Date: 2025-07-15
S-1-CV-2023-000 265

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NAHANNI CONSTRUCTION LTD.

Plaintiff

-and-

BONITO CAPITAL CORP and LUPIN MINES INCORPORATED

Defendants

MEMORANDUM OF JUDGMENT ON COSTS

[1] Nahanni Construction Ltd. ("NCL"), has brought an action against Bonito Capital Corp ("BCC") and Lupin Mines Incorporated ("LMI") for breach of a settlement agreement. NCL applied for a partial summary judgment. I dismissed the application. At the time, I had not received submissions from NCL on the issue of costs and I allowed the parties to file written submissions on this issue.

[2] The Defendants BCC and LMI rely on Rule 180 of the *Rules of the Supreme Court of the Northwest Territories* [the *Rules*] to seek costs on a solicitor and client basis, payable immediately. NCL takes the position that the question of the costs of the summary judgment application should be dealt with by the trial judge or, alternatively, that only party and party costs should be awarded.

[3] For the following reasons, I am not awarding costs of this application on a solicitor and client basis but rather on an enhanced party and party scale.

[4] The Defendants submit that the test set out in Rule 180 is met and that consequently, they are entitled to solicitor and client costs.

[5] Rule 180 states:

> 180. (1) Subject to subrule (2), where the applicant obtains no relief on an application for summary judgment, the Court may fix the respondant's costs on the application on a solicitor and client basis and order the applicant to pay the costs without delay.
>
> (2) The Court may decline to fix and order costs under subrule (1) where it is satisfied that the making of an application, although unsuccessful, was nevertheless reasonable.
>
> (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.

[6] The Defendants note that solicitor and client costs are usually only granted if the court finds reprehensible, scandalous, or outrageous conduct occurred during the litigation. However, they argue that Rule 180 expands the court's discretion to award solicitor and client costs and allows such an award on a lower threshold of establishing the applicant for summary judgment obtained no relief and the application was unreasonable.

[7] They submit that NCL's application for partial summary judgment was unreasonable. They point to several factors which they argue support a conclusion that the application was unnecessary and caused the Defendants to expend significant time and resources to respond. They note one of the reasons I denied the partial summary judgment application was that NCL had not complied with mandatory procedural steps under the *Rules*. NCL brought the application before the close of the pleadings and not having filed a Statement as to Documents, despite several requests from the Defendants. They further point out that I concluded the application was premature because the failure to comply with the *Rules* prejudiced the Defendants' ability to respond adequately. The Defendants also note that I found the issues raised by the claim and the counterclaim were so intertwined that they had to be determined at trial because of the risk of inconsistent findings of facts. Finally, they submit that NCL raised a legal argument that required the parties to file additional written submissions only for NCL to later concede the issue did not apply

in this case, which unnecessarily amplified the complexity of the case and the costs of the proceedings for the Defendants.

[8] The Defendants claim this situation is similar to *Sese v Valuphram Drugs et al* 2017 NUCJ 8 [*Sese*]. The civil procedure rules in the Nunavut Court of Justice include the same Rule 180. In *Sese*, Bychok J. granted solicitor and client costs pursuant to Rule 180. He found the summary judgment application was unreasonable because the factual issues at play could not be resolved without the benefit of *viva voce* evidence, which ought to have been obvious to the moving party on the application.

[9] The Defendants also advance a position in the alternative that NCL did not bring the application in good faith but rather for the primary purpose of delaying the proceedings. They rely on NCL's failure to file a Statement as to Documents despite repeated requests and the delay to the close of pleadings, which prevented the Defendants from pursuing legitimate discovery and disclosure processes. The Defendants argue that NCL pursuing the application for partial summary judgment when the Defendants had raised procedural concerns in writing establishes NCL brought the application in bad faith which justifies solicitor and client costs pursuant to Rule 180(3).

[10] NCL submits that this Court has ruled that an unsuccessful applicant on a summary judgment application must not necessarily pay solicitor and client costs (*Igloo Specialties Ltd. v Royal Oak Mines Inc.*, 1998 CanLII 6972 (NWT SC); *Paul's Aircraft Services v Kenn Borek Air Ltd.*, 2012 NWTSC 85 [*Paul's Aircraft Services*]). It points out that in *Paul's Aircraft Services*, Charbonneau J., who was deciding whether to award solicitor and client costs under Rule 180, noted that in general, solicitor and client costs are exceptional and reserved for situations where the parties have engaged in reprehensible conduct deserving of the Court's sanction. NCL submits that the Defendants' position is akin to arguing that NCL's position was unreasonable because it was not accepted by the application judge. Such an interpretation would result in solicitor and client costs always being awarded when a summary judgment application is dismissed, which is not the test set out in Rule 180.

[11] NCL notes that the Supreme Court of Canada has encouraged parties to make increasing use of summary disposition. It argues that in this case, the application was not clearly without merit. NCL points out that the Defendants filed a lengthy response brief and that the oral hearing lasted several hours, which shows there were genuine issues to debate. NCL argues that I did not rule it failed to comply with the

Rules in the way the Defendants describe. NCL claims *Sese* has no application in this case because here, unlike in *Sese*, the evidence does not establish that NCL brought the application for the purpose of delaying the action.

[12] I am not satisfied that NCL's application for summary judgment was unreasonable. I agree with NCL that Rule 180 must be interpreted considering the shift in culture in summary disposition initiated in *Hryniak v Mauldin*, 2014 SCC 7. The Supreme Court of Canada has clearly signaled to litigants that they can, and they should, make more use of summary judgment applications. Accordingly, Rule 180 must not set such a low threshold to the awarding of solicitor and client costs that it would have a significant chilling effect on litigants. What is considered to be a reasonable position for the application of Rule 180 must be informed by the Supreme Court of Canada's expansive approach to summary judgment.

[13] I dismissed NCL's application because it was premature considering procedural steps were still required for the process to fairly allow the Defendants to pursue discoveries and disclosure and because the claim and the counterclaim are so intertwined that they must both be decided at trial. I disagreed with NCL's position on the application, but I am not convinced it was unreasonable.

[14] In addition, I do not accept the Defendants' position that the record reveals that this application was brought in bad faith and for the primary purpose of delaying the proceedings. Although I accept NCL's conduct had the effect of delaying the litigation, the evidence before me does not allow me to draw an inference that the purpose of the conduct was to cause delay.

[15] Solicitor and client costs are not justified in this case. Enhanced costs are a lower scale of costs based on a multiple of the tariff costs. Enhanced costs can be ordered as a sanction by the court for conduct that unduly delays the litigation or unnecessarily lengthens proceedings resulting in additional costs for the opposing party (*Marlowe et al v Barlas et al*, 2025 NWTSC 12, para 49). In my decision on the application for partial summary judgment, I found that NCL failed to comply with the *Rules* in a way that prejudiced the Defendants. Recognizing that the main reason the litigation had not progressed was NCL's failure to produce a Statement as to Documents, I used the power to give direction under Rule 179 to order NCL to produce it within 60 days. NCL's failure to comply with the *Rules* warrants enhanced costs. Considering the nature of the conduct and its impact on the proceedings, I conclude that a multiple of 3 of the applicable tariff and immediate payment of these costs are justified.

[16] I make the following order:

a. The Defendants are awarded enhanced costs on this application;

b. The Plaintiff must pay party and party costs on a multiplier of 3 of the tariff amounts in any event of the cause, payable immediately.

Annie Piché
J.S.C.

Dated at Yellowknife, NT, this
15th of July 2025

Counsel for Plaintiff: Jonathan Hillson

Counsel for Defendants: Michael Morgan

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THE HONOURABLE JUSTICE ANNIE PICHÉ