SUPREME COURT OF YUKON

Citation: *North America Construction (1993) Ltd. v Yukon Energy Corporation*, 2022 YKSC 65

Date: 20221202
S.C. No. 11-A0114
Registry: Whitehorse

BETWEEN:

NORTH AMERICA CONSTRUCTION (1993) LTD.

PLAINTIFF

AND

YUKON ENERGY CORPORATION

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — H. David Edinger (by video conference)

Counsel for the Defendant — Todd Shikaze (by video conference)

REASONS FOR DECISION

Introduction

[1] Judgment after the second trial ordered by the Court of Appeal of Yukon in this complex construction dispute was issued by this Court in February 2021. In November 2021, extensive written and oral submissions were made by both parties in case management on the unresolved matters of costs, interest on the overpayments, and repayment of overpayments.

[2] These issues are complicated, due in part to the complexity of the matters in the underlying dispute, but also due to the protracted procedural course of the litigation, and the highly adversarial but nonetheless civil nature of the proceedings.

[3] Counsel have agreed on the parameters of the Court's role at this stage. This hearing represents an incremental step towards the final resolution of costs, interest and overpayments. Counsel are not asking the Court to assess costs or to determine mathematically the amounts owing after calculations of overpayments, deductions and interest. The answers to the questions set out below will allow the parties to move towards preferably settling the amounts or at least narrowing the matters for further adjudication.

[4] The issues are:

a. whether the defendant, Yukon Energy Corporation ("YEC") is entitled under the contract to the reasonable solicitor-client costs of its counterclaim regardless of success, or on another scale;

b. which party is entitled to its costs of the action and at what scale;

c. whether an offer to settle made by YEC should be considered at this stage of the proceeding and if so, what is its effect;

d. what rate of interest applies to overpayments from YEC to the plaintiff, North America Construction (1993) Ltd. ("NAC") made as a result of the first trial, 2016 YKSC 33 ("Trial 1");

e. whether an immediate repayment from NAC to YEC of the net difference between the parties' successful claims after the second trial, 2021 YKSC 5 ("Trial 2") should be ordered; and

f. whether this Court should issue a declaration that YEC is entitled to set off judgments in its favour from Trials 1 and 2 and costs and disbursements of the counterclaim against the amounts owing to NAC under the contract.

[5] The conclusions on each of these issues are as follows:

a. YEC is not entitled to reasonable solicitor-client costs for its counterclaim or on any other scale on a contractual basis;

b. YEC is the substantially successful party and is entitled to increased costs at Scale C for its defence and counterclaim;

c. YEC's offer to settle should be considered at this stage and entitles it to double costs from April 17, 2019, to the end of the litigation, exclusive of this hearing;

d. the rate of interest set out in s. 8.4 of the contract applies to the repayment of the overpayments made by YEC to NAC after Trial 1;

e. an immediate repayment of $112,242 from NAC to YEC is not required; and

f. it is not necessary to issue a declaration that YEC is entitled to set-off any amounts owing to it after the Trials 1 and 2, including costs and disbursements against the amounts owing under the contract.

Background

[6] The *Rules of Court* of the Supreme Court of Yukon (the "*Rules of Court*") were amended effective October 31, 2022. This decision refers to and applies the *Rules of Court* that were in effect prior to the amendments, as all matters in dispute occurred and submissions were provided before that time.

[7] The factual background to the dispute is set out in the Trial 2 judgment and will be summarized briefly here.

[8] YEC built a third turbine and installed a new power cable and switchgear at the Aishihik hydro-electric generating station in 2010-11. YEC entered into a contract with NAC for this work in December 2010 (the "Contract"). The work began in August 2010, before the Contract was finalized. It was substantially completed by December 2011. During and after the construction, there were many change orders ("CRXs") issued, price adjustments, and disputes. Many of these were settled, but those that were not proceeded to litigation.

[9] YEC and NAC agree that in March 2016, at the outset of Trial 1, YEC owed NAC $1,308,462[1] under the Contract, comprising holdback monies, work invoiced but unpaid, and the cost of labour and materials (the "Agreed Contract Debt"). This amount was paid by YEC to NAC after Trial 1, along with an amount representing the judgments in which NAC was successful, plus costs and interest, for a total of $2,267,470. Of this amount, $1,682,470 was awarded by the trial judge as a result of the disputed claims.

[10] The Court of Appeal of Yukon then ordered a new trial on four of the litigated claims, with a total value of $341,510 (*North America Construction (1993) Ltd. V Yukon Energy Corporation*, 2018 YKCA 6 (the "Appeal decision")). The costs of the appeal were settled between the parties and paid by NAC.

[11] YEC brought an application in case management to this Court on January 24, 2019, for return of the monies it paid to NAC that were unsupported by any judgment, plus costs and interest. This amount was the $341,510 plus $585,000, equalling $926,510. This Court ordered NAC to repay that amount less any interest calculations as agreed.

[1] Throughout these Reasons monetary amounts have been rounded to the nearest dollar.

[12] Pursuant to the January 24, 2019 case management conference order, NAC paid $582,500, representing the $341,510 plus part of the costs and interest YEC asserted was owed to it, to YEC on March 7, 2019, without prejudice to the rights of either party to recalculate or renegotiate the amount of interest on the Trial 1 judgment or the amount of overpayment by YEC to NAC. This left NAC with a payment of $1,684,970 ($2,267,470 - $582,500) from YEC in November 2019 at the outset of Trial 2.

[13] YEC made an offer to settle to NAC on April 17, 2019, that NAC pay $350,000 to YEC representing all outstanding claims, costs, and interest. There was no end date to the offer. NAC did not respond to this offer.

[14] As a result of the judgment in Trial 2, the award to NAC was reduced by $486,516. This meant that NAC was owed $854,444 ($1,682,470 (amount awarded at Trial 1) - $341,510 (the Appeal decision) - $486,516 (reduced amount Trial 2)).

[15] NAC repaid YEC $486,516 in November 2021. This has left NAC currently with $1,198,454, from the original amount of $2,267,470 paid by YEC after Trial 1.

[16] Costs and interest adjustments following Trial 2 remain outstanding and answers to incremental questions leading to their determination are the subject of these reasons.

[17] This background is set out in Schedule 1, prepared by NAC for the hearing, a copy of which is appended to these reasons.

[18] I will first address the general legal principles applicable to costs. Then I will address each issue - positions of the parties, analysis, including any applicable law to each issue, and conclusion.

General legal principles

[19] An award of costs is a matter of judicial discretion, based on the material before the court and the circumstances of the case.

[20] Mark M. Orkin, Robert G. Schipper, *Orkin on The Law of Costs*, 2nd ed., (Toronto: Thomson Reuters, 2022) ("*Orkin*"), summarized the approach to costs in Canada as an attempt to balance two conflicting principles: first, that a successful party to litigation who is free of blame should not be required to bear the costs of either prosecuting or defending the action; and second, that citizens will be hesitant to assert or defend their rights in court if an unsuccessful party is required to bear all the costs of a successful one (see *Orkin* 2:1, p. 2-20, FN 42).

[21] The Supreme Court of Canada in *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 404-5, summarized the primary purpose of the costs rule as follows:

> The long-standing rule regarding costs is that they are generally awarded to a successful party, absent misconduct on his or her part. A successful litigant has a reasonable expectation that his or her costs will be paid by the unsuccessful party. The rationale for this rule is based on the fact that, had the unsuccessful party initially agreed to the position of the successful one, no costs would have been incurred by the successful party. Accordingly, it is only logical that the party who has been found to be wrong must be ready to support the costs of a litigation that could have been avoided. [emphasis in original]

[22] In addition to indemnifying the successful litigant, other purposes of costs awards have been recognized:

- to encourage settlement, thus freeing up judicial resources for other cases;

- to prevent frivolous or vexatious litigation;
- to discourage unnecessary and expensive litigation and to encourage conduct that reduces duration and expense;
- to require litigants to assess the strengths and weaknesses of their cases at the outset and throughout the litigation;
- to promote access to justice.

(*Can-West Development Ltd v Parmar*, 2020 BCSC 439 ("*Can-West*") at para. 8, quoting *Giles v Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74).

[23] Costs have also been considered and used as an instrument of policy, and "as a tool in the furtherance of the efficient and orderly administration of justice" (*British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para. 25).

[24] Costs are not intended as punishment, nor as a source of profit to a successful party.

[25] An order depriving a successful party of costs is exceptional. The court in exercising its discretion must determine whether the normal rule is unsuitable on the facts of the case *(British Columbia (Minister of Water, Land and Air Protection) v British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368 at para. 8).

[26] The general rule where an appellate court orders a new trial is costs are left to the discretion of the trial judge presiding over the new trial (*Laframboise v Billett* (1992), 5 Alta LR (3d) 294 (CA)). Where a new trial is ordered because of some error or misdirection by the trial judge, the usual order is the costs of the appeal and the abortive trial should follow the result of the second trial.

[27] Here the second trial was ordered on four issues because of the trial judge's error in the interpretation and application of the rule in *Browne v Dunn* (1893), 6 R. 67 (H.L.). The matters not appealed or sent to a second trial were of lesser significance and complexity than the ones ordered to a second trial, justifying the application of the general rule that the costs of both trials should follow the outcome of the second trial.

a. Does YEC have a contractual right to solicitor-client costs for its counterclaim?

Legal principles applicable to contractual costs of counterclaim

[28] The first step in contractual interpretation is to determine whether the contract gives rise to more than one reasonable interpretation. The plain and ordinary meaning must be given to words in the contract unless to do so would result in an absurdity (*Ohman v Synq Access + Technology Limited*, 2018 BCSC 1556 at para. 20 ("*Ohman*")).

[29] In *Ohman*, the Court of Appeal for British Columbia cites *Group Eight Investments Ltd v Taddei*, 2005 BCCA 489 at paras. 20-22 which set out the general principles applicable in the consideration of costs indemnity clauses in contracts including:

> [11] … (a)words must be given their plain and ordinary meaning unless to do so would result in an absurdity; (b) words must be interpreted in light of the whole of the contract and the intention of the parties expressed therein; and (c) the court assumes that the words in a contract are there for a purpose and may reject an interpretation that would render one of the contract's terms ineffective.

[30] Commercial contracts must be construed in accordance with "sound commercial principles and good business sense" (*Ohman* at para. 21).

[31] Where ambiguity arises in costs indemnity clauses, they should be interpreted against the drafter (the *contra proferentum* rule) (*Ohman* at para. 22).

YEC's position on costs of counterclaim

[32] YEC's counterclaim in Trial 2 consisted of two claims. The first was CRX 111, a claim for the costs of replacing or remediating cabinets that had been ordered improperly and inserted in error by NAC. YEC claimed for replacement costs of $206,971 or in the alternative, remediation at the cost of $100,000. YEC was successful in obtaining an award of $100,000.

[33] The second counterclaim was the deficiencies claim. YEC claimed damages for deficiencies in the range of $713,688 to $738,864. YEC was awarded damages of $509,241.

[34] YEC argues it is entitled to its reasonable solicitor-client costs of these counterclaims based on the wording of ss. 9.1 and 12 of the Contract.

[35] Section 9.1 states:

> Setoff and Holdback
>
> YEC may deduct, withhold or setoff against any monies due or to become due to the Contractor under this Agreement:
>
> …
>
> (d) an amount equal to the reasonable cost to YEC for services of a solicitor or accountant, where such services are required in respect of a failure by the Contractor to comply with any of the obligations of the Contractor under this Agreement.

[36] YEC says because the Court has found that NAC has breached the Contract in the context of YEC's counterclaims, YEC is entitled to costs under s. 9.1(d). These

costs are unaffected by the determination of other costs and which party has enjoyed substantial success as they are a contractual right.

[37] Section 9.1(d) in its plain and ordinary meaning includes litigation costs because a provision covering legal costs for any breaches of contract must necessarily also cover the costs to litigate those breaches. Any doubt about whether s. 9.1(d) includes court costs is put to rest by the wording of s. 9.1(b), according to YEC. This section permits YEC to holdback and set off the amount of "any claim, demand, or lien made or filed or that may be made or filed" against YEC by NAC or a third party by reason of any act or omission of NAC, and permits YEC to pay into Court an amount owing up to the amount of the claim. This phrase suggests litigation costs are contemplated and included in the set off by YEC for any breach of contract by NAC.

[38] In addition, YEC says the broad language in s. 12 of the Contract, in the context of the importance of the Aishihik generating station to the power supply in the Yukon, demonstrates the parties' intention that a breach of contract would result in significant consequences. Section 12.1 of the Contract provides for indemnification of YEC by NAC "from and against all costs, expenses, and liabilities" arising from NAC's failure to comply with the Contract, or from NAC's negligent or defaulting performance of the work under the Contract. Section 12.1 covers indemnification of all legal fees and disbursements arising from a breach of contract, according to YEC. Section 9.1(d) limits the indemnity to the "reasonable cost to YEC" but does not preclude the recovery of disbursements as set out in s. 12. Section 9.1(d) does not modify the indemnity related to disbursements, only the indemnity related to legal fees. YEC says it is entitled to set

off and deduct all disbursements arising from the counterclaim against any amounts owing to NAC, regardless of the interpretation of s. 9.1(d).

[39] YEC says the words “to YEC” in s. 9.1(d) refer to the solicitor-client costs of YEC, in other words, the legal fees actually charged to YEC and paid. To interpret “to YEC” other than the costs of all services of a solicitor would be to render “to” meaningless. This word “to” distinguishes it from other cases in which interpretations of indemnity clauses were considered.

[40] YEC says the word “reasonable” must be interpreted to mean the insulation of the indemnifying party from paying frivolous, unnecessary or vexatious legal fees that result in prolonging the litigation or prohibitively increasing its costs.

[41] YEC says there is no basis to NAC’s argument that s. 9.1(d) does not survive the Contract, which ended in early 2012. YEC says the crystallized obligation of YEC to pay NAC for its work under s. 8.2 of the Contract survives any termination of the Contract, and correspondingly, any rights of deduction, holdback and set-off must also survive. Further, YEC says s. 2.1 of the Contract provides the term continues until NAC completes the work to the satisfaction of YEC. This litigation confirms this condition has not been fulfilled.

[42] YEC says the fact it did not recover the full amount claimed is irrelevant. What is significant is that NAC was found to have breached the Contract, thus entitling YEC to its costs.

[43] Alternatively, YEC argues if the Court does not accept their position that NAC must pay the costs to be assessed on a reasonable solicitor-client basis and disbursements related to the counterclaim, then they are entitled to their costs of the

counterclaim to be assessed at Scale C of the tariff. They argue the contractual right set out in s. 9.1(d) entitles them to the costs of their counterclaim regardless of a finding of substantial success.

NAC's position on costs of counterclaim

[44] NAC argues the plain and ordinary meaning of s. 9.1(d) cannot include litigation costs, displacing the tariff under the *Rules of Court*. Such an interpretation, resulting in significant consequences, would require clearer language, referencing litigation for failure to comply with obligations. Section 9.1(d) retains its meaning without including litigation costs because it can relate to a curing of NAC's failure to comply with the Contract through means short of litigation. The costs referred to are out of pocket costs – that is, the cost of rectification of NAC's negligence or default, if any. They argue the reference to "accountant" in s. 9.1(d), as well as the application of sound commercial principles and good business sense, supports this interpretation.

[45] NAC says YEC's reliance on s. 12 of the Contract for their costs indemnity argument is unfounded because this clause does not refer to litigation costs either. It does not refer to costs of a "solicitor". Further, the provision in s. 12 stating that it survives the expiration or termination of the Contract and the absence of a similar provision in s. 9.1(d) suggests s. 9.1(d) applies during the currency of the Contract. NAC says the Contract terminated in 2012 when YEC advised NAC not to return to the site to address deficiencies.

[46] NAC refutes YEC's reliance on the words "to" and "reasonable" for their interpretation. The word "to" read in context cannot be understood by a reasonable business person to mean payment of solicitor-client costs of litigation about the

Contract, especially without a reciprocal obligation. Section 9.1(d) sets out other non-litigation costs to which it applies. The word “reasonable” is not limited to meaning frivolous, vexatious or unnecessary legal fees. It could equally be interpreted to refer to reasonable costs under the *Rules of Court* tariff.

[47] NAC also notes s. 17.3 of the Contract for the purpose of interpreting s. 9.1(d) in the context of the agreement as a whole. Section 17.3 refers to arbitration as a means of dispute resolution under the Contract and provides that each party shall bear their own costs of the arbitration. Section 17.3 also provides that either party may refer the dispute being arbitrated to the courts for resolution, making no reference to costs. Consistency suggests that costs of litigation would similarly be left to the discretion of the Court, unless otherwise specifically provided for.

[48] NAC argues in the alternative that if solicitor-client costs of the counterclaim are awarded, it will be difficult to determine which of YEC’s costs are attributable to the successful parts of the counterclaim, isolated from the settled aspects of the counterclaim. Further, s. 9.1(d) does not address how costs are to be assessed where a claim has been partially and not fully successful.

Analysis – costs of counterclaim

[49] The issue is whether the wording in s. 9.1(d), interpreted in accordance with its plain and ordinary meaning, in the context of the Contract as a whole, the parties’ intentions, and sound commercial principles is capable of supporting a recovery of costs of YEC’s counterclaim on a solicitor-client basis regardless of success – that is, a full indemnity approach.

[50] There is ambiguity in the Contract with respect to YEC's entitlement to legal costs in relation to its counterclaim and the scale of those costs. The ambiguity arises because although the reasonable costs to YEC of services of a solicitor (or accountant) for NAC's failure to comply with its contractual obligations is provided for, nowhere in the Contract are litigation or court proceedings specifically referenced. While s. 9.1(b) refers to YEC's ability to deduct its payment into Court of an amount owing for any claims, demands or liens filed by NAC or a third party against it, this is a narrow, specific situation and not equivalent to litigation for a breach of contract.

[51] The Court of Appeal for British Columbia in *Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd*, 2010 BCCA 469, described the difference between costs and legal and other expenses as well as the ability to contract out of the tariff as follows:

> [42] A distinction must be made between costs and legal (and other) expenses. Costs are awarded pursuant to the *Rules of Court*. They are normally granted on a party and party basis in accordance with a tariff contained in the *Rules of Court*, and they amount to only a portion of the party's actual legal expenses. By contrast, it is open to the parties to a contract to include a provision for reimbursement by one party to the other party for its actual legal and other expenses in certain circumstances. These are sometimes referred to as indemnity costs or contractual costs. …

[52] The Court in *Rai v Can-Pacific Farms and Packers Ltd*, 2014 BCSC 957 ("*Rai*") at para. 62, noted that parties cannot by agreement fetter the discretion of the courts with respect to costs but can contract for reimbursement for their actual legal expenses.

[53] The wording of the contracts in the cases in which the courts have upheld contractual provisions for full indemnity costs differs from that in this case. For example, in *Rai*, the lease stated:

> 14 …
>
> > 6.1 … In the event that it shall be necessary for the Lessor to retain the services of a solicitor or any other person for the purpose of assisting the Lessor **in enforcing any of its rights hereunder in the event of default on the part of the Lessee i**t shall be entitled to collect from the Lessee **the reasonable cost of all such services** as if the same were rent reserved and in arrears under this Lease [emphasis added].
> >
> > …

[54] Retaining the services of a solicitor for the purpose of assisting in the enforcement of rights under a lease in its plain meaning includes court action. Reasonable cost of all such services makes it clear that the costs of enforcement of rights are included in the indemnity. This wording does not appear in the Contract in this case.

[55] In *Ohman* the contractual provision at issue was:

> [7] …
>
> III. Collection of Costs
>
> If any payment obligation under this Note is not paid when due, the Borrower [Synq] promises to pay **all costs of collection, including reasonable attorney fees**, **whether or not a lawsuit is commenced as part of the collection process.** [emphasis added].

[56] The Court in that case concluded this phrase was broad enough to capture solicitor-client fees related to the collection of the debt. It said:

> [25] … By wording the costs collection term in this way, the defendant, in its drafting, and the plaintiff in its acceptance, clearly meant that the defendant's failure to adhere to its payment obligations would result in stiff consequences – namely the defendant would bear in its entirety, any,

> whatever, or the whole amount of the costs their breach caused.

[57] The wording in *Ohman* is much clearer than the wording in the Contract in this case. The costs of collection including an attorney's fees for a lawsuit are specifically referenced in *Ohman*.

[58] In *Freshslice Properties Ltd v RTM Holdings Ltd*, 2013 BCSC 135, the Court found the landlord was entitled to contractual recovery of its legal fees and expenses under the lease and referenced the wording of the applicable clause:

> [120] …
>
> > If it is necessary for the Landlord **to retain the services of any person for the purpose of assisting the Landlord in enforcing any of its rights under this Lease or otherwise available at law, the Landlord shall be entitled to collect from the Tenant the cost of all such services including,** but not limited to, all charges by any bailiff effecting a distress and **all legal fees and disbursements incurred in enforcing the Landlord's rights hereunder and in connection with all necessary court proceedings at trial or on appeal on a solicitor and own client basis,** as if the same were Rent reserved and in arrears hereunder [emphasis added].

[59] Once again, the language in this clause is clear in support of solicitor-client costs and disbursements in the event of litigation.

[60] A final example is found in the case of *Tsawwassen Quay Market Corporation v Delane Industry Co Ltd*, 2011 BCSC 940. An explicit clause in the contract referred to payment of legal and other costs incurred in enforcing a sublease or pursuing remedies against a subtenant arising from a breach, including costs of several kinds of court

actions, defending an unsuccessful counterclaim by the subtenant, and disbursements.

This clause was deleted and replaced by the following provision:

> [5] …
>
> > Para. 12.04 Replace by "In the event of a breach by either party of this Sub-Lease and the other party is successful in seeking legal remedies of the breach, the unsuccessful [as written] shall pay reasonable legal cost [as written] to the successful party. …["]

[61] In finding that the replacement clause, even with the wording "legal remedies" and "reasonable legal costs", did not entitle the successful party to solicitor-client costs, the court wrote:

> [13] The court should be reluctant to interpret the bare phrase "reasonable legal costs" in a manner that elevates its scope to provide for special costs. The latter are generally designed to penalize reprehensible conduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). It seems to me implicit in a contract clause dealing with the "reasonable costs" of litigation, that this must mean something that the courts would consider objectively "reasonable" and that means costs as awarded by the court in the litigation in question, which would typically be at the ordinary scale. If parties wish to contractually provide for special costs that more closely approximates actual legal fees, I suggest they must do so by clear language, such as language that provides a party for full indemnity of their actual legal expenses.

[62] In *Tsawwassen,* solicitor-client costs were denied and ordinary costs awarded. This wording was clearer than the wording in the Contract in the case at bar, as it referenced legal remedies for the breach, implying a court process.

[63] I do not accept that the intention of the costs clauses in the Contract in this case, interpreted in their plain and ordinary meaning, applying sound commercial principles, in the context of the entire Contract, is to reimburse YEC for its reasonable solicitor-client

costs of their counterclaim. The phrase "services of a solicitor or accountant … required in respect of a failure by the [NAC] to comply with any of the obligations of the Contractor under this Agreement" is not sufficient to cover costs of litigation arising from a breach of contract. There is an absence of clarity in the Contract wording to support YEC's interpretation, compared to the contract wording in cases where such costs awards have been granted. The plain and ordinary meaning of the wording in ss. 9 and 12 does not include litigation costs – words such as court actions, trials, lawsuits or litigation are not used, nor is litigation implied through use of language such as enforcement of rights or legal remedies for breaches. In contrast, s. 17.3 of the Contract refers to legal fees/costs in the context of arbitration and it provides that each party bears their own costs.

[64] It does not make for sound business or commercial sense for a provision with such significant cost effect to be worded in a way that is ambiguous. I also note that YEC provided the Contract so the *contra proferentum* rule applies to the extent of the ambiguity being resolved against them.

[65] YEC is not entitled to solicitor-client costs of its counterclaim under the Contract.

[66] YEC is not entitled to its costs of the counterclaim under the Contract, regardless of outcome, for the same reasons – the wording is insufficient to support recovery of litigation costs contractually. The costs of the counterclaim will be determined by the general principles applicable to the costs of the action.

b. Which party is entitled to its costs of the action and at what scale?

[67] The issue is which party is the substantially successful party and are they entitled to increased costs at Scale C?

Legal principles applicable to costs of the action

[68] Rule 60(9) of the *Rules of Court* states that "costs of and incidental to a proceeding shall follow the event unless the court otherwise orders."

[69] This has been interpreted to mean:

> [3] …
>
> 1. [A] party who substantially succeeds on the matters in dispute at trial is entitled to his or her costs unless otherwise ordered.
>
> 2. Substantial success is measured objectively taking into account all the matters in dispute, their weight or importance to the parties and the parties' relative of [as written] success or failure with respect to those matters.
>
> 3. As a rule of thumb, substantial success occurs when the prevailing party succeeds on 75% of the matters in dispute looked at globally.

Fotheringham v Fotheringham, 2001 BCSC 1321 ("*Fotheringham*") at para.60, adopted in *Kareway Homes Ltd v 37889 Yukon Inc*, 2012 YKSC 28 at para. 3 ("*Kareway Homes*").

[70] The Court in *Fotheringham* added another factor for consideration where one party has achieved substantial success: are there reasons to "otherwise order" that the winning party be deprived of costs and each side should bear their own costs (at para. 46).

[71] Substantial success does not mean that "a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide" when all the matters in dispute are considered globally (*Fotheringham* at para. 45).

YEC's position on costs of action

[72] YEC argues it was the substantially successful litigant because:

a. all four claims litigated in Trial 2 should have more weight: the deficiencies counterclaim and the Schedule D claim were more complex, contentious and of higher value than the others; CRX 100 received disproportionate attention because of NAC's inconsistent evidence references; CRX 111 was highly contentious and NAC ultimately conceded liability at closing submissions in Trial 1;

b. YEC was successful in the deficiencies claim, CRX 100 and CRX 111;

c. while NAC was awarded $122,725 for its Schedule D claim that it incurred costs for work done over a 102-day period after YEC changed the shut-down schedule, YEC notes its interpretation of the clause prevailed. NAC was awarded costs for approximately 30 of the 102 days it claimed it was on site during the Schedule D period because for approximately 72 days, NAC was doing work other than that related to the change in shut-down schedule. NAC did not lead evidence to show it was on site only because of the shut-down change. In fact, NAC admitted during Trial 2 it was on site during that period for other reasons. YEC expended great effort to lead evidence through cross-examination and other documents to show the multiple reasons other than the change to the shutdown schedule NAC was on site during that time. YEC had brought an unsuccessful application to strike NAC's Schedule D claim before trial, in anticipation of NAC's admission that it was on site for other reasons, in the absence of NAC's

intention to prove why it was on site during that time. Further, YEC argued the Schedule D claim was duplicative and that YEC should not be required to prove why NAC was on site during that time.

NAC's position on costs of the action

[73] NAC says the litigation must be considered as a whole and not in the separate components of NAC claims, YEC defences, YEC counterclaims, NAC's defence to counterclaims. NAC sets out several alternative arguments as follows:

a. NAC was substantially successful because the net result of Trials 1, 2 and other Court orders is that YEC must pay $854,444 to NAC;

b. NAC and YEC had divided success and should bear their own costs; or

c. costs should be apportioned in relation to the success of the parties on matters decided collectively in Trial 1 and Trial 2.

[74] NAC's alternative arguments all include in the amount owing to it the Agreed Contract Debt that YEC held back because of their claims against NAC. NAC argues this amount should be included in the litigation dispute because YEC would not release the Agreed Contract Debt until the amount of its counterclaim was calculated and deducted.

Analysis – costs of the action

[75] Applying the principles set out in *Fotheringham*, adopted in *Kareway Homes* and confirmed by the Supreme Court of British Columbia in *Can-West*, I find on considering the litigation as a whole, YEC was the substantially successful party.

[76] I have considered NAC's successes in Trial 1 and the fact that the successful appeal and subsequent ordering of a new trial on four issues were due to an error of law

committed by the trial judge. I note the most complex and most valuable claims were the Schedule D claim and the deficiencies counterclaim. The defence of the CRX 100 claim was more difficult for YEC because of NAC's failure to provide disclosure of the list of cable connections forming the basis of the claim despite asserting their preparation of it up to the trial. The CRX 111 was not complex; however, NAC waited until the end of Trial 1 to admit liability.

[77] The determination of substantial success will focus on the claims appealed and re-tried in Trial 2, without ignoring the claims decided in Trial 1.

[78] YEC was awarded 69%-71% of its deficiencies counterclaim ($509,241 from a claim of $713,688-$738,864); and 100% of its CRX 111 alternative counterclaim of repair costs ($100,000). YEC also successfully defended NAC's CRX 100 claim for $119,000, as it was dismissed. NAC claimed $633,510 for CRX 20, the Schedule D claim, and was awarded $122,725. As noted in *Can-West*, the requirement that one party pay the other does not necessarily mean they were the unsuccessful party. The entire context is considered, including the amount claimed, the amount awarded, and the conduct of the parties.

[79] YEC raised concerns about NAC's position in its unsuccessful application to strike NAC's Schedule D claim before trial. All the concerns raised were borne out by the occurrences at Trial 2. While NAC was entitled to argue a different interpretation of Schedule D, their position at Trial 2, admitting they were on site during the Schedule D period for reasons other than the shut-down schedule, was different from their position in responding to the application to strike, which was to deny any admission to this effect. NAC made no evidentiary attempts to show their work done on site was attributable to

the shut-down schedule only, in the event their interpretation of Schedule D did not prevail, leaving it to YEC to provide that evidence.

[80] I agree with YEC that the Agreed Contract Debt should not be considered in a determination of substantial success. It was not part of the litigation, as YEC did not dispute it was owing. The only dispute was the amount YEC could hold back from the debt because of their counterclaim and costs. The agreed upon interest to be paid to NAC under s. 8.4 of the Contract by YEC in addition to the debt, accounted for NAC's loss of the monies until repayment occurred. Costs are not intended to encompass issues not part of the disputed matters in the litigation.

[81] NAC achieved overall success in Trial 1 outside of the claims that were appealed (as a result of the trial judge's legal error). However, the claims litigated in Trial 2 were worthy of greater weight given their importance to the parties. For the above reasons, and considering the matter globally, YEC was the substantially successful party and is entitled to its costs of the defence and the counterclaim under the tariff set out in the *Rules of Court*.

Scale of Costs

[82] The parties agree that any award of costs should be calculated on the basis of Scale C in the tariff, and should be subject to increased costs of 1.5 times the Scale C rate pursuant to s. 2(e) under Appendix B.

[83] Scale C provides for an increased rate per unit of activity on the basis that the litigation involved "matters of more than ordinary difficulty." Matters that may be taken into account in determining the scale include whether there was a difficult issue of law, fact or construction; whether there was an issue of importance to a class or body of

persons or is of general interest; and whether the outcome determines rights and obligations of the parties beyond the relief claimed.

[84] Here, the reasons for Scale C costs agreed upon by YEC and NAC include the fact-intensive, highly technical, document-heavy and contentious nature of the claims, requiring expert evidence.

[85] I agree that an award of costs should be calculated on the basis of Scale C for the same reasons. The factors noted by the parties support a finding that the case was of more than ordinary difficulty.

Increased Costs

Legal Principles applicable to increased costs

[86] Subsection 2(e) of Appendix B allows for the Court to order an increase of the value of allowable units by 1.5 times if an award of costs on the fixed scale "would be grossly inadequate or unjust" as a result of unusual circumstances. Three conditions must be met as set out in *Golden Hill Ventures Limited Partnership v Ross Mining Limited and Norman Ross*, 2012 YKSC 18 ("*Golden Hill*") at para. 42:

a. unusual circumstances;

b. unusual circumstances must result in an award of costs that are grossly inadequate or unjust; and

c. the increase cannot be applied only because there is a difference between the actual legal expenses and the scale costs.

[87] While misconduct of a party may justify an award of increased costs, this Court has held that punishment of misconduct is not the sole purpose of s. 2(e) of Appendix B. Increased costs can also be used to indemnify a party against high costs caused by

unusual circumstances such as a trial that is lengthened or delayed unnecessarily (*Golden Hill* at para. 45). In other words, s. 2(e) of Appendix B provides an alternative to special costs, payable when a party's conduct is reprehensible, scandalous, outrageous or deserving of rebuke. Unusual circumstances is a lower threshold and does not necessarily require misconduct.

Positions of parties on increased costs

[88] YEC and NAC agree that the procedural complexity of two trials and an appeal, with the second trial proceeding by way of affidavits, requiring additional work for counsel, in the context of the highly technical, high volume, fact and document intensive content justifies an award of increased costs. There is significant disparity in the amount of actual legal expense and the amount recoverable by the tariff, even at Scale C with increased costs.

[89] YEC's arguments go further in support of increased costs. They refer to the different strategies employed such as new witnesses, some of whom were out of the jurisdiction, new evidence, and the use of affidavits at Trial 2, requiring significant additional time investment of counsel. YEC also blames the conduct of NAC in their strategic choices of litigating Schedule D, CRX 100 and CRX 111 for increasing costs and lengthening trials.

[90] NAC disagrees that these factors are necessary to consider in determining whether increased costs are justified. While NAC does not disagree that Trial 2 required a different work product and led to new strategies, evidence or arguments, they say the procedural and substantive complexity of the proceedings was sufficient. NAC also

disagrees with YEC that to the extent costs are apportioned between the parties, only YEC should receive increased costs.

Analysis – increased costs

[91] I agree with NAC in this case that it is not necessary to go beyond the procedural and substantive complexities, in addition to considering the disparity between actual and tariff costs, to support an award of increased costs. The complexities are enough to constitute unusual circumstances that would result in a gross and unjust award of costs if there were no adjustments made (*Trinden Enterprises Ltd v Ramsay*, 2013 BCSC 568 at para. 20).

[92] Increased costs should apply to both parties, assuming there is apportionment. The conduct of either party is not necessary to be considered here, as it is taken into account in other ways, including the determination of substantial success and the effect of the offer to settle.

c. Should the offer to settle be considered and what is its effect?

[93] YEC made an offer to settle to NAC dated April 17, 2019, after Trial 1 and the appeal, but before significant work to prepare for Trial 2 had begun and seven months before its commencement. The offer was:

> Yukon Energy is prepared to accept $350,000 in full and final settlement of Supreme Court of Yukon Action No. 11-A0114, including without limitation all of the outstanding claims, counterclaim, and claims for costs and interest of NAC and Yukon Energy, respectively.

This offer was not responded to by NAC.

YEC's position on offer to settle

[94] The parties agree NAC owes YEC after Trial 2 a minimum of $486,516, which it has paid. This is based on the overpayment YEC made after Trial 1, that was adjusted after the appeal, and which needed to be adjusted again after Trial 2. YEC says in addition to this amount, which is exclusive of costs and interest, it is also entitled to costs and a return of an additional overpayment with interest. The payment by NAC is an acknowledgement that YEC has achieved a higher recovery than its $350,000 settlement offer.

[95] YEC argues that any of Rule 39(24) (plaintiff by counterclaim – successful beyond $350,000 on deficiencies claim and CRX 111), Rule 39(25)(b) (defendant in respect of CRX 100 which was dismissed), and Rule 39(25)(a) (defendant in the Schedule D claim in which the plaintiff's recovery was less than the settlement offer) apply, depending on which claim is assessed.

[96] YEC states the offer is properly before the Court because the merits of the dispute have been adjudicated and the only outstanding issues are costs, interest and overpayments. Liability for overpayments can only be determined once costs have been determined. NAC seeks an order for costs in this hearing; therefore, a determination of the effect of the offer to settle is necessary.

[97] YEC, in written submissions, stated the offer to settle included overpayment amounts. Their reasoning is based in part on the case management conference order of January 24, 2019, in which the parties joined issue on the overpayment and an order was granted requiring the repayment of monies by NAC to YEC that were unsupported by any judgment after the Court of Appeal decision. YEC's acceptance of NAC's partial

repayment on March 7, 2019, was without prejudice to the rights of the parties to recalculate entitlement to overpayments. Thus, overpayments were a live issue in the litigation at that time. The settlement offer of April 17, 2019, was made in full and final settlement of all claims, costs and interests, including overpayments.

[98] Although YEC relies on several subsections of Rule 39, depending on whether they are found to be making the offer as plaintiff by counterclaim or defendant, the effect of the subrules is the same. If a plaintiff or defendant makes an offer to settle that is not accepted and at the end of trial they are more successful than their offer, they are entitled to double costs from the date of the offer to the end of trial. While the offer to settle of $350,000 to be paid by NAC inclusive of costs and interest is not more than an entitlement of NAC to a payment of $122,725, the entire award to NAC does not exceed the amounts YEC has already paid.

NAC's position on offer to settle

[99] NAC argues first that the disclosure of the offer to settle to the Court is premature as there remain some outstanding questions of liability, related to the amounts of interest payments owing, the amount of costs, and the relief to be granted, that is, the declaratory relief sought. NAC says there is nothing certain to which the offer can be compared.

[100] NAC further notes that the offer says nothing about overpayments, but only goes to the substance of the litigation. It applies to the whole of the litigation, and so it must be compared to the global results of both Trials. It cannot be compared to each of the claims individually, as YEC has argued.

[101] NAC states the result of both trials is that YEC owes NAC $854,444; NAC does not owe YEC.

Legal principles – offer to settle

[102] The parties agree on the applicable law. The principles are set out in *Catalyst Paper Corporation v Companhia de Navegação Norsul*, 2007 BCSC 1595, which was decided under the British Columbia Rule 37 before the 2008 amendments. This Rule was identical to Rule 39 of the Yukon *Rules of Court*. Those principles are:

> [12] …
>
> - Rule 37 is a complete code. If a plaintiff falls within sub-rules (23) to (26) costs follow those sub-rules leaving no discretion to the trial judge: ***Brown v. Lowe***, 2002 BCCA 7; ***Cridge v. Harper Grey Easton & Co.***, 2005 BCCA 33.
>
> - The Rule is to be uniformly applied to give effect to its purpose. Litigants must be able to make offers of settlement under the Rule with confidence that Rule will be applied when costs are awarded: ***Cridge v. Harper Grey Easton & Co***.
>
> - The purpose of Rule 37 is to encourage the settlement of litigation through prescribed consequences in costs: ***Cridge v. Harper Grey Easton & Co***.
>
> - The offer to settle must be clear and unambiguous. The "clarity or legal effectiveness of an offer to settle cannot be based on the individual level of comprehension of the individual who receives the offer ... Rather, the determination of whether an offer is uncertain must be based on an objective standard which takes into account the legal context in which the offer is made: ***Anderson v. Routbard***, 2007 BCCA 193. ...
>
> - a person receiving an offer under Rule 37 cannot claim ignorance of the operation of that rule as a means of avoiding the legal implications of an offer

> made pursuant to that rule. An offer to settle does not have to educate the person receiving it as to the state of law in order for it to be effective": ***Anderson v. Routbard***.
>
> - The reasonableness of a monetary offer to settle under Rule 37 is not a matter for judicial consideration in the application of Rule 37: ***Kurylo v. Rai***, 2006 BCCA 176. [emphasis in original]

[103] The absence of judicial discretion in the face of this rule was noted in the Yukon decision of *Trans North Turbo Air Ltd et al. v North 60 Petro Ltd. et al,* 2003 YKSC 26, in which this Court noted there is no discretion to refuse double costs where the plaintiff's offer to settle falls within the *Rules of Court*. That decision relied on *Brown v Lowe*, 2002 BCCA 7, in which the judge wrote:

> [120]… The court's discretion with respect to costs is an important means of controlling the conduct of the parties in court, and in the pre-trial process. … The discretionary power is not completely unfettered. It must be exercised judicially and must give effect to the rules promulgated as far as they apply. …

Analysis – offer to settle

[104] Here, I find the consideration of the offer to settle is not premature. This was a hearing to determine the principles and answers to questions that will allow for the calculation of costs and interest. In order to determine these questions fairly, any offers to settle must be taken into account. In any event, in this case the offer to settle was inclusive of claims, costs and interest. It was intended to end the litigation at that stage. YEC had paid NAC the outstanding Agreed Contract Debt after Trial 1, in addition to the amount of awards to NAC that were not overturned on appeal. NAC repaid YEC the amount of the claims overturned on appeal. Costs, interest, and overpayments were not calculated and had not yet been paid.

[105] I also agree with YEC that the overpayment became part of the *lis* by the time of the settlement offer. YEC had paid the Agreed Contract Debt and the successful NAC claims. The amount of $341,510 had been overturned and was at risk. The costs of the appeal had been settled and paid. The outstanding costs and interest at that time were those from Trial 1. Given the outstanding amount on the merits that was at risk, the fact that NAC had received the Agreed Contract Debt plus recovery of its successful claims, the proposed offer to settle everything at issue in the litigation at that stage for an additional $350,000 payment from NAC to YEC is reasonable. For an offer to settle not to include the overpayments at that stage is not consistent with the wording of the offer that states in full and final settlement of Action No. 11-A0114. If overpayments were not included, then interest payments would also be outstanding. The offer stated it was in full and final settlement of the interest (as well as claims and costs).

[106] Finally, I agree with YEC that NAC's payment after Trial 2 to YEC of $486,516 is evidence of the lower amount of YEC's offer to settle than its recovery. It is not necessary to review each of the individual claims litigated in Trial 2 and assess them against the offer to settle. The global amount answers the inquiry. There is no further interest owing by YEC to NAC on the Agreed Contract Debt or NAC's successful claims in Trial 1.

[107] As a result and based on the legal principle of an absence of judicial discretion when the *Rules of Court* are clear about the effect of an offer to settle, YEC is entitled to double costs on its award from April 17, 2019 onwards.

[108] However, I will exercise my discretion and not include the costs of this hearing as part of the double costs. The reason for this is that NAC had an arguable case that the

consideration of the offer to settle may be premature at this stage. Given the high complexity of the costs, interest and overpayment issues in this case, and the joint request by the parties for an interim determination of applicable principles to assist in the final costs assessment, I find that each party should bear its own costs of this hearing.

d. What is the rate of interest on overpayments made by YEC to NAC?

YEC's position on interest on overpayments

[109] YEC states the interest owing on any outstanding overpayment to NAC is governed by s. 8.4 of the Contract. It provides:

> Should either Party fail to make payments as they become due under the terms of the Contract, interest at two percent (2%) per annum above the Bank of Canada Prime Business Rate on such unpaid amounts will become due and payable until payment is made. Such interest will be compounded and adjusted on a monthly basis.

[110] YEC reasons it made payments to NAC for amounts owing under the Contract. NAC's failure to "make or acknowledge payments" it owed YEC under the terms of the Contract resulted in the overpayments. NAC's unsuccessful positions taken in their Schedule D and CRX 100 claims, and in defending the deficiencies counterclaim, as well as NAC's claims for s. 8.4 interest on the amounts paid by YEC after Trial 1 caused the overpayments to be made by YEC. NAC failed to acknowledge these amounts should be deducted and set off from amounts owing by YEC to it under the Contract.

[111] YEC further argues it is an implied term of the Contract that the dealings between the parties - contractual claims by NAC and good faith payments by YEC – would attract the penalty of contractual interest for overpayments. It is consistent with the parties'

intention to impose severe monetary consequences for non-payment under the Contract.

[112] Alternatively, YEC asks this Court to exercise discretion under ss. 35(7) and 36(5) of the *Judicature Act*, RSY 2002, c. 128, and order that the rate specified in s. 8.4 of the Contract applies to the repayment of the overpayments. As noted in *Kareway Homes Ltd v 37889 Yukon Inc*, 2014 YKSC 35, the relevant circumstances to be considered include contractual rates between the parties on the same subject matter and past dealings between the parties. Here, s. 8.4 provides compelling and objective evidence of what the parties considered to be a fair and equitable interest rate. YEC should benefit the same way as NAC for the delay in receiving payments owing to it under the Contract.

[113] YEC says interest accrues from the date the payments were made, not from the date of the judgment authorizing the repayment. This is to fulfill the purpose of compensating the party for the time during which they did not have the use of the monies (*Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at paras. 21-23, and 36).

NAC's position on interest on overpayments

[114] NAC states that a plain reading of s. 8.4 of the Contract shows that it applies only to monies owing under the Contract, not monies owed following a judgment requiring the return of monies previously paid to a party. Further, YEC's right to set off funds is not the same as a requirement that NAC must pay money to YEC under the Contract. There should be no implied term that an overpayment would attract the penalty of contractual interest in the event of no repayment or in order to make the Contract

operational. This does not meet the high bar set by the common law in such circumstances: *City of Whitehorse v Ketza Construction Corp et al.*, 2009 YKSC 51, quoting *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para. 27 **–** an "officious bystander" would not conclude this clause is necessary to make the Contract work.

[115] NAC says YEC has been out of funds only since February 2021, the date of the judgment in Trial 2; before that time NAC was under no obligation to repay any monies to YEC. The results of the appeal and Trial 2 were uncertain until the outcome in February.

Analysis – interest on overpayments

[116] Section 8.4 of the Contract was intended to apply to monies owing under the Contract. While overpayments made as a result of court proceedings, especially before they are recognized to be overpayments, may appear at first blush to be a different character than the failure to make a payment under the Contract, in the end, the overpayments represent monies owing as a result of the interpretation of Contract provisions. The judgments from the Court are based on the Contract interpretation and arise from an adjudication of what monies are owed under the Contract. If YEC is required to pay interest under s. 8.4 on its payments to NAC under the Contract, any repayments to YEC by NAC should also require interest under 8.4 to be paid.

[117] The timing of the repayment is related to the time-value of money. The overpayment is due not at the time of the judgment but at the time the overpayment was made, as that represents the amount of time during which the party making the overpayment was deprived of the use of its money.

e. Is YEC entitled to an additional immediate overpayment

Position of parties

[118] NAC has repaid $486,516 as a result of the judgment in Trial 2, excluding costs and interest. YEC seeks an additional $112,242, for a total repayment of $598,758 plus interest at 2% above Prime compounded and adjusted monthly. This amount is based on the payment made by YEC in November 2019 at the outset of Trial 2 **–** $1,684,970 minus $1,086,212, which represents the maximum contract debt to NAC. This is calculated on the basis of the Trial 2 judgment resulting in $854,444 owing to NAC, no set-off amount from YEC, plus $231,768 owing from YEC to NAC in interest at the rate of Prime plus 2% from January 5, 2012, the date NAC issued the final payment certificate to YEC for the project.

[119] NAC's response to this argument is that the interest and costs should be determined fully before any further repayment is made.

Analysis – immediate overpayments

[120] Although at this stage it does appear on a conservative approach that NAC owes additional $112,242 to YEC, part of the complication created in this case is a result of overpayments and repayments. At this stage of determining principles and approaches to govern the calculations of costs and interest, in the hope that it will result in a final determination of this complex matter, it is appropriate to wait for additional repayments until all of those calculations have been made. The amount that NAC has repaid to date is exclusive of costs and interest, which is consistent with the parties' decision to bring the inquiries they have to the Court at this time. Those calculations should be done and then final reconciliation completed.

f. Should this Court make a declaration about set-off by YEC of payments owing to NAC?

[121] YEC has requested this Court issue a declaration that they are entitled to set-off any judgment amounts, costs and interest, from amounts owing to NAC under the Contract.

[122] By YEC's own admission, NAC has not objected to this approach, which has been asserted by YEC and implemented to date.

[123] As a result, I do not find it necessary to issue a declaration to this effect as there appears to be no disagreement between the parties about this approach.

Conclusion

[124] The order will go as follows:

1. YEC is entitled to its costs of its defence and counterclaim assessed at Scale C and 1.5 times the unit value up to April 17, 2019, and double those values thereafter.
2. Interest at 2% above Prime compounded and adjusted monthly accrued on all overpayments made by YEC to NAC pursuant to s. 8.4 of the Contract.
3. NAC shall repay YEC all additional amounts overpaid by YEC by NAC unsupported by any judgment, in an amount to be determined after the assessment of costs.

[125] The parties may speak to costs, interest and overpayments in case management if they are unable to agree.

[126] As noted by both counsel, this litigation has remained contentious throughout, as evidenced by the significant volume of factual and legal submissions at this hearing. I encourage counsel to make all efforts to resolve any outstanding issues and amounts of cost and interest.

[127] Thanks to both counsel for their comprehensive and professionally prepared submissions.

_____
DUNCAN C.J.

Schedule 1

August 1, 2016 - reasons for judgment in first trial released - result is that NAC is owed $1,623,565 (Order of Judge Hawco, August 1, 2016)

On December 2, 2016, Yukon Energy paid NAC	$1,623,565
On November 20, 2017 Yukon Energy paid NAC $58,905 following discovery of mathematical error in favor of NAC	$58,905
On December 6, 2017, first trial interest and costs settled by payment of $585,000 from Yukon Energy to NAC	$585,000
Total paid to NAC following first trial	$2,267,470
May 15, 2018, Yukon Court of Appeal lowers the award in favour of NAC from $1,682,470 to $1,340,960 (a reduction of [$341,510])	
NAC pays the settled costs of the appeal ($18,286)	
March 7, 2019 - NAC repays $582,500 pursuant to the Order of Justice Veale made January 24, 2019	($582,500)
Total amount remaining in NAC's hands following this repayment and prior to the second trial held November 18 to 22, 2019	$1,684,970
February 1, 2021, reasons for judgment in second trial released - result is that the award in favour of NAC is lowered by $486,516 from $1,340,960 to $854,444 NAC's Schedule of D claim was allowed at $122,725 NAC's Claim for CRX 100 was dismissed Yukon Energy's claim for CRX 111 was allowed at $100,000 Yukon Energy's deficiency claim was allowed at $509,241	
Costs and interest adjustment following second trial to be determined	TBA