordinarily I would not expect some claim for costs. Instead, any claim would be part of an overall claim for case management costs at the end of the case.
>
> Similarly, if, because of the convenience of having a case in management, counsel exchange correspondence or memoranda with the management judge seeking advice or direction, then again I would consider those acts as being part of the ongoing case management process. I would not expect a claim for costs prior to the end of the case.
>
> ....

> Having said that, I am also of the opinion that if there is a formal motion then there is no impediment to making a claim for costs. If the motion is truly a discrete one, then it would be appropriate to claim costs to be paid forthwith and, at least, in any event of the cause. By "discrete" I mean one that deals with an issue that is unrelated to and independent of the ultimate outcome.
>
> ....
>
> Therefore, my favoured approach is that any claim for costs be restricted to formal motions. If costs are to be claimed then I will expect the opposing litigants to be put on notice prior to the hearing of the motion. I will expect counsel to be prepared to address costs at the hearing of the motion. If the motion is to be decided solely on the basis of written submissions, then costs should be addressed in those submissions. I will want to know for what steps relating to the motion costs are claimed, in what amount, whether they should be fixed or taxed, for what disbursements, and whether those costs should be payable forthwith. If I do not receive such representations then I will, as a matter of course, order costs in the cause.

[55] I make clear that the fees and disbursements awarded herein cover all case management matters, pre-trial conferences and interlocutory proceedings of whatever kind, via telephone or otherwise, where a party was entitled to or awarded costs in the cause, save and except those matters or proceedings where costs were dealt with or were left to be dealt with by other Justices of this Court. Non-Schedule A items are deemed to be included.

[56] In addition, the Fullowka Plaintiffs shall have enhanced costs awards as set out *infra*.

Enhanced Costs

a) CAW National

[57] Pinkerton's argues that the enhanced costs being sought by the Fullowka Plaintiffs from all but one of the unsuccessful Defendants are effectively solicitor-client costs. I have difficulty disagreeing with that characterization.

[58] The Fullowka Plaintiffs contend that CAW National stonewalled, wrongfully failing to admit facts and failing to make reasonable efforts to inform itself, thereby putting the Fullowka Plaintiffs to the trouble and expense of securing evidence from a multitude of sources to establish the union's misconduct. Thus, in their Costs Brief at paras. 58-59, the Fullowka Plaintiffs submit:

> [T]he CAW should bear all that portion of the Plaintiffs' solicitor-client fees (not already included in the party-party costs) relating to the examinations for discovery

> of CAW, the examinations for discovery of union members, all related interlocutory applications (except those that have been the subject of prior orders for costs), the non-suit application and the Plaintiffs' costs related to witnesses testifying to union activities. These solicitor/client fees are as follow:
>
> | | |
> |---|---|
> | · Examinations of CAW (Mitic) | $274,120.05 |
> | · Applications related to CAW exams | $85,362.00 |
> | · Non-suit application | $87,557.90 |
> | · Examinations of union members | $145,451.50 |
> | · Plaintiffs' witness costs | $201,092.90 |
> | · **Total** | **$793,584.35** |
>
> Of the above sum of $793,584.35, the Plaintiffs seek $508,587.23 in the form of party-party costs against all the unsuccessful defendants. The Plaintiffs respectfully request that the balance of $254,293.62 be awarded in the form of enhanced costs against the CAW alone.

[59] Claiming that its conduct in this litigation was not fraudulent, reprehensible or scandalous, CAW National denies that there is any basis for an award of enhanced costs against it. The first principle enumerated by CAW National in its Costs Brief at para. 4 is:

> It is well accepted that courts will only deviate from the general rule of party-and-party costs and award costs on a solicitor-and-client basis in exceptional cases; extreme caution is warranted before departing from the general rule.

In support, it cites *Amalgamated Transit Union v. Independent Canadian Transit Union* (1997), 203 A.R. 204 at paras. 13, 16 (Q.B.); *Canadian Egg Marketing Agency v. Richardson (c.o.b. Northern Poultry)*, [1996] N.W.T.J. No. 85 at paras. 8, 10 (S.C.); *Canadian Egg Marketing Agency v. Richardson* (1996), 38 Admin. L.R. (2d) 87 at para. 3 (N.W.T.C.A.); *Yellowknife (City) v. Foliot*, 2002 NWTSC 1 at paras. 13-16; *Metis Nation v. North Slave Metis Alliance*, 1999 NWTSC 23 at para. 6; *Fullowka v. Royal Oak Ventures Inc.*, 2003 NWTSC 46 at para. 12; and *Sidorsky* (1997), *supra* at paras. 27-35.

[60] CAW National then points to *Jackson, supra*, an oft-cited relevant decision of Hutchinson J., who extensively reviewed cases in which solicitor-client costs had been awarded and provided the following examples at para. 28:

1. circumstances constituting blameworthiness in the conduct of the litigation by that party (*Reese*);

2. cases in which justice can only be done by a complete indemnification for costs (*Foulis v. Robinson*);

3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (*Sonnenberg*);

4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (*Olson*);

5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (*Dusik v. Newton*);

6. defendants found to be acting fraudulently and in breach of trust (*David v. David*);

7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (*Kepic v. Tecumseh Road Builder et al*.);

8. fraudulent conduct (*Sturrock*);

9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (*Pharand*).

[61] Respecting admissions, resort is had to Rules 128, 294(1) and 294(4), which provide for enhanced costs when a party denies a fact that it should have admitted:

> 128. Where the Court is of the opinion that any allegation of fact that was denied or not admitted ought to have been admitted, the Court may make an order with respect to any extra costs occasioned because they were denied or not admitted.
>
> 294.(1) A party may, by written notice, call on any other party to admit, for the purpose of an action or proceeding, any specific fact mentioned in the notice, including any fact in respect of a document.

> (4) Where a party refuses to make a requested admission and the matter for which the admission was requested is proved at the trial, the cost of proving the matter shall be paid by the party who refused to make the admission, whatever the result of the cause, unless the Court finds that the refusal was reasonable.

[62] Concerning the costs consequences of wrongful failure to admit facts, Veit J. in *Waterous Investments Inc. v. Liberton Holdings Ltd.* (1996), 183 A.R. 229 (Q.B.), ruled at paras. 31-32:

> The plaintiff asks for additional costs because the defendant failed to admit two facts when given the opportunity to do so in answer to a notice to admit. The notice to admit process is provided in the *Rules* in an effort to shorten trials and thereby make them less costly. When a litigant wrongly fails to admit a fact which it has been requested to admit, and where the originating party is then put to the trouble and expense of calling evidence to prove the fact in issue, the originating party is entitled to costs in relation to that evidence.
>
> When the originating party is also the successful party, that party is entitled to additional costs to reflect the time and trouble of calling the disputed evidence, even though the originating party will get costs that include all the time taken for the trial. This is because the tariff only compensates the successful party for a portion of the costs expended on the trial. Additional compensation can, and should, be awarded where appropriate.

[63] Rules 251 and 260, concerning an examinee's duty to inform himself or herself for purposes of discovery, read:

> 251.(1) A person who is examined for discovery shall answer, to the best of his or her knowledge, information and belief, *any proper question relating to any matter in issue in the action*....
>
> (2) In order to comply with subrule (1), the person being examined *shall inform himself or herself* and the examination may be adjourned for that purpose.
>
> 260.(1) Where a party has been examined for discovery or a person has been examined for discovery on behalf of, in place of or in addition to the party and *the party subsequently discovers that the answer to a question on the examination was incorrect or incomplete when made or is no longer correct and complete, the party shall forthwith provide the information in writing to every other party*.
>
> (2) Where a party provides information under subrule (1),
>
> (a) the information shall be treated at a hearing as if it formed part of the original examination of the person examined; and
>
> (b) any party adverse in interest may require that the information be verified by affidavit by the party or be subject to further examination for discovery.

> (3) Where a party has failed to comply with subrule (1) or a requirement under subrule (2)(b) and the information subsequently discovered
>
> (a) is favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or
>
> (b) is not favourable to the party's case, *the Court may make such order as it considers just*. [Emphasis added.]

[64] Undoubtedly, a party may raise any defence or claim that it believes in its wisdom is sustainable. However, it cannot avoid responsibility for enhanced costs to a party opposite who was forced to prove the former party's knowledge in order to discredit the former party's plea. Therefore, CAW National had every right to plead and rely on its separate entity defence. Nevertheless, it was clear to this Court that that defence was used as a shield to deny responses legitimately sought by the Fullowka Plaintiffs. CAW National was wrong to do so. It had a legal obligation to inform itself. I cite two examples. First, it was improper for Mitic on examination for discovery to deny that CAW National had any connection to David or to refuse to make inquiries as demanded by the Fullowka Plaintiffs. Second, it was improper for Mitic to refuse to inquire as to fines paid for striking miners who had pleaded guilty to or had been found guilty of criminal offences. The eventual production by CAW National of boxes of CASAW documents, pursuant to the lever of an Order of Vertes J., and the Fullowka Plaintiffs' discontinuing against Legge, then calling him as a witness, answered most of the Fullowka Plaintiffs' inquiries. It was then that CAW National's denial that it had knowledge or its insistence on its right to refuse to inform itself fell flat.

[65] In my view, CAW National demonstrated a shocking indifference to the applicability of the aforesaid relevant Rules and its responsibility to comply therewith, thereby putting the Fullowka Plaintiffs to the trouble and expense of securing evidence from a multitude of sources to establish the union's misconduct.

[66] CAW National endeavours to justify its discovery conduct by alluding to support for it in *Fullowka v. Royal Oak Ventures Inc.*, 2002 NWTSC 13, and *Fullowka v. Royal Oak Mines Inc.* (2002), 33 C.P.C. (5th) 165, 2002 NWTSC 83. However, those rulings are no answer. I grant that both refuse blanket or general directions, but most importantly both direct Mitic to expand the scope of his inquiries for discovery purposes so as to enable him to answer questions put to him relating to information given by Slezak, David and Kosta. Moreover, CAW National responded to the Fullowka Plaintiffs' demands for undertakings only after a contempt application had been launched.

[67] CAW National's obdurate disregard of Rules 128 and 294 was demonstrated by its continued repetition of the words, "[t]he Defendants have no independent knowledge", which simply was not the case as indicated *supra*. CAW National cannot claim compliance with the Notice to Admit, given that the Fullowka Plaintiffs provided evidence at trial that CAW National had earlier refused to provide in response to the Notice to Admit. CAW National's refusal to respond was not reasonable and so cannot be excused under Rule 294(4).

[68] Finally, the above recitation of inappropriate observance of the Rules proves the Fullowka Plaintiffs' assertions of stonewalling.

[69] I make these findings against CAW National appreciating that Vertes J. directed CAW National to inform itself so as to enable itself to answer questions relating to information given by Slezak, David and Kosta, this being without prejudice to CAW National's advancement of a separate entity defence at trial. However, confirming its knowledge of information given by Slezak, David and Kosta could not, in itself, found CAW National's liability, and its failure to be forthcoming about its knowledge is what gives rise to an award for enhanced costs against it.

[70] CAW National must be censured for its conduct as described *supra*. I do not award the sum requested by the Fullowka Plaintiffs because I believe that the actual solicitor-client fees on which the requested sum is based are, at least in some respects, beyond what would be considered appropriate solicitor-client fees. (Indeed, any enhanced costs awarded herein are fixed with this in mind.) Thus, CAW National shall pay enhanced costs to the Fullowka Plaintiffs in the sum of $150,000.00, an amount I consider reasonable in the circumstances.

b) Bettger

[71] The Fullowka Plaintiffs accuse Bettger of stonewalling. I find that it would be improper to yield to the Fullowka Plaintiffs' demand for enhanced costs for interlocutory applications that they believed necessary to make but that would not be unusual in this type of litigation. On the issues of production of documents and objections to questions on examination for discovery, I find no effort to defeat or delay justice. Moreover, to the extent that the issues arose as a result of Bettger's previous counsel acting in error, I am not prepared to punish Bettger for uninformed counsel.

[72] Therefore, I award no enhanced costs against Bettger.

c) Seeton

[73] The background on the claim for enhanced costs against Seeton is set forth in the Fullowka Plaintiffs' Costs Brief at paras. 78-80:

> It took three separate sessions of Examination for Discovery of Harry Seeton in order to obtain his evidence. The last discovery took place in January, 2000. In order to compel Seeton to attend those discoveries, it was necessary to make a court application.
>
> At the conclusion of the third discovery session, there remained a significant number of undertakings that Seeton had not answered. Notwithstanding regular reminders to Seeton's counsel, the majority of the undertakings remained outstanding as at the start of trial.
>
> It was only in January, 2004, on the eve of the Plaintiffs closing their case, and in response to repeated demands by the Plaintiffs, that Seeton sent the balance of the answers to his undertakings. Then, instead of exposing himself to cross-examination

> on his answers, Seeton abruptly announced that he would not be testifying at the trial.

[74] For Seeton's conduct in this litigation as described *supra*, I agree in part with the Fullowka Plaintiffs' submission at para. 81 of their Costs Brief:

> The Plaintiffs respectfully submit that (in addition to his share of the party-party costs) enhanced costs relating to the protracted discovery of Seeton should be awarded against Seeton in the sum of $14,298.33 (being 1/3 of the Plaintiffs' solicitor-client costs of the third session of discoveries and the related application).

[75] Thus, I award enhanced costs in lieu of that claimed in the sum of $10,000.00, which I consider reasonable.

d) Warren

[76] After ten years of denial, Warren finally admitted his involvement in events culminating in the fatal blast. I agree with and endorse the Fullowka Plaintiffs' submission at para. 84 of their Costs Brief:

> Though it appears unlikely that the Plaintiffs will ever be able actually to collect much from Warren, the Plaintiffs respectfully submit that (in addition to his share of the party-party costs) enhanced costs should be awarded against him in the sum of [$81,401.58] in denunciation of his nearly ten years of lying, and of the economic and emotional toll it took on the widows.

[77] In the result, the Fullowka Plaintiffs are awarded enhanced costs against Warren in the sum of $50,000.00, which I consider reasonable.

e) GNWT

[78] The Fullowka Plaintiffs seek enhanced costs against the GNWT for obstruction during the discovery process and refusal to make admissions.

[79] Concerning the discovery process, the GNWT argues that objections to questions respecting Patterson's honest belief in a comment he had made were proper because credibility is not a proper subject on examination for discovery. The GNWT further says that objections to questions as to Patterson's belief respecting the effect of using replacement workers were proper because the questions were directed at eliciting conclusions or opinions. In addition, the GNWT contends that its successful opposition to the Fullowka Plaintiffs' application to expand the scope of discovery was not improper and that it is problematic to characterize as obstructionist applications to determine issues of privilege. I find merit in these submissions.

[80] As to the Notice to Admit, out of 72 requested admissions (from a total of 241), the Fullowka Plaintiffs say that 49 were found by this Court. The GNWT argues that its objection to many of the requested admissions was that the Fullowka Plaintiffs sought conclusions, not facts. See *Saint John Port Corp. v. Ultramar Canada Inc.*, [1995] N.B.J. No. 581 at para. 2 (Q.B.). I agree that much of the information sought bordered on opinion, which begged the question whether the use of replacement workers would incite the strikers. Moreover, the Fullowka Plaintiffs resorted to the trial evidence of Ballantyne, Plummer and Dr. Strahlendorf , whose evidence on that issue I found weak.

[81] In the result, I am not satisfied of any misconduct by the GNWT as alleged by the Fullowka Plaintiffs. Therefore, no enhanced costs are awarded against the GNWT.

f) Royal Oak

[82] The Fullowka Plaintiffs accuse Royal Oak of stonewalling. Royal Oak counters by pointing to the Fullowka Plaintiffs' mixed success respecting applications in relation to the discovery process. I agree with Royal Oak's characterization that for the most part the difficulty experienced by the Fullowka Plaintiffs was not the former's obfuscation but the Fullowka Plaintiffs' insistence on the application of the April 1998 Rule amendments. Moreover, I agree that the extensive Notice to Admit questions put to Royal Oak were appropriately answered.

[83] Thus, I award no enhanced costs against Royal Oak.

g) Pinkerton's

[84] I reiterate that Pinkerton's argues that the enhanced costs being sought by the Fullowka Plaintiffs are effectively solicitor-client costs and that I have difficulty disagreeing with that characterization.

[85] The position of Pinkerton's is that none of the circumstances outlined in the relevant authorities are present to justify a departure from party-party costs as against Pinkerton's. For example, in *Kátlodééche First Nation v. Canada*, [2004] 8 W.W.R. 256 at para. 11, 2004 NWTSC 12, Vertes J. noted that "[t]he jurisprudence is clear that solicitor-client costs should only be awarded in rare and exceptional circumstances", following *Young v. Young*, [1993] 4 S.C.R. 3 at 134, where McLachlin J., as she then was, observed that "[s]olicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". The Alberta Court of Appeal similarly held in *English v. Steeves* (2004), 6 R.F.L. (6th) 125 at para. 21, 2004 ABCA 195, that "[s]olicitor-client costs are exceptional and should be ordered only in unusual circumstances", referring to *Sidorsky* (1997), *supra* at para. 31, and *Jackson*, *supra* at para. 28.

[86] Pinkerton's takes the position that its refusal to make the admissions requested by the Fullowka Plaintiffs does not entitle them to enhanced costs. It argues that no additional costs were incurred, nor were any additional witnesses called in order to prove the matters included in the Notice to Admit served on Pinkerton's. The Fullowka Plaintiffs concede at paras. 115-116 of their

Costs Brief that Pinkerton's voluntarily produced two former senior employees for examination, who forthrightly answered questions. Excerpts from their examinations were accepted by Pinkerton's and read-in at trial.

[87] Pinkerton's also asserts that the Fullowka Plaintiffs' claim for enhanced costs set out at para. 120 of their Costs Brief is flawed and does not reflect the intent of Rule 294(4). Instead, it says that the global sum identified by the Fullowka Plaintiffs as solicitor-client fees from July 7, 2002, has no relation to the costs allegedly incurred by them regarding items in the Notice to Admit. I agree.

[88] Accordingly, I find no basis for an award of enhanced costs against Pinkerton's.

Settlement Offers

a) By Fullowka Plaintiffs

[89] Settlement offers are relevant to the matter of costs. Rule 201(1) provides:

> 201.(1) A plaintiff who makes an offer to settle at least 10 days before the commencement of the hearing is entitled to party and party costs to the day on which the offer to settle was served and solicitor and client costs from that day where
>
> (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the defendant; and
>
> (b) the plaintiff obtains a judgment on terms as favourable as or more favourable than the offer to settle.

[90] In the Fullowka action, proposals that were similar in substance were made by the Fullowka Plaintiffs to Pinkerton's and the GNWT on June 7, 2002, and January 14, 2003, respectively. The Fullowka Plaintiffs argue that these constitute Calderbank letters and therefore are seeking solicitor-client costs on a full indemnity basis against Pinkerton's and the GNWT from and after the dates of the respective proposals. They rely on *Terham Management Consultants Ltd. v. OEB International Ltd.* (1993), 17 C.P.C. (3d) 270 at para. 22 (Ont. Gen. Div.), where Chapnik J. said, "Parties may insist on having their day in court. If they do so in the face of reasonable offers to settle, they must reasonably expect to indemnify the other party for its costs."

[91] First, it must be noted that neither of these proposals satisfies Rule 201(1) as both expired before the commencement of the hearing, both being open for acceptance for only 30 days, thereby violating the temporal requirement for a costs benefit outlined in Rule 201(1)(a). Furthermore, as Pinkerton's properly argues, and the Fullowka Plaintiffs subsequently agreed in oral argument, Rule 203(a), set out below, is also not satisfied:

> 203. Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the

> defendants, the costs consequences set out in rule 201 do not apply to the offer to settle unless,
>
> (a) in the case of an offer made by the plaintiff, the offer is made to all the defendants and is an offer to settle the claim against all the defendants; or ...

[92] Therefore, neither proposal was made pursuant to the Rules so as to entitle the Fullowka Plaintiffs to a costs benefit thereunder.

[93] Jurisprudence from Ontario, whose rules are similar in this regard, suggests that even those offers which do not fall within the Rules may warrant similar costs treatment. The Ontario Court of Appeal dealt with this in *Bifolchi v. Sherar (Litigation Administrator)* (1998), 38 O.R. (3d) 772 at 778-779:

> Given the specific language used in the various offers, we agree that none of them fell within the provisions of rule 49.10, thereby giving Bifolchi and Lisgar a *prima facie* entitlement to solicitor and client costs from the date of the offer. We think, however, that the trial judge fell into serious error in failing to consider the substance of those offers and a further offer made by Bifolchi and Lisgar shortly after the commencement of the trial when deciding the appropriate order as to costs.
>
> Liability was never a serious issue. The various offers made by Bifolchi and Lisgar demonstrate a genuine and continuing effort by them to settle this case.... These offers should have figured prominently in the trial judge's determination of the appropriate order as to costs: see rule 57.01(1).

[94] Calderbank letters (*Calderbank v. Calderbank*, [1975] 3 All E.R. 333 (C.A.)) are settlement offers that are privileged and without prejudice until the parties speak to costs. In *Ferris v. Kirstiuk* (1989), 39 B.C.L.R. (2d) 268 at 271 (Co. Ct.), Drost Co. Ct. J. ruled:

> I think that a "Calderbank" letter should have an effect upon the question of costs similar to that of an offer to settle, that is, to allow the court in appropriate cases to punish a party for failing to accept a reasonable offer of settlement, thus forcing an unnecessary trial.

[95] I must then consider whether the proposals to Pinkerton's and the GNWT constitute Calderbank letters so to entitle the Fullowka Plaintiffs to a costs benefit similar to that achieved via an offer to settle pursuant to the Rules. The threshold question with respect to this determination is whether they were reasonable offers of settlement, which when rejected by Pinkerton's and the GNWT forced an unnecessary trial.

[96] Pinkerton's argues at para. 26 of its Costs Reply Brief that "the amount of the Offer is not clear or certain, as the outcome was [dependent] on a number of future contingencies, and could have resulted in Pinkerton's being required to pay $6,724,000 to settle the Plaintiffs claims in action CV 05408". Some examples of the contingencies contained in the proposal are as follows:

- If the litigation proceeds to trial against one or more of Royal Oak Ventures Inc., Margaret K. Witte, Procon Miners Inc., the Government of the Northwest Territories or the CAW Union (the "other major defendants"), and none of those other major defendants is found to be at fault for any part of the Plaintiffs' damages claimed in this litigation, then Pinkerton's will be required to pay, and our clients will be entitled to draw upon the Bank Letter of Guarantee for, the maximum settlement payment of $6,724,000 (inclusive of costs).

- If the Plaintiffs do not proceed to trial against at least one of the other major defendants, Pinkerton's settlement payment will reduce from the maximum to $4,224,000 (inclusive of costs).

- If the Plaintiffs proceed to trial against at least one other major defendant and, after trial and the exhaustion of all appeals, at least one of such other major defendants is determined to be at fault for the Plaintiffs' damages but no other major defendant is found to be vicariously liable for Roger Warren's torts, then the amount Pinkerton's is obliged to pay in settlement will be $6,724,000 (inclusive of costs) less 50% of any amount (exclusive of judgment interest accruing subsequent to the date of this offer, exclusive of costs, and net of any amounts that the Plaintiffs are required to provide to Pinkerton's for claims for contribution by co-defendants) that the Plaintiffs collect from such other major defendants pursuant to any judgment against them.

[97] I agree with Pinkerton's that these future contingencies create uncertainty, and I identify a further problem contained within the Fullowka Plaintiffs' proposals to Pinkerton's and the GNWT. In both proposals, the Fullowka Plaintiffs make reference to an agreement not yet drafted, as indicated by the words "the terms of which would be more fully worked out between us acting reasonably in the respective interests of our clients".

[98] With the benefit of hindsight, the Fullowka Plaintiffs argue that, had Pinkerton's accepted the proposal, it would have been required to pay $1,224,000.00 inclusive of costs. They contrast this with the ultimate judgment against Pinkerton's, totalling approximately $1,911,213.00 exclusive of costs, and conclude that they have substantially "beaten" the proposal made to Pinkerton's. I disagree with the Fullowka Plaintiffs' position that the proposal was a reasonable one entitling them to solicitor-client costs from Pinkerton's from the date of the proposal. The possible settlement payments pursuant to the proposal ranged from $1,224,000.00 to $6,724,000.00, the latter value significantly exceeding that which Pinkerton's now must pay. This $5.5 million range was dependent on the outcome of the litigation, and for this reason I cannot find that the proposal was reasonable so as to qualify it as a Calderbank letter. In arriving at this conclusion, I apply *Delair v. Byrnell* (1996), 26 B.C.L.R. (3d) 179 at para. 5 (C.A.):

> In my view, the form of the letter is not an unqualified offer to settle. To come within the provisions of the *Calderbank* decision, it is necessary that the letter be unqualified.

[99] The proposal made to the GNWT contained substantially the same terms as the proposal made to Pinkerton's, with an approximate $4.5 million range, as it stipulated possible settlement payments starting at a minimum of $324,000.00 and extending to a maximum of $4,864,000.00. Again with the benefit of hindsight, the Fullowka Plaintiffs state that, pursuant to the proposal, the GNWT would have been required to pay $324,000.00 inclusive of costs and conclude that they significantly "beat" their proposal as the GNWT now faces judgment against it totalling approximately $1,146,728.00 exclusive of costs. I reject the Fullowka Plaintiffs' submission that the proposal made to the GNWT is a Calderbank letter for the same reason I rejected their submission that the proposal made to Pinkerton's is a Caldberbank letter.

[100] Furthermore, although the Fullowka Plaintiffs refer to the proposals as settlement offers, I accept the characterization advanced by the GNWT that the proposals were not offers to settle but rather invitations to negotiate further agreements.

[101] Thus, the Fullowka Plaintiffs' claims for enhanced costs against Pinkerton's and the GNWT for the refusal of Pinkerton's and the GNWT to settle pursuant to Calderbank letters cannot succeed.

b) By Unsuccessful Defendants

[102] The Fullowka Plaintiffs make reference in their Costs Brief to offers that were made by some unsuccessful Defendants, either pursuant to the Rules or "without prejudice except as to costs", which can therefore be placed before this Court. These are:

(a) the GNWT's offer to settle for costs for $215.00 dated November 8, 1999;

(b) CAW's offer under the Rules to settle the action for $9.00, dated August 28, 2003, "representing $1.00 in respect of each of the claims of the nine Plaintiffs"; and

(c) Bettger's offer under the Rules to settle the action for $90,000.00, dated September 16, 2003.

[103] Not surprisingly, there is no further reference to these offers in the written submissions nor was there in oral argument, and I see no costs benefit flowing from them.

O'NEIL ACTION FEES

[104] Making submissions similar to those made by the Fullowka Plaintiffs, O'Neil seeks party-party costs equal to two-thirds of his solicitor-client fees, plus disbursements, in the sum of $942,462.40. He notes in his Costs Brief at paras. 9-14:

> In this case, there were multiple Defendants. The database of documents produced by all parties exceeded 27,500 documents. There were many interlocutory applications and a number of case management conferences. Approximately 43 witnesses were examined for discovery, some of the examinations lasting a number of days and some requiring multiple attendances. There were many undertakings given.
>
> Given the volume of documents and the thousands of pages of discovery transcripts, the task of preparing for trial, including read-ins from discovery, was an enormous task. The trial itself consumed 88 trial days, 65 witnesses were called, including numerous experts. 1217 exhibits were filed at the trial, many of them multi-page documents.
>
> Much of the work involved in a trial of this magnitude is not covered, or not significantly covered, by Schedule A of the Rules. For example, the tariff in Schedule A for preparation for an examination for discovery is $600.00. In this case, each time a witness was examined for discovery, or further examined, as occurred with a number of witnesses, particularly persons testifying as "officers" for a corporate party, the task of preparation involved the review of hundreds or thousands of documents, and hundreds or thousands of pages of discovery transcripts, involving far more cost than provided for in Schedule A.
>
> After the O'Neil action was commenced, this writer, as counsel for the Plaintiff O'Neil, with a view to keeping the costs of the action down as much as possible, filed an application for an order, which was ultimately consented to by all parties, to have the actions tried together, and for leave to use in this action examination transcripts from the Fullowka action, with leave to ask additional questions of witnesses examined by counsel for the Fullowka Plaintiffs.
>
> It was necessary in the O'Neil action also to establish the liability of the Defendants and for O'Neil's counsel to take whatever steps were considered necessary to assist in that process, as well as to establish O'Neil's damages. The writer, as O'Neil's counsel, endeavoured to keep the cost of the O'Neil action down to the extent possible. The writer did not attend all of the examinations for discovery conducted by Fullowka's counsel, but did attend some of those examinations, prepared to ask further questions if necessary. The writer reviewed transcripts of many of the examinations, in lieu of attending. Likewise, the writer did not attend or participate in all of the interlocutory proceedings in the Fullowka action, instead in some instances reviewing briefs and decisions, and providing suggestions to counsel for the Fullowka plaintiffs from time to time. Likewise, the writer did not attend at trial where it was deemed unnecessary, for example during the evidence of the Fullowka Plaintiffs as to damages, or where it was considered that a review of transcript would

> be sufficient. This is, of course, reflected in the solicitor-client accounts in the O'Neil case, which would otherwise have been much larger.
>
> The writer did conduct a number of examinations for discovery, eleven in total, most of which required extensive review of a large volume of documents in preparation for the examination. The writer was provided with access to the database maintained by counsel for the Fullowka Plaintiffs and was able to search for and review documents in the data base for the purpose of examinations for discovery and trial, and did so extensively.

[105] As was the case with the Fullowka Plaintiffs' solicitor-client fees, O'Neil's solicitor-client fees were billed pursuant to special blended hourly rates that discount counsel's normal hourly rates by about 10%. There is a filed affidavit of Michael Triggs, general counsel for the WCB, to that effect. As well, O'Neil's claimed disbursements were approved by the WCB.

[106] Of course, regardless of what the WCB approved for O'Neil's solicitor-client fees and disbursements, the question remains the same: what costs award as against the unsuccessful Defendants would be reasonable and proper in the circumstances?

[107] Applying the case law pertinent to the setting of party-party costs set out *supra*, I reiterate that this was complex multi-party, multi-issue, document-intensive litigation culminating in an 88-day trial, that the Plaintiffs' work had to be and was a collaborative effort and that, given the nature of the claims advanced by the Plaintiffs, the importance of this litigation to the parties and to the community cannot be overstated. I note that, at trial, O'Neil called nine witnesses, including eight experts, one being a joint expert for the Plaintiffs.

[108] I also consider that O'Neil's counsel was required to follow the Fullowka action and to participate when it impacted the O'Neil action. In conducting the O'Neil action, O'Neil's counsel strove for efficiency. For example, he reviewed the transcripts of many of the examinations conducted by counsel for the Fullowka Plaintiffs, in lieu of attending the examinations.

[109] Some unsuccessful Defendants argue that the O'Neil action should have been conjoined with the Fullowka action, particularly as the WCB was the beneficial Plaintiff in both actions, and thus that minimal party-party costs for O'Neil are in order. I reject that argument and say that O'Neil was not a fatal accident claim, but one of personal injury.

[110] Furthermore, contrary to what some unsuccessful Defendants contend, a cost award is not controlled exclusively, nor principally, by the amount of the judgment awarded. Nevertheless, the amount claimed and the amount recovered are considerations.

[111] O'Neil asserts actual solicitor-client fees totalling approximately $1,200,000.00. For the same reasons I declined to award fixed party-party costs equal to two-thirds of the Fullowka Plaintiffs' actual solicitor-client fees, I decline to award fixed party-party costs equal to two-thirds of O'Neil's actual solicitor-client fees.

[112] On the other hand, I am not persuaded by some unsuccessful Defendants that Column 6 costs would be reasonable. Column 6 costs fail to recognize the complexity and challenges of this litigation.

[113] In the circumstances, I would be inclined to fix party-party costs at 40% to 50% of O'Neil's appropriate solicitor-client fees, but I am unable to do so because I am not convinced that O'Neil's actual solicitor-client fees are entirely appropriate.

[114] Application of a multiplier, then, is in order. In my view, it is reasonable that O'Neil recover party-party costs equal to two times his calculated Column 6 costs of $140,640.00, namely, party-party costs of $281,280.00, and I so order. (His calculated Column 6 costs include 156 trial half-days for first counsel, which I find appropriate. To find otherwise, as urged by some unsuccessful Defendants, would be to misconceive the role of O'Neil's counsel.)

[115] As a cross-check on reasonableness, I consider that $281,280.00 would represent a 40% indemnity for solicitor-client fees of $703,200.00, the latter being, in my view, much less susceptible to attack as inappropriate solicitor-clients fees. I also note that some unsuccessful Defendants made submissions in favour of O'Neil being awarded double Column 6 costs.

[116] I again make clear that the fees and disbursements awarded herein cover all case management matters, pre-trial conferences and interlocutory proceedings of whatever kind, via telephone or otherwise, where a party was entitled to or awarded costs in the cause, save and except those matters or proceedings where costs were dealt with or were left to be dealt with by other Justices of this Court. Non-Schedule A items are deemed to be included.

FULLOWKA ACTION DISBURSEMENTS

Parties' Positions

[117] At the outset of a discussion of individual amounts claimed, it is appropriate to set forth the parties' positions with the actual numbers. The Fullowka Plaintiffs' position is as follows:

Disbursements	Amounts
Copies from outsources	$10,981.82
Research	$5,401.44
Process Server	$3,275.22
Discovery/formal interview expenses	$34,483.10
Discovery/formal interview transcripts	$72,817.27
Application transcripts	$189.00

Disbursements	Amounts
Other transcripts	$1,988.52
IT Services	$11,028.25
Opposite counsel	$8,827.41
Counsel travel expenses	$55,077.77
Jed Fisher services	$53,961.28
Jed Fisher other expenses	$1,128.58
Shepp Johnman & Associates Investigations services	$10,375.84
David Ray services	$18,429.75
David Ray other expenses	$1,688.97
Peter Strahlendorf services	$29,091.59
Peter Strahlendorf other expenses	$1,966.55
Ian Plummer services	$17,528.63
Ian Plummer other expenses	$2,811.88
Dr. Julio Arboleda services	$89,494.19
Dr. Julio Arboleda other expenses	$1,265.23
Ron MacKay services	$11,409.12
Gerard Seguin services	$5,700.00
Cara Brown services	$333,135.15
Cara Brown other expenses	$7,029.67
Gordon Smith services	$27,625.78
Gordon Smith other expenses	$1,058.08
Alberta Service Bureau	$447.30
Out of province services	$17,319.14
Corporate searches	$24.00
Case management conference transcripts	$143.00
Conference call charges	$1,148.23

Disbursements	Amounts
Counsel travel expenses re witnesses	$31,892.68
Counsel travel expenses re experts	$4,028.39
Witnesses' expenses	$51,614.92
Trial related expenses	$10,783.85
Trial transcripts	$14,053.80
Counsel flights re trial	$35,468.85
Counsel accommodation re trial	$63,538.00
Counsel expenses re trial	$15,118.11
Computer Research	$4,026.68
Copies (in-house)	$75,306.76
Court searches	$454.00
Delivery	$9,414.70
E-Carswell	$5,583.86
Fax	$13,373.70
LD phone	$10,944.48
Postage	$516.12
Printing	$28,744.42
Quicklaw	$112.80
Reg. services	$3.00
TOTAL	**$1,211,830.88**
Deduction from copies from outsources re Warren documents	($2,964.06)
REVISED TOTAL	**$1,208,866.82**

[118] The unsuccessful Defendants provided the following list, entitled "Defendants' Position on Disbursements", with which they ask this Court to revise the Fullowka Plaintiffs' claimed disbursements:

Category	Claim		Proposal	Deduction

Category	Claim		Proposal	Deduction
Alberta Service Bureau	$447.30	$447.30	$447.30	$0.00
Application transcripts	$189.00	$189.00	$189.00	$0.00
Cara Brown other expenses	$7,029.67			
Cara Brown services	$333,135.15	**$340,164.82**	$53,000.00	$287,164.82
Case management conference transcripts	$143.00	$143.00	$143.00	$0.00
Computer Research	$4,026.68	$4,026.68	$4,026.68	$0.00
Conference call charges	$1,148.23	$1,148.23	$1,148.23	$0.00
Copies (in-house)	$75,306.76	$75,306.76	$25,000.00	$50,306.76
Copies from outsources	$10,981.82	$10,981.82	$10,981.82	$0.00
Corporate searches	$24.00	$24.00	$24.00	$0.00
Counsel accommodation re trial	$63,538.00	$63,538.00	$63,538.00	$0.00
Counsel expenses re trial	$15,118.11	$15,118.11	$15,118.11	$0.00
Counsel flights re trial	$35,468.85	$35,468.85	$35,468.85	$0.00
Counsel travel expenses re witnesses	$31,892.68	$31,892.68	$31,892.68	$0.00
Court searches	$454.00	$454.00	$454.00	$0.00
David Ray other expenses	$1,688.97			
David Ray services	$18,429.75	**$20,118.72**	$0.00	$20,118.72
Delivery	$9,414.70	$9,414.70	$9,414.70	$0.00
Discovery/formal interview transcripts	$72,817.27	$72,817.27	$72,817.27	$0.00
Dr. Julio Arboleda other expenses	$1,265.23			
Dr. Julio Arboleda services	$89,494.19	**$90,759.42**	$9,000.00	$81,759.42
E-Carswell	$5,583.86	$5,583.86	$5,583.86	$0.00
Fax	$13,373.70	$13,373.70	$2,000.00	$11,373.70
Gerard Seguin services	$5,700.00	$5,700.00	$0.00	$5,700.00
Gordon Smith other expenses	$1,058.08			
Gordon Smith services	$27,625.78	**$28,683.86**	$15,000.00	$13,683.86
Ian Plummer other services	$2,811.88			
Ian Plummer services	$17,528.63	**$20,340.51**	$5,000.00	$15,340.51
IT Services	$11,028.25	$11,028.25	$11,028.25	$0.00

Category	Claim		Proposal	Deduction
Jed Fisher other expenses	$1,128.58			
Jed Fisher services	$53,961.28	**$55,089.86**	$5,000.00	$50,089.86
LD phone	$10,944.48	$10,944.48	$10,944.48	$0.00
Opposite counsel	$8,827.41	$8,827.41	$8,827.41	$0.00
Other transcripts	$1,988.52	$1,988.52	$1,988.52	$0.00
Out of province services	$17,319.14	$17,319.14	$8,645.68	$8,673.46
Peter Strahlendorf other expenses	$1,966.55			
Peter Strahlendorf services	$29,091.59	**$31,058.14**	$5,000.00	$26,058.14
Postage	$516.12	$516.12	$516.12	$0.00
Printing	$28,744.42	$28,744.42	$0.00	$28,744.42
Process Server	$3,275.22	$3,275.22	$3,275.22	$0.00
Quicklaw	$112.80	$112.80	$112.80	$0.00
Reg. services	$3.00	$3.00	$3.00	$0.00
Research	$5,401.44	$5,401.44	$5,401.44	$0.00
Ron McKay services	$11,409.12	$11,409.12	$0.00	$11,409.12
Shepp Johnman & Associates Investigations services	$10,375.84	$10,375.84	$0.00	$10,375.84
Trial related expenses	$10,783.85	$10,783.85	$10,783.85	$0.00
Trial transcripts	$14,053.80	$14,053.80	$14,053.80	$0.00
Counsel travel expenses	$55,077.77			
Counsel travel expenses re experts	$4,028.39			
Discovery/formal interview expenses	$34,483.10			
Witnesses' expenses	$51,614.92	**$145,204.18**	$100,000.00	$45,204.18
	$1,211,830.88	$1,211.830.88	$545,828.07	$666,002.81

General Comments

[119] Any discussion of allowable disbursements must be given birth with my opening remarks in these reasons respecting the nature of this litigation, as those comments apply equally to disbursements and fees.

[120] Respecting disbursements, the general principle was stated in *Sidorsky v. CFCN Communications Ltd.* (1998), 216 A.R. 151 at para. 4, 1998 ABCA 127:

> Disbursements should not be used as a means, even unintentionally, of distorting the cost scheme by allowing, as a disbursement, fees for work normally considered part of the cost of litigation to which Schedule C applies. Taken to the extreme, preparation for trial could be subcontracted to another firm and reimbursement of that firm's account sought as a disbursement.

[121] Days before the week of the costs hearing began, counsel for the Fullowka Plaintiffs provided a disk setting forth in minute detail every item that comprised their disbursements claim. With little assistance from any counsel, this Court was unable to secure even a minimal appreciation of the relationship of this minute detail to the disbursements claimed. Items attacked were not detailed by counsel for the unsuccessful Defendants so that this Court could secure an appreciation of the same. Counsel for the Fullowka Plaintiffs provided the backup material, but no counsel on behalf of the unsuccessful Defendants, except in a most superficial manner, was prepared to study it and use it in support of attacks made on individual disbursements.

[122] The unsuccessful Defendants chose a few large random items and argued for their reduction in a most arbitrary way. Because no evidence was called by the unsuccessful Defendants to substantiate allegations that the Fullowka Plaintiffs' claims are unreasonable, and no real effort was made to tie the allegations to the information on the disk or its backup material, only Solomon could make the findings sought.

[123] I turn my attention, then, to those disbursements in dispute or perceived by me to be improper.

Experts

[124] The Fullowka Plaintiffs retained ten experts, namely, Dr. Julio Arboleda-Florez ("Dr. Arboleda-Florez"), David Ray ("Ray"), Dr. Strahlendorf, Dr. Jed Fisher ("Dr. Fisher"), Plummer, Dr. Lloyd Denmark ("Dr. Denmark"), Ron MacKay ("MacKay"), Yves Pelletier ("Pelletier"), Cara Brown ("Brown") and Gordon Smith ("Smith").

[125] These experts had expertise in criminal behaviour, forensic psychiatry, occupational health and safety, mining safety and its regulations, security of work force, labour relations, explosives, economics and accounting. Unchallenged in their fields were Brown, Smith, Plummer and Dr. Denmark. Objection was taken by the Defendants to qualification of Drs. Strahlendorf and Fisher. Dr. Arboleda-Florez and Ray were not qualified as proffered. Pelletier and MacKay were experts who assisted counsel for the Fullowka Plaintiffs in their preparation for examinations for discovery and for trial.

[126] Several of the unsuccessful Defendants raise similar objections with respect to expenses claimed for experts retained by the Fullowka Plaintiffs. I turn firstly to Rule 641:

> 641. In this Part, "costs" include all reasonable and proper expenses that a party has paid or become liable to pay for the purpose of carrying on or appearing as a party to a proceeding, including
>
> (a) the charges of a solicitor,
>
> (b) the charges of an accountant, an engineer, a medical practitioner or any other expert for attendance to give evidence and, where the Court so directs, the charges of such an expert for an investigation and inquiry or assisting in the conduct of a trial, ...

[127] The test in law as the Rule indicates is whether the sums claimed are "reasonable and proper".

[128] I take comfort in the words of O'Leary J., as he then was, in *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1990), 105 A.R. 384 (Q.B.). In that case, the defendant had not called some of its experts, while the opinions of others it had called had not been relied on by the Court. Speaking of expense claims for experts, O'Leary J. said at paras. 45, 47:

> Regardless of the scale of fees awarded, the defendant is entitled to recover as costs "all the reasonable and proper expenses which ... [it] has paid or become liable to pay for the purpose of carrying on ... [this] proceeding...." (rule 600(1)(a)). This includes expenses incurred directly by the defendant as well as those paid on its behalf by its solicitors. The defendant is entitled to tax reasonable and proper amounts paid to experts for their attendance to give evidence at the trial. In addition, the court has a discretion to allow the costs of experts for investigations and inquiries or for assisting in the conduct of the trial, even though those experts do not attend and testify....
>
> ....
>
> When considering the reasonableness or otherwise of an expenditure made by the defendant I must view the matter through the eyes of the defendant and in light of the problem facing it when the expenditure was made. The test of reasonableness is not, in my opinion, entirely based on the importance of the expenditure to success at trial. Hindsight may show that some liabilities assumed were, in the end, of little or no benefit. The question is whether the expense was reasonable and proper in the light of the circumstances which existed at the time it was incurred. The issues raised from time to time by the pleadings and by discovery and production are significant circumstances. The magnitude of the expenditure in relation to the amount at risk in the proceedings is another important consideration. In all cases the party taxing costs has the burden of showing that both the nature of the expense and its amount were reasonable and proper in the circumstances.

[129] When considering expenses associated with expert witnesses in *McAteer v. Devoncroft Developments Ltd.* (2003), 340 A.R. 1, 2003 ABQB 425, Rooke J. said at paras. 232-233, 236-238:

The only objection to these costs was advanced by Mason in relation to Cristall. She argued that because his opinions were rejected at trial ... these costs should be disallowed. In that regard she relied on *Hughes v. Gillingham*....

Billes replied that the reasonableness of disbursements should be assessed at the time the disbursement was made. Here, although Cristall's evidence was not ultimately accepted on the valuation issue, Billes argued that it was reasonable for Billes to provide expert reports and evidence on valuation and business issues. In this regard she relied on *Monashee Petroleum Ltd. v. Pan Cana Resources Ltd.*... She also pointed out that each of the experts was qualified to give evidence, and the areas of their testimony were within the applicable parameters of opinion evidence.

....

In *Hughes*, Lefsrud, J., merely found, without elaborating, that the testimony and reports of two experts were of no "particular assistance" to him. Nonetheless, I am of the view that, unless there is (this list is not intended to be exhaustive but illustrative): a true lack of expertise; the opinion is not on the point of a matter in issue; the conduct of the expert is improper in some sense; or there is some other good reason; the fact that an opinion was ultimately rejected is not by itself sufficient to disentitle a party to the costs of retaining the expert in good faith to opine on a matter of relevance to the court.

The fact that I did not accept Cristall's opinion, and, indeed, found his reasoning absolutely flawed on the primary issue of the value of the shares of DDL ... does not mean that it was imprudent for Billes to have retained him or to have called him. Moreover, as Billes argued, the reasonableness should be assessed at the time the expert was retained, not at the time of trial....

Perhaps Billes should have had very serious concerns about the credibility of advancing the opinion she did through Cristall.... In any event, Cristall's report cannot be characterized as a "totally useless report which never should have been commissioned", such that costs should be denied: *Anderson*, at para. 8. Moreover, Billes could not have completely anticipated my findings and, accordingly, it is relevant to recognize that such "expenses are incurred by ordinary mortals, not by prophets": *Monashee*, at p. 9. This is consistent with the advice offered in *Anderson* at para. 11 that, as it relates to the assessment of the cost of experts:

> "... the court's approach should be generous, reminding itself that litigants must make decisions about the retention of experts well before they have completed all trial preparations."

[130] In *Anderson v. Ball* (1997), 214 A.R. 332 at paras. 3, 10-11 (Q.B.), Veit J. said:

Are expert fees reasonable? Was it reasonable to incur them and is their amount reasonable? It was reasonable for the plaintiff to incur the contested expert fees.

> However, the amount of the fees must be assessed. One way to deal with the problem of determining if expert fees are reasonable is to hear evidence on the point from other experts. The amounts in question in this lawsuit make that process unreasonably expensive. In the absence of such evidence, judges must make their best assessment of what is reasonable from the material available....
>
> ....
>
> A fourth thing to note about experts' reports is that such reports are required in much litigation where the tendency of the court would perhaps be to make erroneous findings of fact about liability or loss without the assistance of such reports. The court should assess the reasonableness of obtaining the report not from the perspective of trial but from the perspective of the party at the time the expert report was commissioned. If getting the report was reasonable at the time, then the fact that the report was not useful at trial, or was not relied on at trial, or was not accepted at trial, is presumably not a factor that will determine whether the report should be paid for by the parties opposite.
>
> A fifth thing to note about the assessment of the cost of experts reports is that the court's approach should be generous, reminding itself that litigants must make decisions about the retention of experts well before they have completed all trial preparations.

[131] In oral argument (see costs hearing transcript, p. 333, ll. 10-16, 19-25), Mr. Champion for the Fullowka Plaintiffs argued:

> I submit that the guiding legal principles are that a court is to consider the complexities and issues that a party is facing well in advance of the completion of its trial preparation and determine whether, in view of all the circumstances of the case, it was reasonable and proper for the party to utilize experts in two ways....
>
> There are two ways in which counsel use experts. The first is to assist counsel in the organization of its case and in preparing for examinations for discovery. And cross-examination at trial. And second, to tender expert evidence at trial whether or not the expertise or the evidence is accepted or relied on by the trial Judge.

In support, he referred this Court to *Nova*, *supra*, *Kernwood Ltd. v. Renegade Capital Corp.*, [1993] O.J. No. 500 (Gen. Div.), aff'd on other grounds (1997), 97 O.A.C. 3 (C.A.), and *Balkos v. Cook* (1994), 29 C.P.C. (3d) 375 (Ont. Gen. Div.), aff'd [1997] O.J. No. 4360 (C.A.).

[132] In that regard, *Narayan v. Djurickovic*, 2004 BCSC 341, is interesting. At paras. 16-17, Wilson J. said:

> Ms. Sheane's opposition to the substance of the application is based upon the following propositions, which I take from the plaintiff's brief:
>
> > 31. Whether disbursements were reasonably incurred and were justified are determined by all of the circumstances of the case....
> >
> > 32. Whether a disbursement or expense was necessarily or properly incurred must be judged by the circumstances existing at the time the disbursement or expense was incurred....
> >
> > 33. Necessary means indispensable to the conduct of the proceeding. Proper means not necessary but nevertheless reasonably taken or incurred for the purpose of the proceeding....
> >
> > ....
> >
> > 35. The costs of expert reports prepared but not relied upon are recoverable if the costs were reasonably incurred in contemplation of, or in preparation for, litigation....
>
> I take those to be the governing principles in the exercise of the discretion conferred by Rule 57(7).

[133] The Fullowka Plaintiffs correctly argue that the Defendants admitted nothing and conceded nothing throughout the litigation, which meant that the Fullowka Plaintiffs could assume nothing. The Fullowka Plaintiffs state that they were required to retain experts because of this, not due to excess or unreasonable caution. Indeed, a lawyer runs the risk of being found negligent if no essential expert is retained. See *Henderson v. Hagblom*, [2003] 7 W.W.R. 590, 2003 SKCA 40, leave to appeal refused [2004] 1 S.C.R. ix.

[134] In *835039 Ontario Inc. v. Fram Development Corp.*, [1994] O.J. No. 2937 (Gen. Div.), cited by CAW National, Trafford J. held, at para. 8, that a manifestly excessive expert claim "must be precipitously reduced", a proposition with which I agree.

[135] In *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.* (1999), 176 F.T.R. 142 (T.D.), var'd on other grounds (2001), 273 N.R. 217, 2001 FCA 137, Reed J. similarly said at para. 20:

> [T]he costs for which a defendant will be required to indemnify a losing party are the reasonable expenses of the litigation. If a party chooses to hire a "Cadillac" of experts, the unsuccessful opposing party will not be responsible to compensate for extravagance....

Also see the comments of Taxing Officer Reinhardt in *AlliedSignal Inc. v. Dupont Canada Inc.* (1998), 81 C.P.R. (3d) 129 at para. 77 (Fed. T.D.).

[136] Rule 641 provides that costs include all "reasonable and proper" expenses incurred in relation to the charges of an expert who gives evidence. However, as noted by CAW National, case law informs that the expenses associated with an expert's evidence will be reduced or disallowed where the evidence was "irrelevant" (*Ramrakha v. Zinner* (1994), 162 A.R. 315 at para. 11 (C.A.)), where the evidence was of "no use to the Court" (*Rushton v. Hofer*, 1999 ABQB 257 at para. 4) or where the cost of the evidence is "highly disproportionate to the value of [the] testimony at the trial" (*Arnusch v. Saskatchewan School Division No. 4* (1998), 162 Sask. R. 154 at para. 14 (Q.B.)). Furthermore, CAW National says that the onus is on the Fullowka Plaintiffs to justify the necessity and reasonableness of their claimed disbursements for experts, especially given the amounts claimed (see *Sidorsky* (1997), *supra* at para. 44).

[137] It is to be noted that, although the Defendants had experts in the very fields the Fullowka Plaintiffs did, the unsuccessful Defendants led no evidence at the costs hearing to demonstrate that the amounts claimed by the Fullowka Plaintiffs are unreasonable or improper.

[138] At the costs hearing, the unsuccessful Defendants asked that $220,851.61 be deducted from expenses claimed for experts, excluding expenses claimed for Brown and Smith. I find this is arbitrary and unsupported by evidence and thus is not meritorious.

[139] Turning to the claims for individual experts, the Defendants unanimously characterized Warren's conduct, motivation and objective to be well outside reasonable norms of human behaviour. The main thrust of the unsuccessful Defendants' objection to the expenses claimed for Dr. Arboleda-Florez is that, until Warren was ordered to be brought to testify, Dr. Arboleda-Florez was to parrot evidence that Warren would give. However, following this Court's order to render Warren up to testify, the Fullowka Plaintiffs were entitled to ask this Court to have Dr. Arboleda-Florez testify on the human behavioural aspect of a person in Warren's circumstances. While I refused to allow Dr. Arboleda-Florez to testify, that does not mean that the Fullowka Plaintiffs' motives were ill-intentioned or that the expenses claimed for him, in the amount of $90,759.42, are unreasonable or improper. The Fullowka Plaintiffs were faced with proving the liability of multiple Defendants, each with unique defences and distinct factual involvement. CAW National asserts that, because Dr. Arboleda-Florez's proposed evidence was of no assistance whatsoever to this Court, no costs ought to be payable with respect to him for the four days of trial time taken up with his attempted qualification (March 1-4, 2004) or the two days spent arguing about postponing his appearance (January 13-14, 2004). However, I note that Dr. Arboleda-Florez had been retained during Warren's criminal trial and had an insight into Warren's personality and, as Mr. Champion for the Fullowka Plaintiffs said in oral argument (see costs hearing transcript, p. 378, ll. 23-26), "[t]he intent of Dr. Arboleda's evidence was to give the Court the contextual framework to correlate all of the evidence about what happened and leading up to September 18th". I also note that Dr. Arboleda-Florez's consultations aided the Fullowka Plaintiffs in preparing for their discoveries of Warren and in reviewing the psychological and psychiatric material produced by Warren. Moreover, the Fullowka Plaintiffs make no claim for $31,444.35 expended for Dr. Arboleda-Florez's services. Thus, the claim made for Dr. Arboleda-Florez in the sum of $90,759.42 is allowed.

[140] Respecting Warren, only with lengthy and persistent grilling, with the aid of several experts consulted by the Fullowka Plaintiffs, did Warren confess, so that he came willingly to testify and

implicated various Defendants. But for that course of action, Warren's evidence would have been evidence against him alone. Moreover, with Warren's evidence, further expert evidence in that area was rendered unnecessary. Dr. Denmark's report went in by consent, and I note that no claim is made for some $2,000.00 expended for his services. MacKay, a forensic behavioural analyst, helped the Fullowka Plaintiffs in preparing for their discoveries of Warren, a very necessary step to gain appreciation of the complexity of Warren's personality. I note that some expenses for MacKay, totalling $75,851.87, are not claimed. In the circumstances, the claim made for MacKay in the sum of $11,409.12 is in order.

[141] The Fullowka Plaintiffs attempted to qualify Ray to give opinion evidence with respect to security practices. Ray was not qualified by this Court, and the unsuccessful Defendants propose that no costs should be payable with respect to his attendance. In fact, unclaimed by the Fullowka Plaintiffs are costs of $100,318.74 because Ray did not testify. The unsuccessful Defendants also dispute the disbursement of $20,118.72 for the expertise of Ray in the field of industrial security standards. However, in my view, consultation with him was necessary to enable counsel for the Fullowka Plaintiffs to prepare for and conduct discoveries of the corporate officers of Royal Oak and Pinkerton's in this area where ordinary counsel would have little knowledge. Thus, the claim made for Ray in the sum of $20,118.72 is in order. In the same vein is the disbursement of $10,375.84 claimed for the Shepp Johnman firm, which provided strategic advice about security services. That disbursement is allowed. The sum of $5,700.00 for Gerard Seguin is likewise in order.

[142] Because this Court found the evidence of Dr. Strahlendorf (Reasons for Judgment at para. 470) and Plummer (Reasons for Judgment at para. 491) of little assistance, the unsuccessful Defendants oppose any costs award with respect to their expenses. Alternatively, the unsuccessful Defendants submit that the amounts claimed by the Fullowka Plaintiffs with respect to these experts are excessive under the circumstances and "the burden of showing that both the nature of the expense and its amount were reasonable and proper in the circumstances" (*Petrogas Processing*, *supra* at para. 47) has not been met.

[143] Respecting Dr. Strahlendorf and Plummer, I reiterate the comment of O'Leary J. in *Petrogas Processing*, *supra* at para. 47, that "[t]he question is whether the expense was reasonable and proper in the light of the circumstances which existed at the time it was incurred". Counsel for the Fullowka Plaintiffs would not have properly fulfilled their obligations to their clients had they not retained, prepared and presented these witnesses. Dr. Strahlendorf initially assisted the Fullowka Plaintiffs in preparation for discoveries. Although I ruled that his evidence in occupational health and safety, like that of Dr. Fisher in industrial relations and bargaining, was somewhat utopian, his evidence and prior consultation were necessary. The claimed disbursement of $31,058.14 is allowed. Respecting Plummer, while counsel for the GNWT damaged his testimony immeasurably, the same counsel relied on much of his evidence in argument. That being the case, I find the Fullowka Plaintiffs' claim of $20,340.51 for Plummer to be in order. Thus, the expenses claimed for Dr. Strahlendorf and Plummer are allowed.

[144] Before moving on, I note that, in oral argument (see costs hearing transcript, p. 443, ll. 10-11), Mr. Gibson for the GNWT contended in relation to Dr. Strahlendorf and Plummer that "there was a lot of commonality in what they had to address". However, no extracts were taken from the disk provided by counsel for the Fullowka Plaintiffs to enlighten this Court as to each component

that made up the sum claimed. More importantly, the argument fell flat when Mr. Gibson said, "They had distinct perspectives" (see costs hearing transcript, p. 443, ll. 4-5).

[145] CAW National argues that Dr. Fisher's evidence was rendered valueless on cross-examination given no reference to him in this Court's Reasons for Judgment and that this is a compelling case of expert evidence being irrelevant or of no use to this Court. As such, it is proposed that no amount be awarded in relation to Dr. Fisher's evidence or the half-day of trial that his evidence consumed. However, as I am satisfied that the Fullowka Plaintiffs have met the test and onus in the authorities cited *supra*, the expenses claimed of $55,089.86 are in order.

[146] Pelletier was an explosives expert with a 37-year career in the RCMP and Canadian military. This is an area about which no ordinary counsel has the requisite knowledge and accordingly counsel would be in need of the benefit of such expertise. I note that no claim is made for some $4,200.00 expended for his services.

[147] Although I disallowed claims for management fees, it was in order for the Fullowka Plaintiffs to proffer evidence in that respect. The disbursement of $28,683.86 for Smith is allowed. Had I allowed management fees, I was prepared to adopt his calculations.

[148] CAW National and Pinkerton's argue that this Court should reduce the expenses claimed relating to Brown's testimony and reports. In urging this Court to award only 10% of the claimed expenses, Pinkerton's highlights that many of the 18 binders prepared by Brown were found to be unhelpful to this Court. In support, it refers to *Ellis v. Friedland* (2000), 276 A.R. 364 at 368 (Q.B.), aff'd [2003] 7 W.W.R. 201, 2003 ABCA 60, where McMahon J. found that, while it was reasonable to call the expert evidence, it was "problematic and speculative". He thus awarded about one-sixth of the expert expenses claimed.

[149] Economic evidence was necessary in the areas in which Brown proffered evidence. Initially, she presented nine binders and a main summary binder. Errors were found in the PCRs and income tax areas and nine revised binders were presented as the trial began. In oral argument, Mr. Russell for the Fullowka Plaintiffs said that, but for the insistence of counsel for the Defendants, the error-stricken first nine binders would not have been used. I am of the view that, since Taunton's rebuttal was premised on the first nine binders, there was little understanding of the Fullowka Plaintiffs' position without the first nine binders. The numbers in the first nine binders matched the numbers in the original report, while the numbers in the second nine binders matched the numbers in the second report. The first nine binders were not only of historical interest. Taunton's report and evidence were difficult to comprehend without the first nine binders.

[150] This Court relied in great part on Brown's calculations and Brown's report notwithstanding the comment of Mr. Russell for the Fullowka Plaintiffs that "[w]ell, half of it I agree was completely useless" (costs hearing transcript, p. 409, ll. 23-24). Nevertheless, suffice it to say, her report and evidence were overkill in its most extreme form. They often bore little relationship to the facts proven at trial and referenced contingencies that bore little or no connection to this case. In contrast, Taunton's report, complete with backup material, was succinct.

[151] Disbursements sought for Brown total $340,164.82. Unclaimed expenses for her total approximately $200,000.00. I need not repeat this Court's frustration with this witness at trial, to say nothing of the additional consumption of time by this Court subsequent to the trial to appreciate the purport of her evidence. However, although I disallowed claims for tax gross-up, it was in order for the Fullowka Plaintiffs to proffer evidence in that respect. While I find the comment by Mr. McBean for Royal Oak that this was "a simple *Fatal Accidents Act* assessment" (costs hearing transcript, p. 451, l. 10-11) to be insulting, the same counsel described the claims as unique. As for the unsuccessful Defendants' attempt to impugn the Fullowka Plaintiffs' claim for Brown by relying on Dr. Chris Bruce's schedule of charges for economic assessment in fatal accident cases, that is a schedule of charges for assessments only, containing nothing about trial time or such things as PCRs and multiple claims with which this Court had to deal. In the circumstances, the Fullowka Plaintiffs' disbursement claim for Brown is reduced to $100,000.00.

Warren's Trial Attendance

[152] I agree that Warren's evidence at trial was significant. Notwithstanding my Order dated March 31, 2004, that the Fullowka Plaintiffs pay "in any event of the cause, all reasonable and necessary Trial Attendance Expenses", they now ask that I revisit this issue. In support thereof, they cite *R. v Adams*, [1995] 4 S.C.R. 707, where the Supreme Court of Canada, per Sopinka J., stated at para. 29:

> A court has a limited power to reconsider and vary its judgment disposing of the case as long as the court is not *functus*. The court continues to be seized of the case and is not *functus* until the formal judgment has been drawn up and entered. See *Oley v. City of Fredericton* (1983), 50 N.B.R. (2d) 196 (C.A.). With respect to orders made during trial relating to the conduct of the trial, the approach is less formalistic and more flexible. These orders generally do not result in a formal order being drawn up and the circumstances under which they may be varied or set aside are also less rigid. The ease with which such an order may be varied or set aside will depend on the importance of the order and the nature of the rule of law pursuant to which the order is made. For instance, if the order is a discretionary order pursuant to a common law rule, the precondition to its variation or revocation will be less formal.

[153] I decline to revisit this issue as no compelling argument has been advanced to cause me to review my earlier ruling.

[154] I have been advised that all Third Party issues between the GNWT and Her Majesty in Right of Canada and Ministers thereof have been resolved, thus I make no ruling in respect thereof.

Counsel Travel Expenses, Counsel Travel Expenses re Experts, Discovery/Formal Interview Expenses, Witnesses' Expenses, Counsel Flights re Trial, Counsel Accommodation re Trial, Counsel Expenses re Trial

[155] The Fullowka Plaintiffs' claims for counsel travel expenses ($55,077.77), counsel travel expenses re experts ($4,028.39), discovery/formal interview expenses ($34,483.10) and witnesses' expenses ($51,614.92) total $145,204.18. These four items entail some 285 entries on the disk provided by counsel for the Fullowka Plaintiffs. Simply put, Mr. Kanee for CAW National determined that there was insufficient time to deal properly with these items but urged this Court to reduce the sum for these items arbitrarily to $100,000.00. As the unsuccessful Defendants acknowledge that the Fullowka Plaintiffs expended the sums claimed, it is not for this Court to bury itself in minutiae if this Court deems the sum appropriate. Consequently, there will be no reduction for these four items on this basis.

[156] In this litigation, counsel for Seeton was the only resident counsel and counsel for the GNWT maintained offices here. Seeton specifically urges this Court to disallow the travel and accommodation expenses of counsel for the Fullowka Plaintiffs.

[157] In *Dennis v. N.W.T. (Commr.)*, [1990] N.W.T.R. 97 (S.C.), the defendant's counsel was a non-resident member of the Bar. At issue at the adjudication on costs was whether the unsuccessful plaintiff should be required to reimburse the defendant for its counsel's travel expenses. The plaintiff argued that the defendant's staff lawyers in Yellowknife could have represented the defendant. In disallowing the travel expenses, Richard J. held at 98-99:

> In considering this matter, I am mindful of a practice which existed for many years in this jurisdiction (if my memory serves me correctly, as I can find no written record of the practice) of the disallowance by the taxing officer of travel disbursements incurred by a litigant in retaining non-resident counsel unless special circumstances existed to show that it was not reasonable to retain resident counsel. Given the increased size of the resident bar today, I am of the view that this is a practice or guideline which should continue, unless "special circumstances" are shown. Litigants are free, of course, to choose to retain non-resident members of the bar, but it may not be just or fair to "pass on" the cost of that choice to the other party to the litigation as of course.

[158] The issue arose subsequently in a proceeding related to the subject action in *Seeton v. Commercial Union Assurance Co. of Canada* (1999), 41 C.P.C. (4th) 361 (N.W.T.S.C.). There, all three counsel representing the three successful respondents resided outside the jurisdiction, one in Edmonton, one in Calgary and the other in Vancouver. The respondents sought to recover the cost of travel to Yellowknife for the cross-examinations of the applicants and for the hearing. The costs ranged from $2,000.00 to $3,000.00 for each counsel. In disallowing the travel expenses, Vertes J. said at paras. 3-8:

> Rule 648(4) of the Rules of Court provides the current guidelines:
>
> > (4) The proper travelling and living expenses of a solicitor who does not reside in the Territories are recoverable under subrule (3) only where, in the opinion of the Court,

> (a) the expertise required to perform the particular service was not available from those solicitors resident in the territories; or
> (b) conflicts of interest prevented solicitors resident in the Territories from acting in the matter.

The issue in the litigation was a relatively complex question of insurance law. It required some expertise but certainly not to an extraordinary degree. Expertise, however, was not the particular concern. The claim for recovery of these costs was placed primarily on the lack of local counsel available due to conflicts of interest. This litigation is related tangentially to other litigation involving the three applicants and a veritable host of other parties. I think it is fair to say, though, that the respondent companies wanted these particular counsel to represent them in this litigation. I heard about the difficulties these counsel had in obtaining local agents but nothing about whether the clients attempted to obtain local representation initially.

Rule 648(4) makes reference to subrule (3). That subrule speaks specifically of travel expenses for counsel for attendance at *pre-trial* examinations. Notwithstanding that specific reference, the criteria set forth in subrule (4) above have been the generally recognized ones for all types of proceedings (including motions, trials, and appeals). It is based on the accepted principle that some special circumstance must justify the retention of non-resident counsel if recovery for the additional costs (such as travel) incurred thereby is sought from the other side. Reference can be made to *Dennis v. Northwest Territories (Commissioner)*, [1990] N.W.T.R. 97 (N.W.T.S.C.), and *Shearing v. Fullowka* (October 20, 1998), Doc. Yellowknife CA 00736 (N.W.T.C.A.).

The approach adopted in this jurisdiction attempts to achieve a balance between (a) the reality that, while the resident bar has grown in size and expertise, there may be times when the necessary legal service is not locally available, and (b) the traditional rule in most jurisdictions that the client is responsible for putting its counsel at the place of trial at its own expense (see, for example, *Westmount Transfer Ltd. v. Mill-Joy Enterprises Ltd.* (1975), 18 N.S.R. (2d) 94 (N.S.T.D.)).

Considering the number of lawyers now resident in the jurisdiction, and the experience level of many of them, I am not totally convinced that the respondents could not have retained local counsel. Even if I was satisfied that the criteria in subrule (4) were satisfied, there is further cause to exercise my discretion in favour of the applicants.

The respondent companies chose to do business in this jurisdiction. They collected premiums from the applicants. The controversy in this litigation raised a genuine and serious issue about the extent of the policy coverage for which those premiums were paid. It seems to me that if the respondents choose to do business here for the economic benefits then the fact that they incur some additional expense by choosing

> to retain outside counsel is part of the cost of doing business (as it also may be for non-resident counsel who choose to do business in the jurisdiction).

[159] The decisions of Richard and Vertes JJ., *supra*, are in my view fact-specific and thus distinguishable. This was not a case of lack of local expertise, rather there were obvious and known conflicts of interest within the Bar. In my view, this litigation so permeated this City with emotion that it is highly doubtful that counsel could be found who would be without conflict. Even Seeton's counsel was caught short at least once because of a conflict with a witness.

[160] I, therefore, decline to disallow the travel and accommodation expenses of counsel for the Fullowka Plaintiffs as urged by Seeton.

[161] What is fair for one is fair for all, including the GNWT, so those parties being awarded costs herein who retained outside counsel are entitled to reasonable travel and accommodation expenses for their counsel.

Faxing

[162] At the costs hearing, the unsuccessful Defendants took issue with the Fullowka Plaintiffs' disbursement for faxing in the sum of $13,373.70, which the unsuccessful Defendants understood to be charged at $1.00 per page. That understanding was not contradicted by the Fullowka Plaintiffs. The unsuccessful Defendants urged me to follow *Gainers Inc. v. Pocklington Holdings Inc.* (1996), 182 A.R. 78 (Q.B.), as do Alberta's taxing officers, and allow faxing at 15¢ per page. I so order, thereby reducing the disbursement for faxing to $2,005.95.

Photocopying

[163] At the costs hearing, the unsuccessful Defendants understood the disbursement for in-house photocopying of $75,306.76 to be charged at 25¢ per page, which was not contradicted by the Fullowka Plaintiffs. The unsuccessful Defendants argued that 15¢ per page is appropriate. In support, they cited *Millott Estate v. Reinhard* (2002), 322 A.R. 307 at paras. 71-80, 2002 ABQB 998; *Sidorsky* (1997), *supra* at para. 46; *V.A.H.*, *supra* at para. 48; and *Dechant v. Law Society of Alberta* (2001), 277 A.R. 333 at paras. 24, 30, 2001 ABCA 81, leave to appeal refused [2001] 3 S.C.R. vi. I agree that 15¢ per page is appropriate, but I am not convinced of the necessity to round down the total to $25,000.00. Thus, the Fullowka Plaintiffs' disbursement for in-house photocopying is reduced to $45,184.06.

Printing

[164] The Fullowka Plaintiffs claim $28,744.42 for printing. At the costs hearing, the unsuccessful Defendants submitted that this claim, which they understood to be charged at 25¢ per page, should be likened to photocopying. I agree. However, they also submitted that it should be disallowed or at best calculated at a rate of 10¢ per page, the latter being the rate currently applied by Alberta's taxing officers. In the result, I apply the rate of 10¢ per page, reducing the Fullowka Plaintiffs' claim for printing to $11,497.77.

Disbursements Subsumed in Fees

[165] It is clear from the Fullowka Plaintiffs' disbursement enumeration that some items claimed are properly viewed as subsumed in the fees recoverable and therefore should be disallowed. I reference Slatter J.'s comments in *Hansraj v. Ao* (2002), 314 A.R. 283 at para. 17, 2002 ABQB 772:

> A disbursement must generally be an amount payable to a third party, must be an expense specifically related to the file in question, and must be something over and above the general overhead expenses of the lawyer. A disbursement is not allowed if it is merely a disguised form of fee for the lawyer, as those are to be taxed in accordance with the Schedule.

and McMahon J.'s comment in *Murphy Oil Canada Ltd. v. Predator Corp.*, 2005 ABQB 134 at para. 36:

> Predator objects to the Plaintiffs' claims for costs for electronic research. The weight of authority in this province is that electronic research costs are not an allowable disbursement because they are contemplated under the fees portion of Schedule C: *Pauli v. Ace Ina Insurance*, (2003), 336 A.R. 85, 2003 ABQB 600, varied on other grounds (2004), 354 A.R. 348, 2004 ABCA 253; *Moser v. Derksen*, [2003] A.J. No. 231 (Q.B.); *Westline Oilfields Construction Ltd. v. Petromet Resources Ltd.*, [2002] A.J. No. 1333, 2002 ABQB 934; and *Leadbeater v. DCS Systems Ltd*, [2004] A.J. No. 954 (Master). I agree.

[166] In *Strandquist v. Coneco Equipment*, 2000 ABCA 138 at para. 7, the Court said:

> Most courts do not allow a fee for this without special circumstances, largely because it is a substitute for lawyers' work and so in theory already covered by the other fee items in Schedule C....

[167] The items that are disallowed on this basis are:

Research	$5,401.44
IT Services	$11,028.25
Computer Research	$4,026.68
E-Carswell	$5,583.86
Quicklaw	$112.80
	$26,153.03

Conclusion

[168] I make one final comment respecting the unsuccessful Defendants' document entitled "Defendants' Position on Disbursements". It is that the deductions put to this Court for consideration were, in my view, for the most part arbitrarily selected and without satisfactory foundation. I invited counsel for the unsuccessful Defendants to seek an adjournment to enable them to explore more thoroughly the disk provided by counsel for the Fullowka Plaintiffs and to call evidence. That invitation was declined. Consequently, disbursements allowed in the Fullowka action total $883,811.87.

O'NEIL ACTION DISBURSEMENTS

[169] O'Neil seeks disbursements in the sum of $199,326.18 detailed as follows:

Experts' fees and expenses Cara Brown	$13,397.60	
Dr. R. Spelliscy	1600	
Dr. H. Juergens	3707.5	
Dr. G. Passey	24194	
Dr. W. Crouse	7233	
Dr. W. McCay	4375	
Dr. C.M. James	4583.68	
Dr. R. Wheeler	675	
		$59,765.78
Airfare and accommodation charges for expert witnesses attending at trial Dr. Spelliscy	$722.08	
Dr. H. Juergens	998.08	
Dr. G. Passey 942.16 972.08	1914.24	
Dr. W. Crouse	1112.16	
Dr. C.M. James	1210	
		$5,956.56
Travel and related expenses, J. O'Neil Travel and related expenses, attendance in Edmonton, June 17, 2002	$1,358.47	
Attendance in Edmonton for examinations for discovery in July and August, 2002, and January 2003, and attendances in Edmonton to brief evidence for trial in June, August and October 2003	2770.35	

Travel and related expenses, attendance at trial	2224	
		$6,352.82
Paid travel and related expenses of Robert Kosta Attending in Edmonton at examination for discovery		$163.48
Travel expenses, J.E. Redmond Pre-trial attendances in Yellowknife	$5,891.36	
Attendance at pre-trial conference, Calgary, April 11, 2003	267.72	
Travel to Vancouver and Victoria to brief Dr. G. Passey and Dr. W. Crouse, October, 2003 and December, 2003 respectively	1251.03	
Airfare, attending in Yellowknife at trial	15055.38	
		$22,465.49
Ground transportation and parking re Attendance at trial		$715.47
J.E. Redmond, accommodation in Yellowknife during trial		$44,600.00
Meal expenses in Yellowknife during trial		$531.21
Court Reporters Pretrial	$28,997.17	
Trial transcripts	1635.6	
		$30,612.77
Courier, long distance, photocopying, postage, faxes, laser-printing, consultants (see breakdown attached)		$27,058.02
Restricted Appearance Certificate and Renewals		$3,214.05
TOTAL		$201,435.65
Less: Witte Judicial Review disbursements		2109.47
Net total disbursements		$199,326.18

[170] O'Neil's counsel had a difficult role to play in this litigation. It was necessary for him to rely on the Fullowka Plaintiffs to elicit evidence whenever possible to minimize O'Neil's costs, yet he was required to be ever vigilant in respect of the evidence the Fullowka Plaintiffs obtained so that it could be supplemented, if necessary, to aid O'Neil. The additional task faced by O'Neil's counsel was that counsel for the Defendants often directed their attacks at O'Neil as they peppered the Fullowka Plaintiffs, thus requiring O'Neil's counsel to be at the ready to cross-examine those whose evidence impacted adversely on O'Neil's case.

[171] This course of action also made it necessary for O'Neil's counsel to study the Fullowka action's witnesses' transcripts and related documents, including exhibits, particularly when he was not present in Court. This meant the continuation of an examination of a witness in the Fullowka action, a Defendant or a witness adverse in interest where there was impact on O'Neil's case.

O'Neil's counsel had to walk a very fine line to take advantage of any benefit gleaned from the Fullowka action yet maintain independence. I note that Mr. Redmond discharged his professional obligation with competence and integrity.

[172] I endorse Mr. Redmond's remarks that he performed his tasks for O'Neil whenever possible with a view to keeping the costs down, such that it behooves this Court to consider O'Neil's claimed disbursements with that in mind, so long as those claimed are reasonable and proper. I note also that the unsuccessful Defendants had little or nothing of note by way of disagreement with O'Neil's claimed disbursements.

[173] I will not repeat my comments in respect of like disbursements in the Fullowka action, except to add that Brown's evidence for O'Neil was well prepared, orderly and succinctly presented.

[174] My review of the disbursements claimed by O'Neil causes me to disallow only $3,214.05, which is being claimed for "Restricted Appearance Certificate and Renewals". I, therefore, allow disbursements in the O'Neil action in the sum of $196,112.13.

SUCCESSFUL DEFENDANTS

Parties' Positions

[175] The Fullowka Plaintiffs' submissions with respect to the successful Defendants are put thusly at paras. 127-128 of their Costs Brief:

> This Honourable Court did not find that Witte, Sheridan, Whitford or Turner (the "successful" Defendants) were liable to the Plaintiffs, which raises the question of their costs....
>
> With respect to the successful Defendants, the Plaintiffs respectfully submit that the Court should either:
>
> a) Award no costs to the successful Defendants, because they joined with the unsuccessful Defendants in a "general defence" to the Plaintiffs' claims; or
>
> b) Order that the successful Defendants' costs be paid by the unsuccessful Defendants, pursuant to a Sanderson Order.

[176] O'Neil asks that claims for costs by the successful Defendants be dismissed or, in the alternative, says that the issuance of a Sanderson Order granting the successful Defendants costs as against the unsuccessful Defendants would be appropriate.

[177] Whitford, Turner and Gould collectively seek party-party costs equal to 20% of double Column 6 costs, plus 20% of reasonable disbursements, from the Fullowka Plaintiffs and from O'Neil. Witte and Sheridan collectively seek party-party costs equal to double Column 6 costs for

most Schedule A items plus reasonable lump sums for certain items, plus reasonable disbursements, from the Fullowka Plaintiffs and from O'Neil. Witte and Sheridan propose two methodologies, the first awarding 100% of the pre-trial costs and 50% of the common costs related to their defence and the second awarding the incremental costs associated with their defence, including the necessity of one extra counsel.

General Defence

[178] The Plaintiffs argue that a defendant is not entitled to costs if he or she joins in a general defence of a plaintiff's claims. See *Dix v. Canada (Attorney General)* (2002), 315 A.R. 139, 2002 ABQB 768.

[179] I am satisfied that this was the case with respect to some of the successful Defendants, namely, Whitford, Turner and Gould. In so finding, I acknowledge that I am departing from the principle that a successful party is generally entitled to his or her costs. However, there is authority for departures for very good reason.

[180] It is the complete joinder of Whitford, Turner and Gould in the general defence of the GNWT that causes me to depart from the aforesaid principle. There will be no costs to these successful Defendants as they would have testified and did testify in an endeavour to establish the defences pleaded by the unsuccessful Defendant, the GNWT.

Bullock and Sanderson Orders

[181] Bullock and Sanderson Orders allow for the transfer of costs of successful defendants onto unsuccessful defendants. Bullock Orders provide that the plaintiff bear the costs of the successful defendants, upon which the plaintiff is entitled to collect those costs from the unsuccessful defendants. In contrast, Sanderson Orders provide that the successful defendants collect costs directly from the unsuccessful defendants, avoiding the circuity of Bullock Orders as was noted by Ritter J., as he then was, in *Dix*, *supra*.

[182] The applicable tests for issuing Sanderson and Bullock Orders are identical and are set out by Murray J. in *Simpson v. Bender* (1996), 180 A.R. 220 at para. 9 (Q.B.):

> In Alberta we have developed a three part test for determining the propriety of awarding a *Bullock* or *Sanderson* Order. This test was enunciated by Bury, D.C.J., and *MacLeod v. Great West Distributors Ltd.*, [1941] 3 W.W.R. 827 (Alta. Dist. Ct.), at 829 where his Honour said:
>
> > "To justify an order in either form the facts must satisfy the judge, in the exercise of his discretion: (1) That it was, in the circumstances of the case, reasonable for the plaintiff to join the successful defendant (Collins, M.R., in *Bullock v. London Gen. Omnibus Co.*, [1907] 1 K.B. 264, at 269, 76 L.J.K.B. 127, approved as the proper test by Vaughn Williams, L.J., in *Besterman v. Br. Motor Cab Co.*, [1914] 3 K.B. 181; 83 L.J.K.B. 1014); (2) That there is no good cause for depriving the successful defendant of his costs (*Sanderson v. Blyth Theatre Co.*, [1903] 2 K.G. 533 (C.A.)); and (3) That as between the co-defendants the unsuccessful defendant was wholly responsible for the action, or to use the words of Jessell, M.R. in the *Rudow* case, that the unsuccessful defendant 'is liable to them [his co-defendant costs] as between himself and his co-defendant'."
>
> This test has been adopted by this court in *Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1994), 170 A.R. 341; 26 Alta. L.R. (3d) 16, and *Wenden v. Trikha et al.* (1992), 124 A.R. 1; 1 Alta. L.R. (3d) 283 (Q.B.). In this case the plaintiff was acting reasonably in joining the successful defendants and there is not good reason for depriving the successful defendants of their costs. However, defendants were not wholly responsible for the action. I do not view this as an obstacle. This court has the discretion to award the plaintiff relief for her obligation to pay the successful defendants' costs as against the unsuccessful defendants.

[183] In assessing the reasonableness of joining Witte and Sheridan pursuant to the first prong of the test, *Badger v. Surkan* (1972), 32 D.L.R. (3d) 216 at 228-229 (Sask. C.A.), offers the following guidance:

> In my opinion, the plaintiff, in instituting the action against both Dr. Surkan and Holy Family Hospital, did only what was reasonable in the circumstances. At the time the action was commenced, the plaintiff could not know, if there was negligence, whether that negligence was attributable to the doctor or to the hospital. Under these circumstances, his action in suing both defendants was reasonable.

[184] Here, I find that it was reasonable for the Plaintiffs to join all parties to the litigation.

[185] Turning to the second prong of the test, which considers whether there is good cause to deprive successful defendants of their costs, the Plaintiffs argue that the successful Defendants joined with the unsuccessful Defendants in a general defence against the Plaintiffs. I do not accept this argument as it pertains to Witte and Sheridan but rather find that they incurred increased expenses beyond that which can be properly attributed to a general defence of the actions.

[186] Considering the third prong of the test, I have already found that the unsuccessful Defendants were wholly responsible for the actions.

[187] Therefore, I find that a Sanderson Order is appropriate with respect to the costs of Witte and Sheridan in both actions, such that they are payable by the unsuccessful Defendants jointly and severally.

Quantum of Party-party Costs for Witte and Sheridan

[188] As to quantum, Witte and Sheridan seek party-party costs equal to double Column 6 costs for most Schedule A items plus reasonable lump sums for certain items, plus reasonable disbursements.

[189] Payment into Court can have an impact on costs awards. In October 1998, nominal payments of $90.00 and $10.00 were paid into Court by Sheridan with respect to the Fullowka action and the O'Neil action respectively. In February and March 1999, nominal payments of $90.00 and $10.00 were paid into Court by Witte with respect to the Fullowka action and the O'Neil action respectively.

[190] Rules 192 and 206 govern the costs consequences of payment into Court. They read:

> 192. Where money is paid into court under subrule 189(1) in respect of a claim and the plaintiff does not recover at trial a sum, including the amount payable pursuant to a counterclaim that would have been surrendered, greater than the amount paid in, the plaintiff is entitled to party and party costs to the day on which notice of the payment was served on the plaintiff and the defendant who made the payment is entitled to solicitor and client costs from that day.
>
> 206.(1) Notwithstanding the costs consequences set out in rules 192 and 201, the Court may make any order or disposition with respect to costs that it determines to be in the interests of justice in the circumstances of the case.

(2) Nothing in this Part prevents the Court from fixing the amount of any costs.

[191] Relying on *Fair v. Jones* (1999), 48 R.F.L. (4th) 279 (N.W.T.S.C.), and *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (C.A.), Witte and Sheridan do not claim solicitor-client costs for all steps taken subsequent to the dates of service of notice of the payments, as they properly recognize that claims such as theirs have not been well received by Courts in the past. Instead, they endorse the view that their costs ought to be determined pursuant to this Court's general discretion to set costs.

[192] Witte and Sheridan then note a judicial reluctance towards awarding solicitor-client costs where payments into Court are, as here, nominal. By way of illustration, they point to *Garofalo v. Canada Safeway Ltd.*, [1998] O.J. No. 901 at para. 6 (Gen. Div.), where Kozak J. determined the offer to be a token or nominal one, "calculated to gain a costs advantage as opposed to settling the action", and so ordered party-party costs. Nevertheless, Witte and Sheridan ask that I consider the nominal payments into Court as a factor in exercising my discretion to determine a just and equitable award of party-party costs.

[193] Having considered the submissions made and authorities cited, I award Witte and Sheridan party-party costs totalling $281,005.87, calculated in accordance with the first methodology outlined in their Costs Brief at paras. 23-26 and utilized in preparing the Draft Bill of Costs appended at Tab 2 of their Costs Reply Brief. In my view, the first methodology is the preferable one, resulting in a reasonable award of party-party costs. I further order that these costs be payable as between Defendants in the same proportions as are the costs payable to the Plaintiffs.

[194] Fees and disbursements not specifically addressed herein are not addressed as counsel did not take issue with them or submissions made were considered to not be sufficiently meritorious to have any impact on a cost issue and therefore I make no award of costs respecting such fees and disbursements.

CONCLUSIONS

[195] In summary, the costs awarded to the Fullowka Plaintiffs are as follows:

(a) party-party fees of $2,826,560.00, plus disbursements of $883,811.87, payable jointly and severally by the unsuccessful Defendants, the unsuccessful Defendants' liability for costs being in the same proportion as their respective ability to make good the damage or loss;

(b) enhanced costs of $150,000.00 payable by CAW National;

(c) enhanced costs of $10,000.00 payable by Seeton; and

(d) enhanced costs of $50,000.00 payable by Warren.

[196] O'Neil is awarded party-party fees of $281,280.00, plus disbursements of $196,112.13, payable jointly and severally by the unsuccessful Defendants, the unsuccessful Defendants' liability for costs being in the same proportion as their respective ability to make good the damage or loss.

[197] Witte and Sheridan are awarded costs of $281,005.87, payable jointly and severally by the unsuccessful Defendants and payable as between Defendants in the same proportions as are the costs payable to the Plaintiffs.

[198] The Parties have leave to speak to costs of this application and of settling the judgment roll.

A.M. LUTZ
J.S.C.

Dated this day of July, 2005.

Counsel for the Plaintiffs: Sheila Fullowka, Doreen Shauna Hourie, Tracey Neill, Judit Pandev, Ella May Carol Riggs, Doreen Vodnoski, Carlene Dawn Rowsell, Karen Russell and Bonnie Lou Sawler	J. Philip Warner, Q.C., Jeffrey B. Champion, W. Benjamin Russell and Lillian H. Riczu
Counsel for the Plaintiff: James A. O'Neil	James E. Redmond, Q.C.
Counsel for the Defendants: Royal Oak Ventures Inc., Margaret K. Witte and William J.V. Sheridan	Robert G. McBean, James T. Neilson and David P. Wedge
Counsel for the Defendant/Third Party: Pinkerton's of Canada Limited	John M. Hope, Q.C., Norma J. Mitchell and Jennifer S. Jones
Counsel for the Defendants: Government of the Northwest Territories, Anthony W.J. Whitford, David Turner and Lloyd Gould	Peter Gibson, Christine Pratt and Randal Carlson
Counsel for the Defendants: Canadian Autoworkers National and	

Basil E. Hargrove	Lyle S.R. Kanee and Patrick Nugent
Counsel for the Defendant:	
Timothy Alexander Bettger	S. Leonard Polsky and Heather Sanderson
Counsel for the Defendant:	
Harry Seeton	Austin F. Marshall and James Mahon
Counsel for the Defendant:	
Roger Wallace Warren	James D. Brydon and Betty Lou McIlmoyle
Allan Raymond Shearing:	Unrepresented
Counsel for the Third Parties:	
Her Majesty the Queen in Right of Canada and certain Federal Ministers	James N. Shaw and Tracy King

CV 05408

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Plaintiffs

- and -

ROYAL OAK VENTURES INC., (formerly Royal Oak Mines Inc.), MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, DALE JOHNSTON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE, and RICHARD ROE NUMBER THREE

Defendants

- and -

ROYAL OAK VENTURES INC., (formerly Royal Oak Mines Inc.), HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, CANADA, AND THE MINISTER OF LABOUR, CANADA and THE ROYAL CANADIAN MOUNTED POLICE AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Third Parties

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE A.M. LUTZ

CV 07028

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

JAMES A. O'NEIL

Plaintiff

- and –

MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., ROGER WALLACE WARREN, PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVID TURNER, LLOYD GOULD, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS LOCAL 4, HARRY SEETON, CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, ROSS SLEZAK, THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, BASIL E. HARGROVE, THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA LOCAL 2304, LISA EVOY as Administrator of the Estate of the late James Milton Evoy, deceased, DALE JOHNSTON, ROBERT KOSTA, HAROLD DAVID, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, WAYNE CAMPBELL, SYLVAIN AMYOTTE, GORDON ALBERT KENDALL, EDMUND SAVAGE, JOE RANGER, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER AND TERRY LEGGE

Defendants

- and –

ROYAL OAK MINES INC., HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA, AND THE MINISTER OF LABOUR CANADA, THE ROYAL CANADIAN MOUNTED POLICE AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE, PINKERTON'S OF CANADA LIMITED

Third Parties

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE A.M. LUTZ