

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Direct Energy Marketing Limited)	
)	Paul Le Vay and Justin Safayeni, for the
Applicant/Responding Party)	Applicant/Responding Party
)	
– and –)	
)	
National Energy Corporation)	Brad Teplitsky, for the Respondent/Moving
)	Party
Respondent/Moving Party)	
)	
)	
)	

J.S. O'NEILL

Ruling on Costs Re: National Energy Corporation's
Motion for Appointment of a Forensic Expert and National Energy's Motion to Set Aside

A. INTRODUCTION

- [1] On June 11, 2013 I released my reasons in relation to National Energy Corporation's motion for appointment of a forensic expert. On July 30, 2013, I released my reasons with respect to National Energy's motion to set aside.
- [2] I have now had an opportunity to review the costs submissions and reply submissions of the parties with respect to both motions. The following sets out my reasons.

B. LEGAL PRINCIPLES

- [3] S. 131(1) of the *Courts of Justice Act* provides:

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

- [4] Rule 57 of the Rules of Civil Procedure sets forth the factors to be considered by the court in exercising its discretion under s. 131 of the *Courts of Justice Act*, placing emphasis on the result in the proceeding and any written offer to settle.
- [5] On July 1, 2005 the costs grid was revoked, given a number of Court of Appeal decisions critical of bills of costs and awards that were mathematical applications of the grids hourly rates to hours expended. It was replaced by reliance on the discretionary factors set out in Rule 57.01(1) now supplemented by reference to the principle of indemnity (including the experience of the lawyers, the rates charged and the hours spent by the lawyer), and the amount of costs that an unsuccessful party could reasonably expect to pay.
- [6] C. ANALYSIS
- [7] The parties have presented the court with considerable legal arguments and documentation in relation to their positions with respect to costs. National Energy's position, in short, is that the amount of costs that Direct Energy is seeking is unreasonable and that it offends the principle of proportionality. National Energy also asserts that it is more just and reasonable that one costs award be made with respect to both motions and questions whether it is possible to fashion a reliable breakdown between the two motions in order to arrive at a fair and reasonable costs award.
- [8] Direct Energy's position in short is that the motions are separate and distinct, that all reasonable steps have been taken to divide the time spent as between both motions and that the claim for partial indemnity or substantial indemnity costs does not offend the principle of proportionality, particularly considering the intrusive nature of the relief requested with respect to the appointment of a Forensic Computer Expert. Direct Energy also points to the serious consequences of any order setting aside my earlier order of July 17, 2012.
- [9] I have carefully reviewed and considered the submissions of the parties, and I have reviewed the bill of costs presented by each of them. I have also considered the issue with respect to Direct Energy's claim for payment in full of the invoice of \$70,820.00 from Telus, dated June 4, 2013.
- [10] It is true that both motions were connected to some degree, but it is to be recalled that they were each prepared separately, defended separately, and argued separately. In all cases, they were presented to the court as independent and separate motions and the parties spared little in aggressively presenting and defending these motions.
- [11] I need not review all of the points made by Direct Energy in support of its position that it be awarded substantial or partial indemnity costs, in the amounts requested with respect to both motions. I have reviewed the background chronology and the event chronology contained in Direct Energy's submissions dated June 21, 2013. In its submissions, Direct Energy requests that the costs be fixed forthwith, and it sets out, at paragraphs 34 through 52, the reasons in support of the costs award it is seeking.

- [12] In addition to its position, as outlined above, National Energy also took issue with the invoice from Telus. Further, in relation to proportionality and reasonable expectations, it filed a bill of costs on a partial indemnity scale, outlining legal fees and disbursements with respect to the Anton Piller/Norwich motion, the motion to inspect and the motion to set aside. National Energy's partial indemnity fee amounted to \$35,910.00 and its substantial indemnity fee amounted to \$48,015.00.
- [13] There can be no doubt that the results of the motion to inspect and the motion to set aside were important to both parties. This is evidenced by the amount of documentation filed by both parties on the two motions, the time taken to prepare and argue the motions, the disbursements incurred in conducting cross examinations and other legal steps in relation to the motions.
- [14] In my view, having regard to s. 131(1) of the *Courts of Justice Act*, and the factors outlined in Rule 57 of the Rules of Civil Procedure, it is appropriate and just that I fix the costs of each motion as separate and independent, but nonetheless having regard to the fact that to some degree success on the one motion would be important to success on the other. I also have regard to the fact that to some extent, the issues and chronology of events and the matters in dispute overlapped.
- [15] I have examined Direct Energy's offer to settle dated May 10, 2013. In my view it was a fair and reasonable offer under the circumstances, although as noted by National Energy in its submissions, the offer was made only shortly before the motion to inspect was argued before me. Direct Energy successfully defended both motions and they were ultimately dismissed for the reasons given by me.
- [16] In all of these circumstances, and in the exercise of my discretion, I fix the costs of these motions as follows:
- [17] i. The motion to appoint a Forensic Expert
- | | |
|---|--------------|
| - Legal fees (on the partial indemnity scale) | \$42,250.00 |
| - For disbursements | \$55,000.00 |
| - HST on fees | \$5,492.50 |
| - HST on disbursements where applicable | \$7,000.00 |
| - Total costs | \$109,742.50 |
- [18] I have concluded that the disbursements incurred by the expert in accordance with the invoice of June 4, 2013 were reasonable considering the complex nature of the forensic order being sought, and the clear need to have a computer expert assist in determining the questions being raised by National Energy. It is to be noted that National Energy incurred a payment of \$25,878 for its expert. Having regard to the principle of proportionality and the costs that an unsuccessful litigant might reasonably expect to pay,


I have accordingly reduced the total of the disbursements by approximately 25%. An order is herein made that the costs on the motion for appointment of a forensic expert, fixed in the amount of \$109,742.50, be paid by National Energy Corporation to Direct Energy Marketing Limited by November 30, 2013.

[19] ii. Costs with respect to the motion to set aside

- Legal Fees	\$70,000.00
- HST on fees	\$9,100.00
- Disbursements	\$936.72
- HST on disbursements where applicable	\$125.28
- Total costs	\$80,162.00

[20] It is hereby ordered that the above noted costs, fixed in the sum of \$80,162.00, be paid by National Energy Corporation to Direct Energy Marketing Limited, by November 30, 2013.

[21] Order accordingly.


Justice J.S. O'Neill

Released: October 3, 2013

CITATION: Direct Energy Marketing Ltd v. National Energy Corp, 2013 ONSC 6140

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Direct Energy Marketing Limited

Applicant/Responding Party

– and –

National Energy Corporation

Respondent/Moving Party

RULING ON COSTS

Justice J.S. O'Neill

Released: October 3, 2013