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Balde v. Millar

Harold Balde and Anthony D'Andrea v. Cal Millar, Romen Podzyhun and Channel Zero Inc.

Ontario Superior Court of Justice [Commercial List]

Spies J.

Heard: June 30, 2006
Judgment: July 7, 2006
Docket: 05-CL-6170

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Counsel: David Hager for Plaintiffs

Victor L. Freidin, Q.C. for Defendants, Cal Millar, Romen Podzyhun

Harold W. Sterling for Defendant, Channel Zero Inc. and Movieola: Short Film Channel Inc.

Subject: Corporate and Commercial; Civil Practice and Procedure

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — General principles

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Discovery — Production of documents

Cases considered by *Spies J.*:

Huebner v. Direct Digital Industrial Ltd. [\(1975\), 11 O.R. \(2d\) 372, 1975 CarswellOnt 899](#) (Ont. H.C.) — referred to

Kitchener-Wilmot Hydro-Electric Commission v. A.F. White Ltd. [\(1992\), \(sub nom. *Hydro-Electric Commission*](#)

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[*of Kitchener-Wilmot v. A.F. White Ltd.*](#) 8 O.R. (3d) 602, 1992 CarswellOnt 1105 (Ont. Gen. Div.) — followed

Thomson v. South Eastern Railway (1882), 30 W.R. 537, 9 Q.B.D. 320 (Eng. Q.B.) — referred to

Statutes considered:

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

s. 106 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 5.04(3) — referred to

R. 6.01 — referred to

R. 19.04(1)(b) — referred to

R. 19.04(2)(b) — referred to

R. 57.01 — referred to

Spies J.:

Background

1 The plaintiffs, Harold Balde and Anthony D'Andrea, bring this motion seeking an order requiring Movieola: Short Film Channel Inc. to include by way of counter claim in this action, ("the 6170 action"), the relief sought by Movieola against Balde in action #05-CL-6197 ("the 6197 action"). They also seek an order requiring, or in the alternative, permitting Movieola and Channel Zero to assert their claims against Marc Lidwill and James Cappadocia by way of counterclaim in the 6170 action or an order staying the 6197 action or, in the alternative, staying the 6197 action as against Balde.

2 This relief is vigorously opposed by both Channel Zero and Movieola and the individual defendants in this action, Millar and Podzyhun. Mr. Werker, the solicitor for Lidwill, did not attend on the motion but provided a letter to counsel for the plaintiffs, which was filed with the court, stating that his client consents to some of the relief sought and in particular the request that Movieola and Channel Zero assert their claim against Lidwill and Cappadocia by way of counterclaim in the 6170 action. Mr. Maggisano, the solicitor for Cappadocia, signed in on the motion but was not

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able to remain. He provided a letter to the court stating that he was not taking a position on the motion.

3 The 6170 action began when the plaintiffs issued a notice of application on November 23, 2005 seeking relief for alleged oppression and other relief. That application only named Millar and Podzyhun as respondents, and was returnable December 20, 2005. The plaintiffs and the individual defendants in this action are each 25% shareholders of Channel Zero. Channel Zero brought a cross motion returnable on December 20, 2005, seeking leave to intervene as an added party to the proceeding and other relief.

4 Farley J. heard the initial return of the application on December 20, 2005 and raised the question of whether or not it was necessary or desirable to have Channel Zero intervene. As no one had a problem with the intervention, he granted leave. As for the application, certain limited interim relief was granted. No timetable or directions as to how the matter should proceed were ordered as it was hoped that the parties would be able to resolve the matter as settlement meetings were scheduled.

5 The 6197 action commenced on December 12, 2005, when the statement of claim was issued on behalf of Channel Zero and Movieola. This was clearly after service on Millar and Podzyhun of the notice of application, as it was referred to in an affidavit sworn by Millar on December 13, 2005, in support of Channel Zero's motion to intervene in the application. In that affidavit, Millar deposed that he had instructed counsel for Channel Zero to commence an action against Balde for breaches of his duties owed to Channel Zero, including "internal espionage, improper disclosure of Corporate Secrets, and conspiracy to subvert management of the Corporation by unlawful means including breach of Director's duties".

6 The statement of claim in the 6197 action seeks damages for breach of fiduciary duties and requests for orders that Balde be removed from any position in which he might vote his shares. The claim (paragraph 20), pleads that between May and November 2005 Balde engaged in an unlawful course of action, which conflicted with his duties owed to the plaintiffs, Channel Zero and Movieola, and the conduct complained of includes unauthorized disclosure of confidential information to Cappadocia, planning a corporate coup to enable Cappadocia to take over management of Movieola and Channel Zero, interfering with access to management, officers and employees, corporate espionage, and placing spy ware programs. It is alleged that Balde enlisted the help of Lidwill in this conduct. In fact it is alleged that Balde and Lidwill and Cappadocia are also liable to the plaintiffs on various conspiracy claims as a result of the same alleged misconduct. In addition, oppression relief is sought, again relying on the alleged misconduct of the defendants. The conduct pleaded of Balde, Lidwill and Cappadocia is all intertwined in the events leading to the termination of Balde's employment.

7 On April 25, 2006, I heard three motions, which raised the primary issue of how the application and the 6197 action should proceed. By this point, Balde and D'Andrea wished to amend their application to add additional relief and everyone agreed that it needed to be converted to an action. Counsel for Channel Zero and Millar and Podzyhun took the position that all issues concerning the termination of Balde's employment with Channel Zero should be asserted by way of counter claim in the 6197 action. It was Mr. Hager's position was that Channel Zero should assert its claims against Balde in the 6170 action by way of defence and counterclaim.

8 Mr. Hager's position prevailed and I dismissed Channel Zero's motion asking that the relief sought by Balde

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with respect to the termination of his employment be asserted by way of counterclaim in the 6197 action. This was on the basis that the events leading up to the termination of Balde's employment with Channel Zero were relied upon by both Balde and D'Andrea in support of their oppression application and in certain relief claimed by Balde and that the issues in evidence in that regard overlapped the conduct by Balde complained of in the 6197 action against Balde, which conduct was relied upon to justify the termination of his employment and to assert a claim for damages for alleged breach of fiduciary duties owed to Channel Zero and Movieola and for oppression against Balde.

9 In coming to this conclusion, I found that:

The conduct in issue [in the 6197 action] is for the period May 05 to Nov 05 and clearly overlaps the conduct complained of in the application. Clearly, the same evidence is going to be relied upon by all parties taking competing positions as to what in fact occurred and who has oppressed who. Not only should the two proceedings be tried together, in my view, there should only be one. Although a motion for this relief is not before me, in my view, Action 05-CL-6197 should be stayed and the relief sought in that action should be asserted by way of counter claim in the action to be brought in this proceeding [referring to action 6170].

I am mindful of the fact that such an order cannot be made specific to 05-CL-6197 (in terms of a stay) at this point, but I do direct Channel Zero to assert whatever claims it has against Balde by way of counterclaim in this action, assuming Channel Zero is named as a defendant. Balde will then defend those claims in this action. He is not required to defend them twice — nor will it be necessary for him to formally move to set aside the noting of default in 05-CL-6197. As for the other individual defendants in 05-CL-6197 [referring to Lidwill and Cappadocia], if the plaintiff in that action intends to pursue them, given the factual connection to this action, it may be that that claim should also be included in the counterclaim. Steps can be taken to ensure that these two individuals do not get swept up in the main fight between the shareholders.

10 In reviewing my past decisions in this matter and my endorsement on costs, I noted with interest that with respect to this motion heard on April 25, 2006, Mr. Freiden submitted with respect to my disposition of costs, that the issue of whether Channel Zero seeks relief in the 6197 action or by way of counterclaim in the 6179 action is "a distinction with no real relevance to the issue at hand". This was in an effort to persuade me that the respondents had prevailed on that motion.

11 Following my decision, the plaintiffs issued a statement of claim on May 5, 2006 in the 6170 action. This claim includes a claim for oppression of Balde and D'Andrea and relies on the events and circumstances giving rise to the purported termination of the employment of Balde with Channel Zero in support of the oppression claim asserted by both Balde and D'Andrea and in support of a claim by Balde for various relief asserted against Channel Zero and a claim by Balde for inducing breach of contract by Millar and Podzyhun. All of this relief sought relies on the same factual allegations covering the period from May to December 2005.

12 Millar and Podzyhun filed a statement of defence and counterclaim which, beginning in paragraph 37, deals with the termination of Balde's employment. Paragraph 43 of the defence pleads that Balde's termination was justified and made in good faith and in the best interest of Channel Zero. The alleged conduct on the part of Balde in support of the allegations includes alleged distribution of confidential information of Channel Zero to unauthorized persons,

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conspiring with Cappadocia to oust key personnel of Channel Zero, secretly changing profiles and passwords within the card access system of Channel Zero, altering the security system and installing spy ware on Millar's computer. The wording of these allegations is slightly different from the wording used in the 6197 action but essentially the same conduct is relied upon.

13 In the counterclaim, Millar and Podzyhun seek a declaration that Balde breached his fiduciary obligations as director of Channel Zero and *Movieola*, and they claim an order that Balde pay to Millar and Podzyhun any loss in value of their shares in Channel Zero and *Movieola*. In support of these claims, paragraph 43 of the defence is specifically referred to. It is also alleged that the conduct of Balde was oppressive to Millar and Podzyhun as shareholders, officers and directors of Channel Zero and *Movieola*.

14 In the defence and counterclaim of Channel Zero in the 6170 action, the 6197 action is pleaded with reference to my order dated May 1, 2006. Channel Zero then "pleads, and adopts, and incorporates by reference, into this Statement of Defence and Counterclaim, all of the claims of the Corporation (Channel Zero) against Mr. Balde in the said Action #05-CL-6197, and states that such claims are required to be pleaded herein by the said order of May 1, 2006". The pleading goes on to state that Channel Zero relies upon the statements pleaded in its claim in the 6197 action and "to the extent that it contains claims of the Corporation against Mr. Balde or supports relief claimed by the Corporation against Mr. Balde, is hereby incorporated by reference into this pleading. The Corporation also relies upon the statements set out in its Statement of Claim in action #05-CL-6197, to support the Corporation's defence to this action".

15 Finally, the defence and counterclaim of Channel Zero specifically pleads that it may be appropriate for the court to order that the 6170 action and the 6197 action be tried either consecutively or together as the trial judge may direct. The pleading goes on to refer to the termination of Balde's employment by Channel Zero and in further justification for terminating Balde's employment specifically refers again to its claims against Balde in the 6197 action which are then summarized in that pleading.

16 In the reply and defence to counterclaim of Balde and D'Andrea to the defence and counterclaim of Channel Zero, Balde pleads that by the rules of pleadings, Channel Zero was obliged to set out the allegations of fact that it relies upon in its counterclaim and that while he has responded and replied to the allegations of fact set out as a summary of action 6197, which were incorporated into the counterclaim, "he does not intend to respond to or reply specifically to the allegations of fact that are set out in another pleading in another action. If, however it is found that pleading in the manner set out in paragraph 79 is a proper method of pleading then Balde denies each and every allegation in such other pleading and puts Channel Zero to the strict proof thereof".

17 I should note here that Mr. Hager did not bring any motion in connection with any concern he has concerning the way in which Channel Zero has pleaded in response to my earlier order.

18 In advance of this motion, correspondence was exchanged between Mr. Hager, counsel for Balde and D'Andrea, and Mr. Sterling, counsel for Channel Zero but unfortunately a resolution was not reached.

Issues

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19 The issues that I must consider are essentially two fold;

1. As Balde was noted in default in the 6197 action, is he permitted to seek any relief beyond seeking an order setting aside his noting in default, given Rule 19.04(1)(b)?

2. Procedurally, how should action 6170 and 6197 proceed? It is the position of counsel for Channel Zero and Millar and Podzyhun that at most an order be made at this time that the two actions be tried together or consecutively as the trial judge may direct. He submitted that it is premature to order common production and discoveries and that such an order, or the relief sought by Mr. Hager, would harm the corporations in that documents that are confidential to the four shareholders would have to be disclosed in action 6170 that are not relevant to action 6197 and thus would be disclosed to Lidwill, an employee of Channel Zero and Cappadocia, a third party.

Analysis

20 Dealing first of all with the fact that Balde was noted in default in the 6197 action, I am not prepared to compel Balde to proceed with this motion in two steps, which is in effect the position taken by counsel for Channel Zero and Movieola. I note that Rule 19.04(2)(b) permits leave of the court, which I would grant if necessary. In any event, Balde has asked for an order setting aside the noting of default if it is necessary for the purpose of bringing this motion.

21 Balde filed an affidavit in the application before the original return before Farley J. that contained his position with respect to the allegations of misconduct and breach of duty that had been made against him in the 6197 action. As soon as it became apparent that there was a competing action, to the application brought by D'Andrea and Balde, there were obvious issues concerning how the two matters ought to proceed. Given Mr. Hager's position, he clearly would not want to "attorn" to the 6197 action and this is the explanation given in evidence by Balde for why a Notice of Intent to Defend was not served. In fact Balde was noted in default after the motion record of the plaintiffs, for the motion heard on April 25, 2006, was served on Channel Zero and Millar and Podzyhun.

22 I directed in my endorsement to the motions heard on April 25, 2006, that Balde was not required to formally move to set aside the noting of default in action 6197. I accept the evidence of Balde filed on this motion that he always intended to defend the allegations made by Channel Zero and Movieola. He is asserting a claim for wrongful termination both personally and with D'Andrea in support of their oppression claim. There has been a procedural issue from very early on as to in which proceeding that defence would be asserted.

23 If it were necessary for me to decide this issue, I would grant an order setting aside the noting of default of Balde by Movieola. Furthermore, I have to consider the position of D'Andrea. In any event, given the conclusion that I have come to on the merits of the motion before me, it is not necessary for Balde to formally move to set aside the noting of default by Movieola because all claims against him shall proceed in this action and he is not required to formally defend the 6197 action. Section 106 of the Courts of Justice Act provides that the court *on its own initiative* or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. I do not consider Balde's default as disentitling him to bring this motion. If I did, I would take the initiative in any event to proceed to hear the motion.

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24 Mr. Sterling also raised an issue with the fact that this motion is brought in the 6170 action and the relief sought affects the 6197 action. In my view, it was not necessary for the plaintiffs to bring the same motion in both actions. That would simply duplicate all of the filings. All of the parties in both actions were served with the plaintiffs' motion record and the matter of how these two actions should proceed is properly before me.

25 Mr. Sterling conceded in argument, that there were some common issues concerning the termination of Balde's employment, which would justify an order that the two actions be tried together as the trial judge may direct. He argued, however, that Movieola ought to be permitted to maintain its action against Balde in action 6197 and that there should not be any order for common production or discovery, as to do so would require production of confidential documents relevant to the issues between the four shareholders in the 6170 action, to Lidwill and Cappadocia. He also argued that as a matter of law, Movieola could not be compelled, without its consent, to become a plaintiff in the 6170 action and to do so would trigger a requirement for arbitration. It was also submitted that to consolidate the two actions will make resolution of these matters more difficult. Mr. Freidin supported the position taken by Mr. Sterling, which is not surprising since he also gets his instructions from Millar.

26 I will dispense with the argument concerning arbitration first. The specific details of the agreement requiring arbitration are not in evidence before me. In any event, since Movieola was able to assert a claim in the 6197 action without triggering the arbitration clause, I see no reason why the arbitration clause would be triggered if the same claim is asserted by way of counterclaim in the 6170 action. Certainly there is no evidence before me that this is a real risk.

27 As for the argument that Rule 5.04(3) of the Rules of Civil Procedure prevents my directing that Movieola be added as a plaintiff by counterclaim in the 6170 action without Movieola's consent, I do not accept that that rule has any application here. Movieola already is a plaintiff in action 6197. I am simply directing with the manner in which the two proceedings should proceed. This is not a situation where Movieola is not a plaintiff in any proceeding and is being brought in or added as a plaintiff to a particular proceeding by court order. Movieola is therefore not being forced to be a plaintiff. It has already chosen to be one. It is also significant that the shareholders of Channel Zero are also shareholders of Movieola and that the same counsel represents both companies.

28 That then leaves the main issue before me, namely, how best to direct that these matters proceed. In considering this matter, Rule 6.01 applies in that the two actions clearly have questions of law or fact in common and much of the relief claimed in them arises out of the same transactions and occurrences. As a result I may order that the two actions be consolidated or heard at the same time or one immediately after the other or that any of the proceedings be stayed or be asserted by way of counter claim in any of the proceedings.

29 Mr. Sterling emphasized that Movieola commenced its action first and points out that Balde and D'Andrea have not sued Movieola for any relief. I do not accept that position because in fact the claim by Movieola and Channel Zero is for essentially the same relief and the action was commenced after the application was served on Millar and Podzyhun. It is Balde and D'Andre that commenced litigation first. In any event, in considering whether or not to stay an action, where there are competing actions, which action was commenced first is only a factor and is not a significant factor.

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30 In considering a stay of one of two competing actions where there are common issues, among the factors to be considered are: which action was begun first; who has the chief burden of proof; which is the more comprehensive in scope; and the balance of convenience. The weight to be given to each factor depends on the facts of each case. [\[FN1\]](#)

31 I agree with the observations of Salhany J. In *Hydro-Electric Commission of Kitchener-Wilmot v A.F. White Ltd.* that the best approach is the one described by Brett L.J. in *Thomson v. South Eastern Railway* [\[FN2\]](#) that in determining whether to stay one of two competing actions, the judge hearing the motion must exercise her discretion and in considering the interests of all parties, take all factors that are relevant to determining what is the fairest way to proceed into account.

32 As for his argument that it is not fair to allow Balde to bootstrap his arguments to my order of May 1, 2006, I also disagree. If Balde had shown no sign of intending to defend the allegations made against him or if I were concerned that he and D'Andrea sought this relief to slow down the litigation in order to interfere with the right of the corporations to pursue their relief, it would be a different matter, but that is not this case. There is no question based on the record that Balde and D'Andrea are intent on proceeding with these actions expeditiously but unfortunately procedural issues have repeatedly arisen which I note they have generally succeeded on.

33 In considering the interests of all parties in this matter, it is clear to me that the fairest way to proceed is to ensure that to the extent possible, there is common production and discovery and trial insofar as the factual and legal issues are concerned with respect to the events leading up to the termination of Balde's employment with Channel Zero, as pleaded in support of the application by Balde and D'Andrea for oppression and Balde's personal claims for relief resulting from the termination and in the defence and counterclaims filed by Millar and Podzyhun and Channel Zero, alleging justification for that termination and claiming relief for breach of duty, all as currently pleaded in the 6170 action, and the claim by Moevieola in the 6197 action for alleged breach of duty by Balde and all of the claims asserted by Moevieola and Channel Zero in that action against Lidwill and Cappadocia ("the Common Issues"). Clearly the events and circumstances leading up to the termination of Balde's employment with Channel Zero and the role of Lidwill and Cappadocia in that regard, represent a significant amount of the facts in dispute in each of these actions and unnecessary duplication to discover on those issues should be avoided in order to minimize expense to the parties. Furthermore all of the individual parties would reasonably need to at least be present when these are discovered on and this order will ensure there is no problem with the Deemed Undertaking rule. There will also be many background facts common to both actions.

34 Were it not for the concern expressed by Messrs Sterling and Freidin concerning disclosure of documents relevant to the oppression action, action 6170, to Lidwill and Cappadocia, that are confidential to the shareholders, I would have no hesitation in granting the relief sought by Mr. Hager and staying the 6197 action so that the claims in that action could be asserted by counterclaim in the 6170 action. My only concern would have been if Lidwill and Cappadocia were concerned about being caught up in what is clearly a broader action, but they have not expressed such a concern.

35 My primary concern is to try to attempt to minimize the expense for the parties, in what is already very expensive litigation. I do not accept the submission that an order for common production and discovery should be de-

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ferred or the suggestion made by Mr. Sterling that the parties might be able to work out the terms of such an order in the future. The history of this matter thus far has demonstrated that the parties are not able to resolve procedural matters without court intervention. Although pleadings are not yet closed, the issues between the parties are known and there is no reason to defer making the order. As for settlement of the actions, I do not agree that in this case, the relief sought by Mr. Hager would make settlement more difficult. The issues in both actions are intertwined and whether there are two actions or a claim and counterclaim should make little difference to the prospects of settlement.

36 The claim by Movieola in the 6197 action cannot reasonably be severed from the claim by Channel Zero against Balde without duplicating the pleading in both actions. Throughout, the relief sought in that action is claimed by both Channel Zero and Movieola. The only difference is the basis upon which certain duties alleged to be owing by Balde to either Channel Zero or Movieola, are alleged to arise. It makes little sense to compel Balde to separately defend the claims asserted against him by Movieola when his defence would be virtually identical to his defence to the claims now asserted against him by Channel Zero in its counterclaim in the 6170 action.

37 I have considered, whether or not I should permit Movieola to continue with the claim against Balde in the 6197 action, as an order that the two actions be tried together as opposed to an order that the 6197 action proceed by way of counter claim would not result in much, if any, difference, save for the question of common production and discovery. In considering this, I have considered how to minimize amendments to the existing pleadings.

38 The claim in the 6197 action presumably requires minor amendments, which have not yet been made, to reflect the fact that Channel Zero no longer is advancing its claim against Balde in that action, given my earlier order that the claims by Channel Zero against Balde be asserted in the 6170 action by way of counterclaim. Furthermore, neither Lidwill nor Cappadocia (nor of course Balde) have defended the 6197 action. Accordingly I see no reason why amendments cannot be made to the claim in the 6197 action at the same time to capture the fact that Channel Zero and Movieola's claims against Balde are now being asserted by way of counter claim in the 6170 action. This is a simpler and cleaner solution to what Mr. Sterling proposes.

39 Accordingly, for these reasons I order a stay of the claims of Movieola asserted against Balde in the 6197 action and direct that Movieola pursue those claims by way of counterclaim against Balde in the 6170 action.

40 To address the concerns raised concerning confidential documents, I will not stay the 6197 action as against Lidwill and Cappadocia and that action may proceed against them. I direct, however, that the 6170 action and the 6197 action be tried together or one after the other, as the trial judge may direct. Furthermore, there will be common production and discovery in the two actions on the Common Issues as defined herein. The other claims made by D'Andrea and Balde in the 6170 action, that support their claim for oppression, which may require production of documents confidential to the shareholders, and are not relevant to the Common Issues, will not be subject to the order of common production and discovery. That way Lidwill and Cappadocia will not have access to those documents.

Disposition

41 Accordingly, the motion by the plaintiffs is granted on the following terms:

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1. The claims by Movieola in the 6197 action as against Balde are stayed and shall be asserted by way of counterclaim in the 6170 action.
2. The claims by Channel Zero and Movieola in the 6197 action as against Lidwill and Cappadocia may proceed in that action as pleaded.
3. The 6170 action and the 6197 action shall be tried together or one after the other, as the trial judge may direct.
4. There shall be common production and discovery in action 6170 and action 6197 on the Common Issues as defined.

42 With respect to costs, although Mr. Hager did not succeed in a complete consolidation of the two actions, he was substantially successful in terms of the relief sought. There is really not much of a difference between a claim proceeding by counterclaim or a separate action if there is an order for trial together and common production and discovery, which is what I have done here.

43 Mr. Hager made an offer to settle the motion by letter to Mr. Sterling dated May 10, 2006. He did not quite achieve the result sought because I have not stayed the 6179 action against Lidwill and Cappadocia and compelled the corporations to proceed with those claims by way of counterclaim in the 6170 action. Accordingly, his clients shall have their cost of this motion on a partial indemnity basis.

44 On this basis Mr. Hager claims costs in the amount of \$9,448.96 of which \$8,178 is for fees, before GST. This is in comparison to a Bill of Costs submitted by Mr. Sterling in the amount of \$7,087.50 for fees plus GST. The rates claimed are the same and the experience of both counsel comparable, although Mr. Hager is more senior. Mr. Sterling's Bill of Costs is the best evidence I have of what the parties would reasonably expect in terms of a cost order on a motion that took approximately 3 hours to argue. Mr. Hager had the additional burden of preparing and filing a motion record. I see no issue with his disbursements. Considering this evidence and the factors set out in Rule 57.01, I fix costs of the plaintiffs for their fees and disbursements (inclusive of GST) on this motion, in the amount of \$9,448.96, payable within 30 days of the release of this endorsement.

[FN1](#) *Kitchener-Wilmot Hydro-Electric Commission v. A.F. White Ltd.* (1992), 8 O.R. (3d) 602 (Ont. Gen. Div.) at p. 604- 605 citing with approval *Huebner v. Direct Digital Industrial Ltd.* (1975), 11 O.R. (2d) 372 (Ont. H.C.)

[FN2](#) (1882), 9 Q.B.D. 320 (Eng. Q.B.), at 327-328

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