Date: 2019 04 10
Docket: S-1-CV 2014-000-056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

Plaintiff

-and-

923115 N.W.T. LIMITED o/a PIN/TAYLOR ARCHITECTS, AMEC AMERICAS LIMITED o/a AMEC EARTH AND ENVIRONMENTAL, AMEC EARTH AND ENVIRONMENTAL, a division of AMEC AMERICAS LIMITED, ENCOMPASS INC. o/a ARCTIC FOUNDATIONS OF CANADA, ARCTIC FOUNDATIONS OF CANADA INC., IGOR HOLUBEC, IGOR HOLUBEC CONSULTING INC., EBA ENGINEERING CONSULTANTS LTD., JOHN ARMSTRONG, BRAD R. NELSON, JOHN ARMSTRONG and BRAD R. NELSON, carrying on business as a partnership under the firm name of ARMSTRONG AND NELSON ENGINEERS AND LAND SURVEYORS, 851791 N.W.T. LTD. o/a ROWE'S CONSTRUCTION and DOWLAND CONTRACTING LTD.

Defendants

MEMORANDUM OF JUDGMENT ON COSTS

[1] The defendants Igor Holubec and Igor Holubec Consulting Inc. (together, "Holubec" or the "Holubec defendants") were awarded summary judgment and granted party-and-party costs: *The Commissioner of the Northwest Territories v 923115 NWT Limited et al.*, 2018 NWTSC 24. With the Plaintiff's consent, the issue of the scale of costs was re-opened and argued in Chambers.

[2] In the Notice of Motion, Holubec seeks the following;

a. An order for costs on a solicitor-and-client scale for defending the action and reasonable disbursements;

b. An order for costs on a solicitor-and-client basis for all fees and reasonable disbursements incurred in the costs application; and

c. An order for punitive costs against the Plaintiff.

BACKGROUND

[3] The facts giving rise to the lawsuit and, in particular, the Holubec defendants' role in it, are set out in *The Commissioner of the Northwest Territories v 923115 NWT Limited et al., supra*. The essential facts are summarized here.

[4] The lawsuit was filed April 9, 2014. The Plaintiff alleged that (1) the defendant Arctic Foundations of Canada Inc. ("AFC") hired Holubec to provide geotechnical engineering services for the design, manufacture and installation of a thermosyphon foundation and gravel pad for a school; (2) Holubec reviewed and approved the design for the foundation and gravel pad, as well as providing advice on site drainage; (3) the Plaintiff relied on Holubec to design and install the foundation and gravel pad; (5) Holubec was negligent in the advice provided, specifically, Holubec fell short of the standard of care expected of a professional engineer; and (6) because of Holubec's negligence, the foundation failed.

[5] The school was completed in 2008. While it is not clear exactly when the serious issues with the school first arose, cracks in the flooring and other problems were reported by members of the Plaintiff's staff in 2012.

[6] Mr. Holubec's advice is contained in a written report dated September 8, 2005. This was in the Plaintiff's possession when it filed the suit in 2014. The report is four pages long. Drawings of the thermosyphon foundation are attached to it. These are marked "draft" and they were not prepared by Mr. Holubec. He did, however, add schematics of proposed drainage systems to the drawings and these are referenced in the written report. His engineering stamp is affixed to the report, but not to the drawings.

[7] On the application for summary judgment it was determined that (1) Holubec was retained by AFC after construction of the foundation had already begun; (2) Holubec was not retained to conduct a full review of the design, nor a full geotechnical review; (3) the scope of Holubec's retainer was limited to providing advice to AFC on the soundness of the assumptions AFC used in its model; (4) Holubec also provided limited geotechnical advice, primarily on how to

prevent water from entering the foundation; (5) no reliance was placed on Holubec's report in designing or constructing the foundation; and (6) had there been such reliance, it would not have been reasonable.

EVIDENCE IN THIS APPLICATION

[8] Both parties' evidence with respect to this application is voluminous and covers many of the same areas canvassed in the summary judgment application. Although I have read through and considered all of it, my comments are limited to those portions which are most relevant to the general analysis and therefore, some aspects are excluded from the summary below.

Igor Holubec's Evidence

[9] Igor Holubec retained counsel on behalf of himself and his firm shortly after being served with the Statement of Claim. He says he had difficulty in finding a lawyer who could take his case, but that Mr. Regel, his current counsel, agreed to do so. He entered into a retainer agreement which provided that he would pay an hourly fee of $600.00.

[10] Mr. Holubec believed he and his firm had been included in the lawsuit in error and so he instructed counsel to take steps to bring the matter to a conclusion without incurring significant fees. Acting on these instructions, Mr. Regel contacted the Plaintiff's counsel by email on February 8, 2016 and wrote the following:

> [Mr. Holubec] indicates he received between two and three thousand dollars on the job for some advice, which he says was NOT followed. He maintains there is no viable cause of action against him.
>
> If this is a case where he was included just to ensure everyone in any way involved was captured in the action, without having any reason to think he was at fault, I would ask that you consider discontinuing against him. If you discontinue he will still cooperate with production of documents and as a witness.
>
> [. . .]
>
> I do understand there are generally two sides to a story. I have not wasted his money doing a full review of the circumstances. If there is some anticipated evidence against him I understand your wish to proceed. If, however, he was included simply as an abundance of caution without any real basis for thinking he was at fault, I would ask that you reconsider the decision to include him in the lawsuit. If you wish to speak with him directly on a without prejudice basis to assist in making up your mind I am sure that could be arranged.

[11] On February 17, 2016 Mr. Regel served the Plaintiff's counsel with a written offer to settle the Plaintiff's claim against Holubec for $100.00, exclusive of costs, under Rules 193 to 203 of the *Rules of the Supreme Court of the Northwest Territories*. Put simply, these rules provide that if the offer is better than the result achieved at trial on application, as the case may be, the offeror is entitled to solicitor and-client costs. There are, however, specific requirements in those rules, including Rule 203(b)(i), which provides that the offer must be an offer to settle the Plaintiff's claims against all of the defendants. The Holubec offer did not do this. Accordingly, Holubec, although having succeeded in the application for summary judgment, is not entitled to solicitor-and-client costs through operation of these rules. The costs consequences of the offer are addressed in more detail later in these reasons.

[12] Mr. Regel wrote to the Plaintiff's counsel a few weeks later, on February 24, 2016. He advised that his clients' Statement of Defence would be filed that day and he proposed a meeting with the Plaintiff's counsel, Mr. Holubec and one of the Plaintiff's engineers with a view to demonstrating that Mr. Holubec's advice had not been followed. He also advised that if the Plaintiff wished to continue with proceedings against Holubec, he would be bringing a summary judgment application.

[13] On April 4, 2016 Mr. Regel sent another email to the Plaintiff's counsel. He said he was in Yellowknife unexpectedly and asked if they could meet. The Plaintiff's counsel replied that her scheduled could not accommodate it and that, in any event, she had not received a final response from her client with respect to a discussion. She also said she was still in the process of reviewing documents pertaining to Holubec and other defendants.

[14] Mr. Regel sent a letter to the Plaintiff's counsel on June 16, 2016. He again asked for a meeting:

> On another note we previously raised the possibility of an informal meeting between ourselves, our client and an engineer who could speak for your client with respect to whether Mr. Holubec had any involvement that justifies even proceeding to discoveries. As I said he is adamant that the limited advice he provided was not even followed. Your own pleadings support his position and in the circumstance it could be an abuse of process to insist on proceeding against him – especially when he is not sitting in silence but protesting.

> We had contemplated such a meeting via teleconference but could make arrangements to attend in person if that is your wish. If you want, we are open to having the meeting *on the record with a transcript being made that you could use in the same fashion as a discovery transcript, and even having other parties who might wish to dispute Mr. Holubec's position present as well.* Please confirm if you are open to attempting to resolve the claim against Mr. Holubec in this fashion. (emphasis in original).

Affidavit of Igor Holubec, *supra*, Exhibit "E"

[15] No settlement meeting took place and the parties moved on to document discovery. Mr. Holubec deposes that he reviewed some 3,400 pages of documents, which he received from Mr. Regel on November 14, 2016.

[16] Subsequently, on November 25, 2016, Mr. Regel requested additional documents which were referenced, but not included, in the Plaintiff's production. He considered these material to the question of his clients' liability. The Plaintiff's lawyer declined to produce them, indicating that they would be "more appropriately raised with the deponent for the plaintiff at his examination for discovery" the following January. Mr. Holubec deposes that had he been provided these documents when requested it would have saved him the expense of having his lawyer attend certain portions of the examinations for discovery.

[17] The Plaintiff's witness was scheduled for examinations for discovery on January 24, 2017 in Yellowknife. Mr. Holubec was not able to be in Yellowknife at that time, but on December 20, 2016 he travelled from his home in Ontario to meet Mr. Regel in Alberta, to prepare for the examinations.

[18] At some point in January of 2017 the Plaintiff's counsel advised that the examinations for discovery would be adjourned. On January 16, 2017 Mr. Regel had a number of email exchanges with the Plaintiff's counsel and I infer from these that the Plaintiff's officer required further time to prepare. Among other things, Mr. Regel stated:

> I am not just beating my chest but on reviewing the documents [I] really do not see any rational reason for including [Holubec] in the circumstances. I am not sure if you overlooked the fact the drawings were clearly marked DRAFT and NOT stamped, the AFC drawings do not form part of the HIS report and the minimal advice he gave was not followed and the failure to follow it – is in part what lead *[sic]* to the problem.

Affidavit of Igor Holubec, *supra*, Exhibit I

[19] The Plaintiff's counsel replied, in part, that this did not reflect the Plaintiff's understanding of Mr. Holubec's involvement, but that she would bring it to her client's attention.

[20] The Plaintiff's officer was produced for examinations for discovery in early March of 2017.

[21] Subsequently, Mr. Regel filed the application for summary judgment. Mr. Holubec swore an affidavit in support of the application. The Plaintiff's counsel cross-examined him on that affidavit in May of 2017. Mr. Regel cross-examined the Plaintiff's deponent, Mike Burns, on his affidavit as well.

[22] Mr. Holubec swore two affidavits in support of this application. In summary, Mr. Holubec says he has suffered great financial strain, having found it necessary to tap into his savings and to incur debt to cover the legal fees and disbursements associated with the suit. He also claims that the suit has taken a toll on his health, although he does not offer independent medical evidence on this. As of May 7, 2018, Mr. Holubec's legal fees and disbursements totaled nearly $350,000.00. In addition, he incurred airfare and travel expenses to attend in Alberta (where his lawyer's office was located) and in Yellowknife, to prepare for examinations for discovery and to attend for cross-examination on affidavit, respectively. He also travelled to Yellowknife to attend the application hearing itself.

[23] The Plaintiff did not cross-examine Mr. Holubec on the affidavits he swore in support of this application. Rather, it questioned Mr. Holubec by way of written interrogatories. It asked Mr. Holubec forty-six questions including, among other things, whether he had worked since retiring or if he intended to do so in future; whether he had sought indemnity from AFC; whether he established his professional corporation as a means of avoiding personal liability for engineering advice; whether he felt his lawyer's hourly rate was reasonable and whether he had asked his lawyer to use students or junior associates to perform work; why he thought it would take less time and money to apply for summary judgment than to wait for the Plaintiff to complete examinations for discovery for the other defendants; and to provide copies of his and his wife's income tax returns for the last three years as well as a statement of assets and liabilities.

[24] Mr. Holubec provided answers to the interrogatories in June of 2018. Although the questions are connected to things Mr. Holubec raised in his affidavits

(such as, for example, not having professional liability insurance and the effect of legal fees on his savings and debt load) the information sought by way of the interrogatories and the answers provided do little to inform the question of the scale of costs and accordingly, the responses will not be summarized here.

The Plaintiff's Evidence

[25] The Plaintiff provided affidavit evidence about what led to its decision to name the Holubec defendants in the suit. This evidence came from Mike Burns. Counsel for Holubec cross-examined Mr. Burns on the affidavit and a transcript of that examination was before the Court.

[26] According to Mr. Burns, shortly before the suit was filed the defendant Pin/Taylor Architects ("PTA") told the Plaintiff the damage to the building was likely due to the foundation shifting. PTA was the architect of record for the project. No testing had been done at that point to determine what was causing the shifting and so, according to Mr. Burns, it was not possible to identify what party or parties involved in the project might be liable for the problem. The testing would have to be conducted over a number of years. Meanwhile, the Plaintiff was concerned that if it did not bring the suit, the limitation period would expire. Therefore, the Plaintiff decided to name all parties that played a role in the design and construction of the school, including Mr. Holubec and his firm.

[27] During cross-examinations on the affidavit he swore in response to the summary judgment application, Mr. Burns admitted that the Plaintiff had no evidence about the nature and scope of the retainer AFC had with Mr. Holubec. Nevertheless, he felt it was reasonable in the circumstances for the Plaintiff to have sued Mr, Holubec and his firm. This was stated at paragraph 11 of the affidavit he swore in response to this costs application:

> 11. In my view, it was reasonable for the Plaintiff to bring a claim against Holubec in the absence of a complete picture of what was causing damage to the School and without knowing Holubec's scope of work, because it was necessary to preserve the Plaintiff's claims against Holubec. If we had waited for this information to be collected, it is likely that the limitation period would have elapsed.

[28] According to Mr. Burns, the Plaintiff's intention from the beginning of the action was to gather information from the named defendants through the discovery process while at the same time engaging in its own testing, before assessing each defendants' liability. It would discontinue the action against any defendant not

liable for damage to the school. Mr. Burns said this strategy was made known to all of the defendants.

[29] The Holubec report was in the Plaintiff's possession for several years before it filed the lawsuit. PTA had provided a copy to the Plaintiff's project officer by email on September 21, 2005. Mr. Burns deposes PTA did so as proof that the foundation's design had been certified by an engineer licensed to practice in the Northwest Territories, as required by the construction contract for the foundation. This appears to be what PTA represented to the Plaintiff's project officer in its email to her.

[30] Mr. Burns deposed there was no record of the foundation design being certified by any other engineer. It was assumed that AFC engaged Holubec for this purpose. On cross-examination Mr. Burns stated the Plaintiff had "very clear information" from PTA and the quality control contractor, the defendant AMEC Americas Limited ("AMEC"), that they had relied on those documents to allow the construction to proceed.

THE LEGAL FRAMEWORK

[31] The legal framework is well-known. Costs are discretionary. They are typically awarded on a "party-and-party" scale, which provides partial indemnity in accordance with the tariff set out in Schedule "A" of the *Rules of the Supreme Court of the Northwest Territories*. Schedule "A" is divided into five columns, each representing costs for steps taken in the suit in relation to the value of the suit or the amount claimed in damages.

[32] Recognizing that strict adherence to the tariff may not always provide a just result, the Court may, in its discretion, award "enhanced" party-and-party costs. Enhanced party-and-party costs can be calculated in a variety of ways, such as using a multiplier of one of the columns in Schedule "A" or calculating costs on the basis of a column that corresponds to a higher amount than what is claimed or awarded in the suit. (For example, *Fullowka v Royal Oak Ventures Inc.*, 2008 NWTCA 9). In determining whether enhanced costs are justified, the Court may take a number of factors into account, including: the complexity of the suit; the amount of the costs recoverable under the tariff compared to the actual costs incurred; the conduct of the other party or parties; and the importance of the issues raised for both the litigants and the broader community. *WCB v Mercer et al; and Mercer v WCB*, 2012 NWTSC 78 (CanLII), at para 11; *5142 NWT LTD et al v Town of Hay River et al*, 2008 NWTSC 31 (CanLII), at para 6;*Union of Northern Workers v Carriere (No. 2)*, 2013 NWTSC 27 (CanLII), at para 17.

[33] Costs may also be awarded on a "solicitor-and-client" basis, which is based largely on what counsel actually charged the client to complete various steps in the litigation. Barring contractual or legislative provisions allowing for costs on this scale, they are not awarded unless "there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 SCR 3 (at 134).

[34] An award of solicitor-and-client costs does not necessarily provide a full indemnity. Costs on this scale may be reduced through taxation and must be reasonable, having regard to a number of factors, including the nature and urgency of the proceeding, the skill and labour required, the general conduct of the proceedings and other relevant factors: *Cooper, Peach and Gullberg v England*, 1994 CarswellNWT 25 (SC), [1994] NWTR 305. They are limited to fees and disbursements for carrying out the litigation steps in Schedule "A". *Apotex Inc. v Egis Pharmaceuticals*, 1991 CanLII 2729 (ON SC), 1991 CarswellOnt 3149 at para 13; 4 OR (3d) 321.

[35] In certain circumstances, however, costs may be awarded on a "full indemnity" or "solicitor-and-own-client" basis, which reflect the entirety of fees and disbursements and not just those items included in Schedule "A". These awards are rare. Barring contractual, statutory or regulatory provisions, they are limited to cases where a party's conduct has been particularly reprehensible. For example, in *Baryluk (c.o.b. Wyrd Sisters) v Campbell* (2009), 66 CCLT (3d) 160, 2009 CarswellOnt 3900 (ONSC), the plaintiff was found to have initiated an action which constituted a "scurrilous attack on the administration of justice" in which it made baseless allegations that judges abused public office, were dishonest and "fixed" cases. Full indemnity costs were granted to the defendants. Another example is found in *Schreiber v Mulroney,* 2007 CanLII 34441 (ONSC) where full-indemnity costs were awarded because an undertaking to opposing counsel was not honoured and a party was unnecessarily noted in default as a result. What is clear is that particularly egregious, positive misconduct is required to attract this scale of costs.

THE PARTIES' POSITIONS

Holubec

[36] Holubec is seeking full indemnity costs, although the relief is characterized as a request for solicitor-and-client costs and punitive costs. The grounds put forth are summarized below.

[37] First, naming Mr. Holubec and his firm was an abuse of process. It named these defendants in the suit without having a reasonable basis for doing so. Further, the Plaintiff sought to use the Court's process, including examinations for discovery, for investigative purposes.

[38] Second, Holubec argues that solicitor-and-client or else full indemnity costs are justified due to the Plaintiff's conduct during the litigation. Holubec characterizes it as "petty and obstructive", and provided a number of examples. Among other things, the Plaintiff refused to admit uncontroversial documents, failed to produce documents in a timely manner and in some cases, not at all, and purported to tender an expert's report into evidence improperly, attaching it to Mr. Burns' affidavit.

[39] Holubec also suggests the officer the Plaintiff produced for examinations for discovery, Mr. Engram, was evasive and unresponsive in his answers. In support of this argument, Holubec produced a list of those undertakings to the Court. Holubec's position is that most of the 132 undertakings given by Mr. Engram related to documents which ought to have been produced in advance of examinations taking place.

[40] Similarly, Holubec contends that the responses Mr. Burns provided during cross-examination on the affidavit he swore for this application are, among other things, "self-serving", "unresponsive" and "evasive". He produced a list of these, which was tendered at the hearing, with references to the pages and lines of the transcript.

[41] The final point Holubec makes on the Plaintiff's conduct during the litigation is that at the time the summary judgment application was heard, the Plaintiff was in possession of an engineering report which supported Holubec's position, but which it did not disclose.

[42] Holubec's third ground for seeking a higher scale of costs is that the Plaintiff took "disingenuous positions" at the summary judgment application itself. Among these was the Plaintiff's argument that it did not have an opportunity to conduct examinations for discovery with many of the defendants, including Mr. Holubec, and that it needed an expert opinion on what caused the foundation to fail. The

Holubec defendants contend these are disingenuous because the Plaintiff *did* have an opportunity to conduct examinations for discovery on Mr. Holubec and other defendants, but did not do so. Further, Holubec's counsel offered the Plaintiff an opportunity to meet and interview Mr. Holubec under oath in an informal setting and to have the interview transcribed for later use. The Plaintiff declined to do so. Finally, Holubec argues that the Plaintiff could have led expert evidence but chose not to do so.

[43] Fourth, Holubec argues that a higher scale of costs is warranted by operation of Rules 128, Rules 193 to 203 and Rule 180(3).

[44] Holubec says the Plaintiff refused to admit certain facts and documents that it ought to have. This, it is argued, should attract costs additional costs (although not necessarily solicitor-and-client costs) under R. 128. It provides:

> 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.

Examples of facts that Holubec argues ought to have been admitted were that Holubec did not design the thermosyphon foundation; that his advice was not relied upon for construction; that his advice on drainage was not followed; and that the Plaintiff did not know if the advice Holubec gave was sound or not.

[45] I note that Holubec did not at any time serve the Plaintiff with a notice to admit facts under Rule 294.

[46] As indicated, Holubec made an offer to settle early in the process under the regime set out in Rules 193 to 203. It is argued that Holubec's success on the summary judgment application was better than the offer. Although this offer did not comply with the prerequisites under Rule 203, Holubec argues it may be taken into account in determining the appropriate scale of costs. *Fullowka v Royal Oak Ventures Inc., supra.*

[47] Holubec submits that solicitor-and-client costs should be imposed on the Plaintiff under Rule 180(3). It applies specifically to summary judgment applications and provides:

> 180. (3) Where it appears to the Court that a party to an application for summary judgment has acted in bad faith or primarily for the purpose of delay, the Court

> shall fix the costs of the application on a solicitor and client basis and order the party to pay them without delay.

Holubec does not allege that the Plaintiff acted in bad faith, but argues that the Plaintiff resisted the application on the basis that the summary judgment application was premature and that it needed more time. This, it is submitted, is "delay" within the meaning of Rule 180(3) and accordingly, mandates an award of solicitor and client costs.

[48] Before moving on to the Plaintiff's position, I will address those issues raised by Holubec which, in my view, do not support an award of enhanced, solicitor-and-client, or full-indemnity costs.

[49] I turn first to the arguments that solicitor-and-client costs should be awarded under Rules 128 and 180(3).

[50] Rule 128 is inapplicable. It pertains to admissions in pleadings. Its purpose is to discourage parties from putting matters in issue unnecessarily by refusing to admit facts known to be true. *Twentieth Century-Fox Corp. Ltd. v Broadway Theatres Ltd. (No. 2)*, 1951 CarswellSask 24, [1951] 3 D.L.R. 105 at 121.

[51] The evidence does not support an award of solicitor-and-client costs under Rule 180(3). Although the Plaintiff argued that the application for summary judgment was, in its view, premature, there is no evidence that the Plaintiff engaged in conduct designed "primarily for the purpose of delay" in respect to Holubec's summary judgment application.

[52] On the issue of whether the Plaintiff's conduct during the litigation attracts enhanced, solicitor-and-client, or full-indemnity costs, I find it does not. While Holubec may have disagreed with the decisions the Plaintiff made on how it would conduct the action, there is insufficient evidence to support a finding that the Plaintiff's conduct in the steps it took during the litigation was outrageous, scandalous or reprehensible.

[53] Similarly, Holubec's opinion that the answers Mr. Burns and Mr. Engram gave during their respective cross-examinations were evasive, self-serving or otherwise unsatisfactory is just that – an opinion. The evidence does not support the conclusion that either witness was deliberately misleading, unprepared or evasive in answering the questions put to them. It is also not surprising that in a case involving thousands of documents and some twelve individual and corporate

parties there would be a significant number of undertakings given during examinations for discovery and that full disclosure of documents would take some time.

[54] I reject the argument that the Plaintiff took "disingenuous" positions at the summary judgment application, thus attracting some form of enhanced costs. The Plaintiff made a number of arguments in support of its position on the application, including an argument that the application was premature. It was entitled to make these arguments and neither the fact that they were unsuccessful, nor Holubec's opinion on their merit or sincerity, mean that they were "disingenuous".

[55] Finally, the question of whether the Plaintiff had in its possession a report exonerating Holubec at the time of the summary judgment application and whether that ought to have been produced cannot be determined on the basis of the evidence before me on this application. Making that determination would require the Court to hear extensive evidence from experts for the Plaintiff and the Holubec defendants.

The Plaintiff's Position

[56] This narrows the discussion on the Plaintiff's position to three issues, namely, whether its decision to sue Mr. Holubec and his firm was reasonable; the effect, if any, of the offer to settle; and what is the appropriate scale of costs.

[57] With respect to its decision to name Holubec in the suit, the Plaintiff says it was not using the Court's processes in lieu of an investigation into why the structural problems had occurred. It filed the action when it did to preserve its legal claim(s) against those parties, including Holubec, it reasonably thought were responsible for the problems with the school. A separate investigation into the technical reasons for the school's structural problems was being conducted concurrently.

[58] With respect to the offer to settle, the Plaintiff argues that it was inadequate, given the potential costs of repairing the school and the fact that the offer did not include costs. The Plaintiff also says the offer was not genuine as it lacked any element of compromise.

[59] Accordingly, the Plaintiff argues that Holubec is entitled to party-and-party costs only.

ANALYSIS

Did the Plaintiff have a reasonable basis for suing Mr. Holubec and his firm?

[60] The answer to this is "no".

[61] Litigation is serious business. It is a daunting process which can, and often does, have significant personal and financial consequences for all of the parties involved. It ties up both public and private resources. In a suit like this, worth millions of dollars, with complex legal issues and multiple parties, it is completely foreseeable that someone in Mr. Holubec's position would feel compelled to hire a lawyer to defend the action. It is also foreseeable that in such a complex lawsuit, that person would necessarily incur substantial costs for legal advice, preparing and serving documents, responding to motions and participating in the discovery process, among other things.

[62] Given the consequences, it follows that a plaintiff must consider carefully why it is suing a particular defendant. This does not mean a plaintiff is required to know with 100% certainty that is claim will succeed; however, it must take care to ensure there is a *reasonable basis* for naming that defendant. Anything short of that is an abuse of process.

[63] Unfortunately, the evidence shows that the Plaintiff did little to determine the nature and extent of Holubec's involvement in the project before it made the allegations in the Statement of Claim. It did not verify PTA's representation that Mr. Holubec had certified the foundation's design. It had Mr. Holubec's report in its possession for some nine years before it filed the suit, and when the structural problems first surfaced. Yet, there is no evidence the Plaintiff reviewed the report and considered the nature and scope of the advice it contained, nor whether it reasonably supported the allegations. It took no steps to ascertain what instructions AFC gave to Mr. Holubec. Then, as a limitation period was winding to an end, it filed the suit and alleged negligence against Mr. Holubec and his firm, just in case Mr. Holubec bore some responsibility. In short, the Plaintiff acted in haste, without exercising due diligence and, in doing so, fell far short of its obligation to ensure there was a reasonable basis for suing Mr. Holubec and his firm.

[64] Exacerbating the situation is that the Plaintiff had a number of opportunities to reconsider its decision to sue Mr. Holubec and his firm after the Statement of Claim was served and before putting him to the time and expense of filing a Statement of Defence and participating in the discovery process.

[65] Mr. Holubec, through counsel, asked to be released from the suit. The Plaintiff's counsel was asked what she anticipated the evidence against Holubec would be. The Plaintiff declined to provide this. Holubec's counsel offered to make Mr. Holubec available to meet with the Plaintiff's engineers, presumably, to explain his advice and the scope of his retainer. He pointed out the minimal nature of the written advice Mr. Holubec provided, the fact that the drawings appended to it were marked "draft" and that they were not prepared by Mr. Holubec. Still, the Plaintiff insisted on maintaining its position, keeping Mr. Holubec and his firm as defendants in the suit.

[66] This is not to say that in every case where a defendant disputes a claim the plaintiff is required to re-assess the allegations it has made against that defendant or, as in this case, to meet with a defendant for an informal form of discovery. Context is very important. In this case, the Plaintiff did not take sufficient steps at the outset to determine if it had a reasonable basis for making the allegations. Mr. Holubec's counsel raised a number of reasonable issues, such as the limited scope of the work Mr. Holubec did and the fact that he did not create the design, which ought to have led the Plaintiff to at least look at what evidence it had to support the allegations against these defendants. As it turned out, it had virtually none.

[67] The fact that the Plaintiff is a government, with a large public service, cannot be ignored. According to its 2012 *Public Service Annual Report*, it had just over 4700 employees in 2012, when structural problems were reported by staff, with 255 employees in the Department of Public Works.[1] I do not suggest that the Plaintiff should be subject to a markedly higher standard than any other party to an action by this reason alone. It is, however, reasonable to assume that the Plaintiff had resources at its disposal which it could have used to inquire into the nature and extent of Mr. Holubec's involvement and thus make a properly informed decision about suing him and his firm. There is no reason advanced for why it did not do so.

[68] Mr. Burns deposed that the Plaintiff's intention from the outset was to gather information from the defendants, including Mr. Holubec, through the discovery process, while at the same time engaging its own testing processes, prior to assessing each defendants' liability. The Plaintiff intended to discontinue

[1] https://www.assembly.gov.nt.ca/sites/default/files/13-11-07td_14-175.pdf

against any defendant not liable for the damage to the school. Respectfully, what the Plaintiff proposed is an abuse of the Court's process.

[69] Discovery serves a number of purposes in civil litigation. It may be used to better define and narrow issues, augment disclosure of documents and facts, obtain admissions and assist the parties in assessing the strengths and weaknesses of their own and other parties' cases. *Laybourne Enterprises Ltd. v Laybourne*, 2005 SKQB 128 at para 5, 2005 CarswellSask 170, 264 Sask. R. 128. They are not, however, a replacement for exercising diligence in ensuring there is a reasonable basis for naming a party in the first place. There is a great difference between using the discovery process to gauge the strengths and weaknesses of a case and using it to perform a preliminary investigation. The former is appropriate. The latter is not.

What is the effect of the Offer to Settle?

[70] As noted, the Plaintiff argues the offer was not reasonable, given the potential costs of repairing the school and given that it did not include costs. It also submits the offer was not a genuine one because it lacked any element of compromise.

[71] I disagree. Given the limited nature of Mr. Holubec's involvement with the project, it would not be reasonable to expect him to make an offer which reflected, to any extent, the costs of repairing the school. Further, not including the scale and disposition of costs with the offer does not make it unreasonable. If the Plaintiff had concerns about this, it could have asked for clarification. It declined to do so. Finally, the offer did not lack compromise. It was premised on Mr. Holubec's understanding about what he was retained to do, in particular, the limited scope of his work. To a certain extent it was also based on his belief that the advice he gave was not followed. Given this, it was a compromise. He was offering to walk away from a suit in which he and his firm had been improperly included, for minimal consideration.

[72] When combined with the success on the summary judgment application and my findings respecting the Plaintiff's decision to name and maintain Mr. Holubec and his firm as parties in this action, I find the offer to settle is a factor that supports an award of something more than party-and-party costs. As stated in *Fullowka, supra,* "Even informal offers are, however, relevant to costs. Modern litigation is focused on dispute resolution, *and all parties are encouraged to act reasonably and settle actions where possible."* (emphasis added). In all of the

circumstances, the Plaintiff ought to have given serious consideration to the offer and the context in which it was put forth.

What is the Appropriate Scale of Costs?

[73] As noted, Holubec seeks full-indemnity costs. These are not warranted. The Plaintiff's conduct does not amount to the type of deliberate misconduct that requires this highly punitive response from the Court. There was no deliberate attempt to mislead the Court, Mr. Holubec or his counsel. The allegations the Plaintiff made against Mr. Holubec and his firm, while ultimately without merit, were not outrageous, made in bad faith or designed to cause harm to these defendants.

[74] I do, however, find that solicitor-and-client costs are warranted. Although the Plaintiff did not engage in deliberate misconduct designed to harm Mr. Holubec, its conduct is nevertheless reprehensible and an abuse of the Court's process. It named Mr. Holubec and his firm without knowing if it had a reasonable basis for doing so. It planned to use the discovery process to determine this. It used this strategy without regard to the significant personal and financial consequences which would result for Mr. Holubec. The Court simply cannot sanction this conduct and justice demands Mr. Holubec is granted some relief from the financial burden.

ORDER

[75] I order that the Holubec defendants recover reasonable solicitor-and-client costs and disbursements from the Plaintiff for all steps taken by them in the litigation, including this application. If the parties are unable to agree on what is reasonable in the circumstances, either may apply to the Clerk of the Court for taxation.

(authorized to sign for)
K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
10th day of April 2019

Counsel for the Applicant:	Alan R. Regel
Counsel for the Respondent, the Commissioner of the Northwest Territories	Christopher Buchanan and Karin Taylor

S-1-CV 2014-000-056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

Plaintiff

-and-

923115 N.W.T. LIMITED o/a PIN/TAYLOR ARCHITECTS, AMEC AMERICAS LIMITED o/a AMEC EARTH AND ENVIRONMENTAL, AMEC EARTH AND ENVIRONMENTAL, a division of AMEC AMERICAS LIMITED, ENCOMPASS INC. o/a ARCTIC FOUNDATIONS OF CANADA, ARCTIC FOUNDATIONS OF CANADA INC., IGOR HOLUBEC, IGOR HOLUBEC CONSULTING INC., EBA ENGINEERING CONSULTANTS LTD., JOHN ARMSTRONG, BRAD R. NELSON, JOHN ARMSTRONG and BRAD R. NELSON, carrying on business as a partnership under the firm name of ARMSTRONG AND NELSON ENGINEERS AND LAND SURVEYORS, 851791 N.W.T. LTD. o/a ROWE'S CONSTRUCTION and DOWLAND CONTRACTING LTD.

Defendants

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE K. M. SHANER