2004 WL 2896054 (Ont. S.C.J.), 2004 CarswellOnt 5308

2004 CarswellOnt 5308

Webb v. Metro Toronto Condominium Corp. No. 973

David Webb and Diann Webb, Applicants and Metro Toronto Condominium Corporation No. 973, Respondent

Ontario Superior Court of Justice

Himel J.

Heard: November 16, 2004
Judgment: December 2, 2004
Docket: 03-CV-249538CM2

Counsel: Timothy Pinos, for Applicants

Patricia M. Conway, for Respondent, MTCC 973

James A. Hodgson, Robert Blair, for Added Respondent, Bell Express Vu

Subject: Contracts; Property; Torts

Sale of land --- Condominiums -- Practice and procedure -- Miscellaneous issues

Applicants were owners of condominium unit in one of three condominium buildings owned by respondent -- Respondent had bulk contract with cable television company and decided to approach new company when bulk contract was about to expire -- Board of Directors of condominium announced intention to replace existing cable television service with new service from new company and board held information meeting with new company representatives and owners of units -- Applicants sought interim interlocutory injunction but application was dismissed -- Applicants applied for compliance order under Condominium Act requiring notice to unit holders on ground that change in television service constituted telecommunications networking upgrade -- Applicants claimed there would be number of adverse impacts from change including loss of channels and disruption of service -- Alternatively, applicants claimed change was substantial one requiring two-third vote of unit holders -- Application dismissed -- Change in service did not involve any additional cost to owners and in fact resulted in reduction of expense -- Therefore, board was entitled to proceed under s. 97(2) of Act without notice -- Also, since new company's service involved use of existing network of telephone wires connected to modem in units, and modems were being provided by company at no cost, company's system could be considered network upgrade -- Therefore, notice provisions of s. 22 of Act did not apply -- Furthermore, change in channel line-up and repackaging of option channels later proposed by new company did not require further notice to owners -- Finally, although board referred to changes as significant, with far reaching implications, it did not elect to treat changes as substantial and therefore

two-thirds vote of unit holders was not necessary to approve change.

Actions --- Champerty and maintenance -- General -- Nature and scope

Applicants were owners of condominium unit in one of three condominium buildings owned by respondent -- Respondent had bulk contract with cable television company and decided to approach new company when bulk contract was about to expire -- Board of Directors of condominium announced intention to replace existing cable television service with new service from new company and board held information meeting with new company representatives and owners of units -- Applicants sought interim interlocutory injunction but application was dismissed -- Applicants applied for compliance order under Condominium Act requiring notice to unit holders on ground that change in television service constituted telecommunications networking upgrade -- Respondent moved for order staying application for abuse of process -- Respondent contended that old cable television company had paid applicants legal fees and costs on interlocutory injunction motion and had prepared responding affidavit for applicants -- Therefore, respondent claimed action of maintenance lay against applicants and that court should intervene -- Motion dismissed -- Applicants commenced proceedings on their own initiative and only contacted cable company to obtain information -- Fact that cable company had provided financial assistance did not amount to tort of maintenance -- Cable company had significant commercial interest in television services provided to respondent and therefore was not acting without justification or excuse -- Also, while maintenance was actionable tort, it did not constitute defence to action.

Cases considered by Himel J.:

> Canam Enterprises Inc. v. Coles (2000), 2000 CarswellOnt 4739, 51 O.R. (3d) 481, 194 D.L.R. (4th) 648, 139 O.A.C. 1, 5 C.P.C. (5th) 218 (Ont. C.A.) -- referred to
>
> Earl Putnam Organization Ltd. v. MacDonald (1978), 21 O.R. (2d) 815, 8 C.P.C. 208, 91 D.L.R. (3d) 714, 1978 CarswellOnt 467 (Ont. C.A.) -- referred to
>
> Frind v. Sheppard (1940), [1940] 4 D.L.R. 455, [1940] O.R. 448, 74 C.C.C. 386, 1940 CarswellOnt 33 (Ont. C.A.) -- referred to
>
> Gudmundsson v. Trinity Plastic Products Inc. (1998), 1998 CarswellOnt 4758 (Ont. Master) -- referred to
>
> Irvin v. Irvin Porcupine Gold Mines Ltd. (July 6, 1940), Chevrier J. (Ont. H.C.) -- referred to
>
> McIntyre Estate v. Ontario (Attorney General) (2001), 2001 CarswellOnt 575, 53 O.R. (3d) 137, 198 D.L.R. (4th) 165, 11 C.P.C. (5th) 267 (Ont. S.C.J.) -- referred to
>
> Woroniuk v. Woroniuk (1977), 17 O.R. (2d) 460, 4 C.P.C. 143, 1977 CarswellOnt 259 (Ont. Master) -- referred to
>
> York Condominium Corp. No. 382 v. Dvorchik (1997), 12 R.P.R. (3d) 148, 1997 CarswellOnt 219 (Ont. C.A.) -- referred to

Statutes considered:

Condominium Act, R.S.O. 1990, c. C.26

> Generally -- referred to
>
> s. 22 -- referred to
>
> s. 22(3) -- considered
>
> s. 97(2) -- considered

s. 97(3) -- considered

s. 97(4) -- considered

s. 97(6) -- considered

s. 97(6)(a) -- considered

s. 97(6)(b) -- considered

s. 134 -- pursuant to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 106 -- referred to

APPLICATION by condominium unit owners for compliance order under s. 134 of Condominium Act.

Himel J.:

1 David and Diann Webb, owners of a unit at 2239 Lakeshore Boulevard West in Toronto, challenge the decision of the Board of Directors of the Condominium to change the provision of television service in the building. The applicants seek a compliance order under section 134 of the *Condominium Act* requiring notice to unit owners and injunctive relief pending such notice. The Condominium Corporation and Bell Express Vu. which was, on consent of the parties, added as a party to this proceeding, support the Board's decision. Television service has been provided by Bell since May 2003. While the Condominium undertook to the court not to execute a written agreement with Bell until this application is resolved, Bell and the Condominium take the position that they have a binding contract.

I. Factual Background

2 David and Diann Webb are owners of a unit in a building located at 2239 Lakeshore Boulevard West, known as Phase III of Marina Del Rey on the waterfront in Toronto. It is one of the high-rise buildings of a development consisting of 817 residential units. Metropolitan Toronto Condominium Corporation No. 973 ("MTCC 973") is the owner of the lands and common elements of the building. The three condominium buildings had a bulk contract with Rogers Cable Television ("Rogers") for telecommunication services. To achieve savings, the contracts were negotiated as a group package. As the Rogers' contract was due to expire on May 31, 2003, the Board discussed a further contract with Rogers and then approached Bell Express Vu ("Bell") for proposals on a contract.

3 Following negotiations, the Board announced its intention to replace the existing cable television service provided by Rogers with new television services provided by Bell. The Board signed a letter of intent with Bell and notified Rogers. Rogers endeavoured to reopen discussions and lowered its price. On April 4, 2003, MTCC 973 released an information circular about the proposed change.

4 The Board met again with both Rogers and Bell. Rogers offered to lowers its price and Bell decided to add channels to its basic package which made it similar to the Rogers service. The Board and Bell held an information meeting of owners and residents on May 7, 2003, Bell described the service including the additional channels. On May 16, 2003, MTCC 973 advised owners that the April 4, 2003 notice was being relied upon. Bell began working on the project and completed installation by the end of July, 2003. Service has been provided since that date. However, because this application was brought and MTCC 973 gave an undertaking to the court at the hearing of the interim interlocutory injunction, the Board did not enter into a contract with MTCC 973.

II. The Preliminary Issue of Abuse of Process

5 Although MTCC 973 did not raise the issue in its responding materials initially, it now takes the position that the court should exercise its inherent jurisdiction and stay this application for abuse of process under section 106 of the *Courts of Justice Act*. Abuse of process exists where a legal process is being used for any purpose other than that which it was designed to serve. There must be some overt act in furtherance of that purpose: see *Earl Putnam Organization Ltd. v. MacDonald* (1978), 21 O.R. (2d) 815 (Ont. C.A.). Abuse of process is a discretionary principle and is used to bar proceedings which are inconsistent with the objectives of public policy: see *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.).

6 MTCC 973 argues that because Rogers paid the legal fees of the applicants and the costs award made against them on the interlocutory injunction motion as well as prepared the responding affidavit for the applicant, the action of maintenance lies against them and the court should intervene.

7 The essence of an action for maintenance is that there must be conduct involving officious or improper interference in a case or an attempt to stir up strife or litigation. The conduct must be immoral or done with an improper motive: see *Frind v. Sheppard*, [1940] O.R. 448 (Ont. C.A.); *McIntyre Estate v. Ontario (Attorney General)* (2001), 53 O.R. (3d) 137 (Ont. S.C.J.).

8 In reviewing the sequence of events leading up to this application, I am satisfied that the applicants commenced these proceedings on their own initiative and contacted Rogers in order to receive information. The fact that Rogers has provided financial assistance does not amount to the tort of maintenance. Rogers has a significant commercial interest in the television services provided to MTCC 973 and is not acting without justification or excuse. Furthermore, while maintenance is an actionable tort, it does not constitute a defence to an action: *Gudmundsson v. Trinity Plastic Products Inc.* , [1998] O.J. No. 5122 (Ont. Master); *Woroniuk v. Woroniuk* (1977), 17 O.R. (2d) 460 (Ont. Master). There is no basis for a stay of proceedings and the motion for a stay is dismissed.

III. Issues

9 This application raises the following issues:

1. Did the proposed change in telephone service from Rogers to Bell require notice to the unit owners?

2. If notice was required, was the notice given by the Board adequate?

3. Did the proposed change involve a "substantial change" such that a vote of at least two-thirds of unit owners supporting the proposal was required?

IV. Positions of the Parties

10 The applicants take the position that notice of the change in television services was required under the *Condominium Act* and that the change in television service constituted a telecommunications networking upgrade. The Bell service involves new technology (VDSL) through delivery of video signals over telephone lines and not through conventional coaxial cable technology which the applicants argue is new and relatively unproven. They also argue that there will be a number of potential adverse impacts from the change in service including: the loss of a number of television channels, a disruption in service and inconvenience to unit owners. In the alternative, the applicants argue that the change is a substantial one requiring a two-third vote of unit owners.

11 MTCC 973 takes the position that the change of television service providers from Rogers to Bell does not involve additional expense to unit owners and that notice to unit owners was not necessary. Out of an abundance of caution, the Board gave notice of the proposed change. Furthermore, the change is not a "network upgrade" which requires notice to owners under section 22(3). The unit owners were given sufficient notice in order to requisition a meeting to discuss the proposed change but no unit owner requisitioned a meeting. In the absence of evidence of arbitrariness, bad faith or statutory non-compliance, the court should not interfere with the decision of the Board. Bell also takes the position that notice to unit owners was not required and that, in any event, sufficient notice was given.

2004 WL 2896054 (Ont. S.C.J.), 2004 CarswellOnt 5308

V. Analysis

1. Was notice to unit owners about the change in service from Rogers to Bell required?

12 Section 97(2) of the *Condominium Act* provides that a corporation may by resolution of the Board and without notice to owners make a change in service if the estimated cost in any month of the change is no more than the greater of $1000 and 1% of the annual budgeted common expenses for the current fiscal year. On the evidence filed, I am satisfied that the change in service from Rogers to Bell does not involve any additional cost to owners and, in fact, results in a reduction of expense. The Board was entitled to proceed under section 97(2) without notice.

13 Section 22(3) of the *Condominium Act* requires that notice be given to unit owners where a change in service involves a "network upgrade". The term "network upgrade" is new to the 1998 legislation and is not defined in the *Condominium Act*. The word "upgrade" connotes raising or improving the quality (see *Webster Unabridged Dictionary, Third Edition*).

14 I find that since the Bell service involves the use of the existing network of telephone wires connected to a modem in the units and the modems are being provided by Bell at no cost, there is no basis to conclude that the Bell system is a network upgrade. Accordingly, the notice provisions under section 22 do not apply.

15 Furthermore, the change in channel line up and re-packaging the option channels later proposed by Bell did not require a further notice to owners by the corporation.

2. If notice was required, was notice to condominium unit owners adequate?

16 If I have erred in my conclusion that notice to unit owners was not required, I now consider whether the notice given was adequate. In January, 2003, MTCC 973 posted a notice to unit owners in the common elements advising that a change in television service providers was being considered. After signing a letter of intent with Bell in February, the Condominium posted another notice in the common elements. In March, 2003, the condominium mailed a notice to all owners with the annual budget and a description of the new service.

17 MTCC 973 delivered a notice on April 4, 2003 to all owners advising they had thirty days to requisition a meeting of owners. No requisition was received. The Board did not believe the change was a "network upgrade to a telecommunications system" but delivered the notice after obtaining legal advice on the drafting of the wording.

18 Section 97(3) of the *Condominium Act* provides that a corporation may make an addition, alternation or improvement to a service that the corporation provides to the owners if the corporation has sent a notice describing the change, stating the estimated costs, advising owners of their rights under section 46 to requisition a meeting of owners within 30 days and the owners have not requisitioned a meeting or have requisitioned a meeting but have not voted against the change.

19 The applicants argue that notice by MTCC 973 was inadequate as it was deficient and misleading about the cost savings of proceeding with an agreement with Bell. They further argue that the information circular of April 4, 2003 did not constitute notice about a network upgrade to the telecommunication service as required by section 22 since there was no description of the technology to be used by Bell in the network upgrade (using VDSL) until the May 7, 2003 meeting. They submit that MTCC 973 failed to advise owners that Rogers reduced their pricing so that it was equivalent to Bell's estimated costs.

20 MTCC 973 argues that the Bell service is not a "network upgrade" under section 22(3). In support of its position, it filed an affidavit from Robert Yip, a professional engineer employed by Bell, who outlined his view as to why the Bell services do not constitute an upgrade as there is no physical improvement to the existing telecommunications network. Mr. Yip was not cross-examined on his affidavit. On the other hand, the applicants' evidence on this point is based upon a conversation by one of the applicants with someone at Rogers who is not named and who did not say how the system was being improved or upgraded.

21 As for the notice given on April 4, 2003, I find that it met the requirements under section 97(3). Unit owners

had sufficient information to determine whether they wanted to requisition a meeting: see *Irvin v. Irvin Porcupine Gold Mines Ltd.*, [1940] O.J. No. 219 (Ont. H.C.). The notice outlined the change in service providers, the effective date, details of services, expected savings, the impact upon owners and the rights of owners under the *Act*. There was other information provided before that notice was given and an information circular was distributed and an information meeting held after the notice was given.

22 Where the Board has acted in good faith and with legal advice, the court should not interfere and substitute its own view unless the Board has acted in a way that is clearly unreasonable or contrary to the legislative scheme: see *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.).

23 The applicants learned sufficient information from the April 4 notice to decide whether to call a meeting. They decided to abandon their effort to requisition a meeting of owners. In fact, no requisition of a meeting of owners was ever received by the Condominium Corporation.

3. Did the Corporation make a substantial change in a service provided to owners by MTCC 973 such that a vote of two-thirds of unit owners supporting the change was required?

24 Section 97(4) of the *Condominium Act* provides that where the Corporation proposes to make a substantial change in service provided to the owners, it is necessary that owners who own at least sixty-six and two-thirds per cent of the units of the Corporation vote in favour of the change. Under section 97(6), a change is substantial if the estimated cost exceeds ten per cent of the annual budget of common expenses or if the Board elects to treat the change as substantial. The applicants argue that, by their description of the changes, MTCC 973 treated the upgrade in telecommunications as substantial, necessitating full disclosure and a vote.

25 On the evidence before me, I find that the change proposed by MTCC 973 would result in a cost savings such that section 97(6)(a) does not apply. I also find that, while the respondent itself when communicating with unit owners referred to the change in service as a "significant change" and a matter that has "far reaching implications", in the context, the Board did not elect to treat the change as substantial and section 97(6)(b) does not apply. Therefore, the requirements of section 97(4) do not apply and a two-thirds vote of unit owners is not necessary to approve the change.

V. Result

26 For reasons outlined, the application for an order enforcing compliance with the *Condominium Act* is dismissed. If the parties are unable to agree on the issue of costs, they may file written submissions as follows: MTCC 973 and Bell by December 15, 2004 and the applicants by December 22, 2004.

Application dismissed.

END OF DOCUMENT

COURT FILE NO.: 03-CV-249538CM2
DATE: 2005-01-20

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DAVID WEBB and DIANN WEBB v. METRO TORONTO CONDOMINIUM CORPORATION NO. 973

BEFORE: HIMEL J.

COUNSEL: Timothy Pinos, for the applicants

Patricia Conway for the respondent
James A. Hodgson for the added respondent Bell Express Vu

ENDORSEMENT ON COSTS

[1] The applicants challenged the decision of the Board of Directors of their condominium to change the cable television services provided by Rogers with new services provided by Bell Express Vu and sought a compliance order under section 134 of the *Condominium Act*. On December 2, 2004, I dismissed the application and issued written reasons for judgment. I also ordered that if the parties were unable to agree on the question of costs, they should file written submissions according to a timetable. The submissions were filed late by MTCC 973 and the applicants but since no objection was made to receiving them late, I have considered them and now render my decision on costs.

POSITIONS OF THE PARTIES:

[2] The respondent MTCC 973 seeks an order of costs fixed on a substantial indemnity basis at $41,827.80 inclusive of GST and asks that the order be made against Rogers which funded the litigation. The added respondent Bell Express Vu takes the position that costs should be awarded on a partial indemnity basis in the amount of $6,366.50. It says it brought a motion to intervene and be added as a party respondent because there was a risk that the respondent MTCC 973 would not have the resources to see the case through to conclusion of the application.

[3] The applicants take the position that there should be no order as to costs. In the alternative, the respondent MTCC 973 only and not Bell Express Vu should be awarded costs on a partial indemnity basis in an amount no greater than $10,000 inclusive of disbursements and GST and there should be no order as to costs against Rogers. The applicants submit that the submissions of MTCC 973 were filed late so no costs should be ordered. Alternatively, this is an appropriate case where the parties bear their own costs because it raised questions concerning the application of certain provisions of the *Condominium Act* which have not been considered by a court. As for Bell Express Vu, it joined the litigation as an intervenor and the applicants should not be exposed to costs unless they were a reasonably foreseeable consequence of the litigation.

ANALYSIS AND THE LAW:

[4] The jurisdiction of this court to deal with costs is found in s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, C.43 which provides:

> "Subject to the provisions of an Act or rules of court, the costs of an incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid."

Rule 57.01(1) of *Rules of Civil Procedure* provides:

> In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (a) the amount claimed and the amount recovered in the proceeding;
> (b) the apportionment of liability;
> (c) the complexity of the proceeding;
> (d) the importance of the issues;
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
> (f) whether any step in the proceeding was,
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
> (g) a party's denial of or refusal to admit anything that should have been admitted;
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and

(i) any other matter relevant to the question of costs. O.Reg. 627/98

[5] On January 2, 2002, a new costs regime came into effect in Ontario, pursuant to O.Reg. 284/01 which amended, *inter alia*, the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Tariff A establishes a "costs grid" for costs on two scales: partial indemnity (replacing the former party and party scale) and substantial indemnity (replacing the former solicitor and client scale): see *Delrina Corp. v. Triolet Systems Inc.* (2002) 22 C.P.C. (4th) 332 (C.A.) However, the costs grid was not intended to involve a mechanical exercise of multiplying hours by rates. Rather the objective is to fix costs in an amount that is "fair and reasonable for the unsuccessful party to pay in a particular proceeding".: *Boucher v. Public Accountants Council for the Province of Ontario* [2004] O.J. No. 2634 (C.A.); *Zesta Engineering v. Cloutier* [2002] O.J. No. 4495 (C.A.). In the case of *Moon v. Sher et al*, a decision of the Ontario Court of Appeal released on November 16, 2004, Borins J.A. followed the approach taken in *Boucher* and *Zesta Engineering* that fairness and reasonableness are the fundamental concepts that govern in the fixing or assessing of costs.

[6] In exercising its discretion, the court must first decide whether procedural and substantive justice would be achieved by fixing costs: see *Murano v. Bank of Montreal* (1998) 41 O.R. (3d) 222 (C.A.). In exceptional cases, the court may decline to fix costs and may refer the costs for assessment. The size and detail of the bill of costs as well as the complexity of the matter are factors to be considered. The fact that the court has extensive knowledge of the legal and factual issues that were addressed before it is an important consideration and an advantage over the assessment officer who has no direct knowledge of the case and the nature and extent of the services performed by counsel.

[7] The court must determine the appropriate scale for costs. The former solicitor and client scale, now substantial indemnity scale, is intended to provide indemnification for costs reasonably incurred in the course of the action. In the usual circumstances, an award of costs on a partial indemnity basis is the appropriate award to impose on the unsuccessful party: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (C.A.); *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.). Costs on a substantial indemnity scale are reserved for those rare and exceptional cases

where the conduct of the party against whom costs is ordered is "reprehensible" or where specific provision is made in the Rules for costs on that scale in certain cases. In determining the quantum of costs to be fixed, the court is to consider the factors set out in Rule 57.01 which include the results obtained, any offers to settle, the complexity and importance of the issues. The court is to assess what is fair and reasonable in the circumstances of the case.

[8] In the circumstances of this case, the respondent MTCC 973 seeks an order of costs awarded against Rogers, a non-party, which it is admitted has funded the litigation. The respondent asks that the principle outlined in the case of *Smith v. Canadian Tire Acceptance Ltd.*(1995) 22 O.R. (3d) 433 (Ont.Gen.Div.) which was upheld by the Court of Appeal on November 8, 1995 be applied. There, Winkler J. awarded costs against a non-party where the non-party was the real plaintiff although not the *de facto* plaintiff in the proceeding and it was found that the non-party engaged in improper conduct in respect of the litigation by instigating, promoting financing and instructing counsel and controlling the conduct of the litigation, by naming the plaintiffs in order to avoid possible adverse costs consequences and by embarking upon an "ill-founded and conceptually flawed" scheme which was "irresponsible" and "attempting to gain financially was akin to champerty and maintenance". Justice Winkler in ordering costs against the non-party, relied upon the decision of *Sturmer v. Beaverton (Town)* (1912) 25 O.L.R. 566, 2 D.L.R. 501 (Div.Ct.) leave to appeal refused. There, Middleton J. held at 505: "Where the real party litigant puts forward another person in whose name proceedings are taken, the Court has jurisdiction to impose costs against the real litigant". He further relied upon *Assaf v. Koury* (1980), 16 C.P.C. 202 (Ont.H.C.) where Justice Cromarty ordered costs on a solicitor and client scale against a non-party to the proceedings who had counselled, financed and conducted the litigation.

[9] In considering the case before me, I note that while Rogers had a financial interest in the outcome of the case, there is nothing to suggest that there was misconduct and irresponsible handling of the litigation. The court has authority to award costs against the real litigant; however, I accept what the applicants argued at the motion alleging abuse of process, that they commenced the application on their own initiative and contacted Rogers in order to obtain

information. That Rogers provided financial assistance did not amount to Rogers acting in an officious, immoral or improper way.

[10] As for the scale of costs in this case, I am satisfied that costs should be awarded on the partial indemnity scale. The conduct of the applicants was not reprehensible nor are the circumstances rare and exceptional in order to justify the award of costs on a higher scale.

[11] The fixing of costs by a judge is not an item by item assessment. Furthermore, "An award of costs is intended to indemnify a party, in whole or in part, for costs which that party has incurred or is obliged to incur to their solicitors.": see *Lawyers Professional Indemnity Co. v. Geto Investments Ltd.* (2002) 17 C.P.C. (5th) 334 (Sup.Ct.)

[12] Having reviewed the attendances set out in the respondent's bill of costs, including preparation and court time, and having considered the factors set out in Rule 57.01, I determine that an award of costs of $36,433.71 inclusive of disbursements and GST in favour of the respondent MTCC 973 which is on a partial indemnity basis, is fair and reasonable.

[13] As for the claim of costs by Bell Express Vu it elected to intervene and seek party status. It was not brought into the proceeding by the applicants but the applicants consented to the application for intervenor status. Clearly, Bell Express Vu could have been adversely affected by the result in the proceeding. It had an important interest in the outcome of the application. A costs award in favour of a party who may have been adversely affected by the judgment sought in the proceeding may be appropriate: see *Elliott v. Toronto (City)* (1999) Carswell Ont. 790 (C.A.), leave to appeal dismissed 2000 Carswell Ont 4337. For this reason, Bell Express Vu is entitled to costs on a partial indemnity scale fixed at $6,366.50 inclusive of GST which I deem a fair and reasonable amount in this case.

RESULT

[14] For the reasons outlined above, I fix costs of this application as outlined above payable

by the applicants to the respondent MTCC 973 and the added respondent Bell Express Vu within sixty days.

HIMEL J.

DATE: January 20, 2005