
CANADA / JUDGMENT

Blatz v. Cosburn and Associates

2011 BCSC 670

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 670 Blatz v. Cosburn and Associates

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blatz v. Cosburn and Associates,

2011 BCSC 670

Date: 20110525

Docket: S104797

Registry: Vancouver

Between:

Hartley Blatz, Karen Blatz, and

Clifford Norman Blatz

Clients

And

Cosburn and Associates

Solicitors

Before: Master Baker

as Registrar

Reasons for Decision

Counsel for clients:

J.C. MacInnis

Counsel for solicitors:

M.D. Tatchell and C.M. Cattermole

Place and Date of Hearing:

Vancouver, B.C.

February 23, 2011

Place and Date of Judgment:

Vancouver, B.C.

May 25, 2011

- [1] The clients ("the Blatzes") apply under the Legal Profession Act[1] to review the accounts of Mr. Cosburn for services rendered over 38 months from February 2007 until April 2010. All in, with taxes, the accounts total \$67,180.26.
- [2] The Blatzes own and operate a farming/ranching concern in the Peace Region; the closest town is Fort St. John. They are in the midst, of course, of oil and gas country, and a gas well owned by Canadian Natural Resources Limited ("CNRL") had been located on their land since 1991. The well site harboured an infestation of a noxious weed, 'Scentless Chamomile'. This plant is a particular problem, I understand, in hay and pasture country; it spreads very quickly and competes aggressively with more slowly growing forage species. In the Blatzes' case, Ms. Blatz said that its presence meant that they had to work the fields in the vicinity of the well more, had to build a special fence (to exclude their buffalo), lost hay production, had to truck in extra hay from other fields, and hand-picked (removed) the weed.
- [3] The Blatzes took this matter to the Mediation and Arbitration Board ("MAB")[2] which deals with disputes between landowners and gas and oil companies. They first engaged an Albertan lawyer who was not licensed to practise in British Columbia so, after awhile, they changed to a lawyer practising in Fort St. John. Unfortunately, within months of retaining him he suspended his practise owing to difficulties with the Law Society of British Columbia.
- [4] I mention these prior lawyers for one reason only: in her evidence Ms. Blatz said that in her very first telephone call with Mr. Cosburn (to whom she was referred by an employee of the MAB) she was clear that the Blatzes needed a lawyer who could "finish the job" to the very end, including pressing their claim if the matter was not resolved by mediation and agreement. I find no fault whatsoever with the Blatzes having had two previous counsel: their reasons for retaining each of them, and for the end of those respective retainers, make sense and seem reasonable to me. It also seems more than likely that Ms. Blatz's version of that first conversation is reliable and that the Blatzes were, in fact, concerned that they not have to change counsel again. She pointed out, for example, that changing counsel meant educating him or her as to the Blatzes' situation and history.

- [5] Mr. Cosburn formalized his retainer with his letter of February 23, 2007. He advised the Blatzes of his hourly rate of \$300.00, the customary charges for disbursements, interest (12%) on accounts due past 30 days, and the implications of termination of the retainer. This last term is interesting and bears quoting:

If our services as counsel are terminated by you or if we decline to represent you further for reasonable cause, we require our accounts to be paid in full by you before we remove ourselves from the record and return our file to you.

(Emphasis added)

In the three years and two months that Mr. Cosburn acted for the Blatzes he rendered 13 accounts for a total of \$52,020.00. With taxes and disbursements the total was \$67,180.26. Every account was paid in a timely way and the Blatzes sent Mr. Cosburn every further retainer (or fee in advance, more correctly put) when requested.

- [6] When they retained Mr. Cosburn the problem they presented was the weed infestation. In his oral evidence Mr. Cosburn said there was "no focussed issue" but that in any event he addressed the jurisdiction of the MAB. I think his recollection is faulty in this. The issue for the Blatzes was weed infestation. On the question of jurisdiction, though, he researched the state of title and found that CNRL was not on the Blatzes' land by virtue of the usual gas and oil surface lease; apparently title was encumbered instead by statutory rights of way ("SRWs"). He determined that, in his view, the SRWs were invalid and were, in law, actually licenses of occupation and as such did not convey the interest in land that an SRW would, and were therefore more limited. This aspect was not explained in detail in these proceedings, but I gather the problem was that, for example, while the SRW allowed for the well site's presence, it did not attach to a publically accessible road. In other words, I understand the right of way to say, in effect, "you can be here, but you cannot get here". An interesting situation, certainly. In any event Mr. Cosburn apparently felt this a pivotal fact and important restriction on CNRL such that, sooner or later, CNRL would have to negotiate with the Blatzes. The problems to CNRL owing to, in his view, unsupportable tenure for the well site were an important key to pressing the Blatzes' claims successfully.
- [7] The Blatzes saw it otherwise. The well, in fact, was inactive. It had not been formally decommissioned but it was not in operation. As far as the Blatzes were concerned there was therefore no impetus on CNRL to do anything about the well or its implications, including the weed infestation. I think they were right in this view. In the end I think Mr. Cosburn constructed a fairly complex castle on a foundation of sand, and that the Blatzes tried to point that out to him.
- [8] This business of the SRW is interesting. On the one hand Ms. Blatz said that neither of the Blatzes' previous counsel was concerned with it, nor did (or do) the Blatzes think it was of any profound significance. Mr. Cosburn, on the other hand, felt it very important. His opinion was that, as CNRL was on the Blatz land by virtue of the SRW and not through a surface lease, the MAB did not have jurisdiction in the matter: wrong venue, in other words.

In any event he commenced proceedings in the Supreme Court July 17th, 2007. In simple terms the pleadings alleged that the previous owner of the well, Amoco, had allowed the weed to become established but had taken steps to control it. When CNRL took over the well site in 1993, the pleadings allege, CNRL refused or neglected to either continue control of the weed or to prevent its spread beyond the well site and onto the Blatz land. Thus arose the difficulties and damages for the Blatzes.

- [9] The statement of claim also dealt in detail with the SRW problem (paras. 18-23) and alleged that the SRWs were inadequate for the purposes of establishing or maintaining the well site. The consequence, of course, is that CNRL was alleged to be in trespass. The prayer for relief seemed to emphasize this aspect and claimed for damages in trespass as well as an injunction against further entry by CNRL. The pleading also claimed, in the alternative, damages in nuisance and negligence, but it is clear, both from Mr. Cosburn's evidence and from the time records that his focus for some time after being retained was the nature and effect of the SRWs.
- [10] It would be interesting at this point to examine Mr. Cosburn's strategy. At the very outset, he said in evidence, he intended to delay. He thought delay the best approach because he knew (and pointed out to the Blatzes, he said) that there was a serious financial imbalance between the Blatzes and CNRL. He felt, or assumed, more appropriately, that as a gas and oil company it could devote crippling financial resources to the action and defeat the Blatzes financially before the matter ever reached court. In evidence he said that the best thing the Blatzes could do was to commence an action against CNRL and

...then hang back, and essentially do nothing because CNRL is in a position to outspend you at every juncture if they wish...

He also said that he "suspected", although he "did not have a clear recollection" that "there was that kind of dynamic either actual or potential" with CNRL. His strategy depended further on his expectation that sooner or later CNRL would need to get onto the Blatzes' property.

[11] What is his recollection of the Blatzes' strategy? He said that he

suspect(ed) that they had probably indicated to me that they wanted to resolve this in an economically efficient way and didn't want to spend a huge amount of money on it.

(Emphasis added)

Expressed in these terms, it seems to me that Mr. Cosburn's account is more assumption than evidence. I was not referred to any communication from the Blatzes, nor any note by Mr. Cosburn of a discussion to that effect, when one would expect that with such an important, overarching strategy. Quite the contrary, as indicated below, I do not accept that the Blatzes were at all aware that this was Mr. Cosburn's fundamental strategy, nor were they willing to delay the matter for financial, or any other, reason. While they clearly agreed with attempts to negotiate (par. 23, below), they never accepted delay as a tool of resolution.

- [12] From the Blatzes' view the problem from the beginning was a weed infestation. From Mr. Cosburn's view it was one of title and legal (or not) right of way. In his early e-mail discussions with both the Blatzes and with Mr. Dellow, CNRL's counsel, he was clear that he regarded the correction of the invalid (in his view) SRWs as "a foundation issue" and a precursor to "regulate their relationship in the future"[3].
- [13] Mr. Cosburn's e-mail to Mr. Dellow[4] is instructive. It does several things. First, it lays clear Mr. Cosburn's major preoccupation with the status of the SRWs. Second, it actually proposes a period of negotiation on the point of correcting the documentation for the SRWs ("...let's say a month..."). Third, it mentions in passing that, even if the SRWs are enforceable and CNRL is legally on the Blatzes' land it could still "...be made the defendant in a claim before the courts framed in nuisance". Finally, in my view, by laying out in detail his argument that the SRWs were insufficient he would reasonably have left Mr. Dellow with the inference that the MAB was not the correct forum to resolve issues between CNRL and the Blatzes.
- [14] The evidence about the MAB's jurisdiction, or not, was a little confusing. During the hearing Ms. Blatz said that the issue of jurisdiction was a live one and was on the table even before Mr. Cosburn was retained. His evidence was to the contrary. After the hearing, however, Mr. MacInnis found and forwarded documents confirming that CNRL's first counsel, Mr. Dellow, had objected to the MAB having any jurisdiction beyond the well site itself i.e. roads, ditches, or property over which the weeds had allegedly spread. Mr. Tatchell, Mr. Cosburn's counsel in these proceedings, responded by arguing that that was an entirely different jurisdiction issue than that which concerned Mr. Cosburn but acknowledged that "...Mr. Cosburn has no memory of it either". It seems odd that Mr. Cosburn would not remember that, given that he was soon telling Mr. Dellow that the MAB had no jurisdiction.
- [15] In his subsequent e-mail to the Blatzes of March 28th (par. 22, below) Mr. Cosburn offered four options, the first of which was to continue the pending proceedings with the MAB. In that case he was clear that he would not represent them, other than advising them "in the background", as he expressed it. He advised the Blatzes that he would not appear in the MAB proceedings because he felt firmly that the law was against them on jurisdiction. He felt he could not, as counsel, "advance transparent arguments..." before the Board. He also had concerns about the quality of expert evidence the Blatzes had accumulated to date.
- [16] It is a good time to review Mr. Cosburn's initial evaluation of the Blatzes' situation, his opinion, and his advice and recommendations. These are all contained in his very lengthy e-mail to them of March 23, 2007[5]; it runs 17 pages and 32 numbered paragraphs (plus various sub-paragraphs). One clear fact, from the e-mail, is Mr. Cosburn's admission that by that point he had not read the file materials given him by the Blatzes[6]. While lengthy and involved, the issues themselves are not numerous. As Mr. Cosburn listed them, they were:
- proving a claim respecting the weeds ("no" was his opinion);
 - assessing any liability by the provincial crown arising from the SRWs ("no" was his opinion);

- whether the SRWs were valid and whether CNRL was in trespass ("uncertain" was his view).

Reading the entire 17 pages, I would say the issues could also be listed as:

- the weed claim;
- the adequacy or enforceability of the SRWs;
- the best venue for resolving the Blatzes' claims;
- negotiation and/or litigation tactics and strategy.

The legal profession exists to explain and guide people through their legal difficulties. This is so obvious and axiomatic that it need not be said. But beyond this, any good professional should be able to adequately explain, in a reasonably limited time, the various aspects of the issue. That is part of the legal service: helping the client to understand not only the true legal nature of his or her issue, but also the elements of its solution. Conversely the duty and skill of counsel, of course, is also to explain when and why a client's expectations cannot be met either because the law or the facts do not support the expectations.

[17] Having said this, the Blatzes would be forgiven for not fully understanding the 17 page missive. I confess to having the same difficulty. Much of it is a very detailed (and, it must be said, erudite) discussion of the minutiae of legal tenure, title, SRWs and other forms of access to land. I am not sure at all that the opinion required such detail, particularly when the Blatzes were mainly concerned with redress for the weed infestation. I wonder if the intent was to impress rather than inform. I think Mr. Cosburn's intent was to tie CNRL's faulty tenure to solving the weed problem, but the point may well have been lost in the blizzard of words.

[18] At one point the document even seems to contradict other advice and counsel from Mr. Cosburn. He (par. 10) discussed the authority given the MAB by s.16(1)(b) of the Petroleum and Natural Gas Act. He advised that because of the "anomalies created by...the statutory right of way..." s. 16 and therefore the MAB authority did not apply. He said further, however that "If the court orders that the srw for the wellsite is invalid, Section 16(1)(b) may well then apply". I understand him, then, to be saying that if the SRWs are invalid the MAB may well then have authority. He counsels against using that venue, however, for several reasons, among them his ironic comment:

As well it has a structural disincentive to resolve matters expeditiously and efficiently because the members of it are paid on a daily basis for dealing with a matter.

Having established that, if the SRWs are invalid (as he clearly feels) and that, therefore, s. 16 may apply and the MAB may take jurisdiction, five days later he emphatically declined to appear before the MAB, should the Blatzes choose that venue as "In a case such as yours, in which I am satisfied that the law is against you with respect to the board having jurisdiction over your claim at all...".

- [19] My confusion: if, as Mr. Cosburn feels, the SRWs are invalid, then s. 16 of the Act "may well apply" to give the MAB jurisdiction, but "...the law is against you with respect to the board having jurisdiction over your claim at all". If the clients were confused by this I would not blame them.
- [20] Of the four concerns above, the legality of the SRW seemed the most complex. The other issues were not overly complex. Mr. Cosburn dealt with the weed claim (the primary concern of the Blatzes, recall) by dismissing the opinions and views of three individuals they had already consulted. He did so after acknowledging (par. 4) that "I have not, for the purposes of this letter, gone through your file materials in great detail." He declined to do so, he said, because to do so "...would be very time consuming and expensive...". He also acknowledged that "I have not reviewed the contents of the cd included with the materials." He dismissed out of hand the opinions the Blatzes had, on their own, obtained (Mr. Hadland, Ms. Copes, and Ms. Colwell), even going so far as to imply that their use to date had made matters worse for the Blatzes. Those reports were not presented in this hearing, so I have no idea whether he was correct in this. I found it odd, however, that in dismissing Mr. Hadland's report he admitted "...and because of its length and in light of the conclusion on the first page I haven't reviewed it from that point of view..." (referring to its probative value).
- [21] At the very outset Mr. Cosburn advised the Blatzes that, based on the evidence and opinions they had obtained to date, they could not prove that the infestation was caused by CNRL. He may well have been correct in that. He then (par. 5) was clear: they needed better expert evidence:

What is needed, to proceed effectively and efficiently to formal resolution of the weed claim against CNRL is specific evidence of each of the elements you are required to prove. You need a report, properly done in accordance with the law governing expert testimony, of an independent expert with significant credentials asserting the opinion, on proper grounds, that the weed on your property is not a natural occurrence there and has been brought or transported or caused to be there by the actions or activities of CNRL and by nobody or nothing else and by no other non-actionable cause. That is the foundation of a claim such as this. Then concise evidence of the costs and/or losses incurred by you in responding to the infestation. That is all.

Indeed, that was all, and well and succinctly stated. I wonder at his other comments on experts. He was clear that, as far as he was concerned, any experts for the Blatzes, to guarantee independence, would have to be from outside the Peace region. I seriously wonder at that and the inevitable increased costs of experts 'from away': there is no indication that Mr. Cosburn either sought or canvassed other potential experts in the vicinity. One would expect, in an agricultural region such as the Peace, that experts might be more locally available and their independence satisfactorily established.

[22] Having put expert opinion so clearly front and centre, to the extent of pointing out that the Blatzes, at that early stage, had to deal with opposing opinions from CNRL[7], Mr. Cosburn seems to have done nothing to improve on the evidence that the Blatzes had gathered, or to gather new and better expert opinion. It seems curious in the extreme that he could expect to either negotiate or litigate the infestation issue without that evidence, yet seemed disinclined to obtain it. Shortly after this long opinion, by e-mail March 28th, Mr. Cosburn outlined four options:

1. Continue with the process before the MAB. In that case Mr. Cosburn declined to act further other than to give advice "in the background", as he put it. He felt the MAB had no jurisdiction and that the evidence the Blatzes had was so deficient that to continue would be to "advance transparent arguments". He implied that to appear before the MAB would require that he breach "a set of duties" that he must otherwise observe;
2. "Commission a proper expert report" that would prove CNRL to be the cause of the infestation and the well site its source;
3. Take the matter to the Supreme Court and challenge the SRWs; if successful the Blatzes could then claim against CNRL in trespass and "...if you have workable evidence available, the weed claim". Mr. Cosburn specifically felt that even if the SRWs were valid that the Court would order that "...the crown provincial's purported reservation of rights in the srw's (sic) is invalid. That would allow you to be the only party with whom CNRL must deal with respect to the srw's (sic)".
4. "Attempt to negotiate a resolution of your concerns with CNRL"

Mr. Cosburn doubted the success of (1) ("...a shot in the dark, with the risk of losing credibility for your claims..."), and felt (2) and (3) would be "...quite costly to you". He clearly favoured and encouraged further negotiation.

[23] Within a day of that e-mail Ms. Blatz responded with a two-page e-mail clearly emphasizing the infestation as their main concern and specifically suggested, if not directed, that Mr. Cosburn interview Mr. Hadland, Ms. Colwell, Ms. Copes, and a fourth witness, Mr. Vince. She gave telephone numbers for each. There was no evidence given that Mr. Cosburn ever talked to these people. In any event, Ms. Blatz closed by giving a clear instruction that their preference was to "...go with the 4th option and if this doesn't work we will go with the 2nd option". The Blatzes therefore instructed negotiation and failing that retaining experts.

[24] What is interesting in this, and in numerous other exchanges between counsel and client and, in fact, in the evidence heard during the hearing is this: Mr. Cosburn consistently proposed paths of action as exclusive. Broadly speaking, he counselled the Blatzes to either negotiate or litigate. It seems never to have occurred to him that both avenues could and, probably usually should, proceed at the same time. In simple and elementary terms nothing spurs negotiation and settlement like a deadline and Mr. Cosburn seems not to have appreciated or used this tool. He seemed not to appreciate that the deadlines litigation offers

can, and usually do, encourage negotiation.

[25] The Blatzes consistently wanted to press the matter and relied on Mr. Cosburn to use whatever tools were available to do that. He, on the other hand, seemed reluctant (putting it kindly) to press the various steps in litigation. At every turn, I think, he talked about pressing the matter, but in fact delayed. His e-mail to the clients December 4, 2007 is a good example of this. He discussed examining a representative of CNRL but seemed nonplussed that CNRL's counsel, by response, wanted better document disclosure. He again offered delay: "The choice for you at this stage is whether you wish me to keep pushing the matter ahead, or just sit back and wait and see if CNRL gets desperate to get on the wellsite." He further discussed delay and opined "Certainly there is no disadvantage for you tactically, although I understand your wish to bring the matter to an end." He said that he assumes the weed infestation "is now being controlled..." and said

If I am correct then the lawsuit is simply over costs and losses you incurred in the past and an incentive to get the title situation straightened out. Those things are of course not insignificant, but they are matters that can wait from the point of view of the court."

Finally, he referred to the information and reports the Blatzes had obtained to date and said, directly, that because the reports "...were not prepared on the instructions of a lawyer..." it was possible "if not probable" that the Blatzes could not maintain privilege over them. In an ironic turn of phrase, he advised the Blatzes that to disclose information that has, in his view, evidentiary weaknesses "...will not, in my view, assist in maintaining the litigation momentum that is presently in place - you are the aggressor and they are both stalling and retreating". Frankly, I see no 'litigation momentum' of any consequence in place at the time.

[26] Certainly the Blatzes, instinctively, seem to have realized the importance of deadlines and pressing the case. Ms. Blatz's short response to Mr. Cosburn, the same day, was pithy and emphatic:

We want to get this going as we have too much money tied up in this. If we don't push this matter we believe CNRL will do nothing because it is not an active well...

Concerning the weed control, scentless chamomile is not a one shot deal. It must be treated aggressively for many years or it could get out of control like was when CNRL was doing the weed control. The lawsuit is not just over costs incurred in the past but also for future weed control costs as scentless chamomile cannot be eradicated in one year. Has payment been demanded for the weed control that we did in 2007?

What could be clearer than that? The clients were clear that they wanted the matter pushed, and clear that any devaluing of the weed infestation issue by Mr. Cosburn was, in their view, wrong. It seems to me they were giving very clear marching orders.

[27] Yet the very next day Mr. Cosburn sent another e-mail to the Blatzes encouraging delay:

There is one other element that I have in mind in seeing some merit in delay and that is of course assuming that CNRL doesn't decide to push the court action ahead on its own...

If a year goes by, or two years for that matter, and you see a diminishment in the extent of weed sprouting/growth on your lands that is effective evidence that the wellsite area was the source, and not some other factor.

[28] A few days later, on December 8th, Ms. Blatz repeated their intent that the matter be pushed and finished:

We still would like to have this issue finished within the next year...CNRL will never be ready to settle this unless they want to put it back to bed and that could be 20 years from now. Hartley wants you to take the appropriate steps to get this into court as you can see from the past they do not want to negotiate.

The proof that the chamomile was from CNRL is because the highly infected area is directly below the wellsite, water ran through the open berms and the weeds were not being controlled. If it was from our negligence it would be over the whole farm and just below the wellsite (see Arthur Hadland's report).

(I understand that Ms. Blatz meant "...not just below the wellsite...").

What is particularly compelling to me in all of this was Mr. Cosburn's response. Ms. Blatz's note also referred to unexpected events, such as illness or death, intruding. Mr. Cosburn's response counselled calm and said that "...In any of the above events...I would brief other counsel as to the land use regulation...Any reasonably experienced litigation lawyer, of which there are many, could take those issues forward at this point.

[29] In this exchange Mr. Cosburn does not suggest that he would not carry the litigation to its completion, unless there were unforeseen events intruding (as with illness). I think that any reasonable person reading the response would assume Mr. Cosburn's commitment to carrying the litigation through. I raise and emphasize this point as, in my mind, it confirms Ms. Blatz's evidence that she and her family, having retained two counsel prior to Mr. Cosburn, were intent that the third counsel be their last, and I think it more than reasonable that Mr. Cosburn understood and acknowledged this.

[30] Surely the overall plan for this litigation was not complex?

1. The basic and pressing problem (clearly expressed by the clients) was the weed infestation and its past and future costs of control or eradication;
2. If the SRWs were valid and enforceable, then arguably the Crown in right of the province might be partially or contributorily liable which, of course, may have given the Blatzes another source of compensation;
3. If the SRWs were not valid then probably CNRL was trespassing and accountable accordingly;

4. Whether the SRWs were or were not valid CNRL could still be pursued for causing or failing to control the infestation.

Frankly, I cannot see how the lengthy and ongoing discussion and preoccupation with the enforceability of the SRWs should have delayed the larger question i.e. CNRL's accountability (or not) for damages for the infestation[8]. Mr. Cosburn correctly recommended the Supreme Court as the venue to resolve both title and access issues as well as the liability of CNRL for damages either in nuisance or negligence.

[31] By July, 2007, according to Mr. Cosburn, the focus of the infestation problem shifted from CNRL's having caused the infestation to CNRL's having failed to control the spread of the weed. I understood him to see this as a reason, for example, for not retaining experts[9]. I wonder at that: even if the focus had originally been the cause of the infestation and had experts been instructed or consulted accordingly, I cannot see that it would have delayed matters, or increased the expense significantly, to have asked them to re-address the problem as one of control vs. cause. Respecting CNRL, he pleaded the case as failure to control.

[32] In the end and after 38 months of representing the Blatzes Mr. Cosburn had not - set a trial date

- retained any experts re: spread or cause of the weed infestation;
- retained any experts or accounting help to quantify the damages of weed control, past and future.

Like the Blatzes, I fail to see much that was done on their behalf.

[33] In Legal Profession Act fee reviews the court is cautious in second-guessing counsel's litigation strategies or decisions. This is not one of those case. Mr. Cosburn, in the face of clear and repeated instructions to press the matter, did not do so and, in fact, did the very opposite. Despite the Blatzes' instruction from their very first contact with Mr. Cosburn, that they wanted him as their final counsel, I am satisfied that he did not intend to litigate the matter to its end. He intended, should the matter go to trial, to refer the matter to other counsel as he clearly attempted, in the end, to do.

[34] Did Mr. Cosburn actually understand his duties and obligations as litigation counsel? I am not at all sure that he did. A singular and salient example of this is found in document discovery. In January of 2008 he was preparing the Blatzes' list of documents and on January 17th, by e-mail advised them of the following:

What I have done is reduced the scope of documents in play down to those that you will rely on in the proof of the issues before the court in the Supreme Court action. Some that were left out were omitted on the grounds that they are irrelevant insofar as the proof of those issues is concerned. Others not (sic) that were left out were omitted on the grounds that they are either inconsistent with your claim, or associated with other documents that are inconsistent. Grounds for omitting

others is that they favour the other side - and are thereby inconsistent with your position. To the extent that credibility issues (for CNRL) may arise out of those documents you will raise them only in the event CNRL puts forward or relies on those documents, or we draw them out during examinations for discovery or on cross-examination. We don't want to put forward documents, in your list, that create lack of clarity in your position. The documents that were apparently drafted to be considered opinion evidence or expert's reports have been excluded for reasons earlier discussed.

The court rules are essentially that unless you disclose a document in your list you can't rely on it at trial. So I have used my assessment of the documents that are necessary for you in that regard as the determining factor in including or excluding a particular document.

(emphasis added).

This was not an isolated or unintentional approach, as in his covering letter of March 5th (accompanying an account) Mr. Cosburn repeated his theory of document disclosure:

Careful review of your documents to isolate and list those containing favourable evidence that can be relied on at trial and to confirm that the contents are not inconsistent with others that are already in the possession of CNRL formed the bulk of the time...

[35] In his cross-examination Mr. Cosburn confirmed that the views in these e-mails reflected his understanding of the law. On re-examination, however, he attempted to rehabilitate his evidence and said that the e-mails were a poor statement of his view that he need not list or produce some documents as they had already been produced to CNRL or their counsel, for example, before he was retained. I do not accept this latter view. I think that his e-mail and his responses in cross are more accurate and confirm his misunderstanding of the requirements of document disclosure. His assumption that he could exclude documents that did not support the Blatzes' position, or that were inconsistent with other documents already produced was stated clearly in his December 17, 2008 letter to them. At par. 3 in criticising the Blatzes for their "binder approach" (his words) he said that

It provided that party with a mass of documentation, much of which is inconsistent with your final position, particularly as to quantification of the claim and evidence for it.

[36] This approach shows a serious misunderstanding of counsel's duty in the discovery process. In *Allarco Broadcasting Ltd. v. Duke*[10] McEachern CJBC said

In the ultimate analysis, it is impossible definitively to furnish guidelines on what is permissible on discovery. It is, as I have said, a professional matter.

There is no higher duty on counsel engaged in litigation than to make proper and full discovery. Mr. Cosburn did not do that. Any counsel doubtful as to what had to be disclosed would do well to read the court of appeal decision in *Dufault v. Stevens*[11], in which, referring to *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.*[12], the court said

11 It follows from this that an applicant need not show that a document is admissible in evidence at the trial as the condition of his obtaining an order under this Rule. If a party seeking the order is able to satisfy the Judge that the document, or information in a document, may relate to a matter in issue, the Judge should make the order...

...

14 Subject to these considerations, any party is entitled to an order for production and inspection of a document which may relate to an issue in a trial notwithstanding the fact that the document may contain some information which is irrelevant or which may contain information which might be embarrassing to one of the parties.

Similarly, any counsel in doubt as to the discovery process would do well to review the relevant portions of Discovery Practice in British Columbia[13]. The wide-ranging scope and duty of disclosure is well known to counsel practising in the superior courts of British Columbia. The fact that the scope of document discovery has been narrowed by the New Rules does not in any way detract from Mr. Cosburn's duty, during his retainer, to make much fuller and more complete document discovery than he apparently understood was his responsibility.

[37] From this bad advice on document discovery a quick chronological review of subsequent discussions and advice would help:

- June 24, 2008: Mr. Cosburn had transcripts from an examination for discovery, but said he hadn't time to review them: "Doing so is however not necessary at this stage for the purposes of the action. It is necessary as part of a pre-trial preparation". I would assume even a quick review of discovery evidence would be better done earlier rather than later. He then contemplated whether Mr. Proudfoot (now counsel for CNRL) will set discoveries, and "If not we can set the matter for trial...". He also advised that if the Blatzes' examination is set for "...let's say August, at a time that is busy for you on the farm, he has the right to do so and you will have to attend." Mr. Cosburn did not seem to even contemplate an adjournment, to farmer/ranchers, during harvest time. I expect a court would have been sympathetic to such an application.
- The same day he sent a note to Mr. Proudfoot and said "If I don't hear from you in this regard I will proceed to set the matter for trial...". No trial date was set.
- By September 26th no trial date had been set, and there was discussion of examinations. In discussing the cost of litigation, Mr. Cosburn said "...I am proceeding on the basis of your responses...to my email of December 4, 2007 when I suggested that you may want to consider a less aggressive approach to the litigation...". His discussion of a trial date is almost diffident: "If we are to set the matter for trial we need to allow CNRL an opportunity to examine you". But there is no evidence that the Blatzes, for any reason, wished to avoid an examination. Quite the contrary, in my view; I think they were anxious to make their case known directly to CNRL.

- Mr. Blatz was examined in mid-December, 2008. There followed a lengthy letter (by e-mail) from Mr. Cosburn to the Blatzes[14]. Some of it was a standard post mortem, some of it analysis of the case (although precious little of that) and some of it, frankly, lecturing and criticising the Blatzes. Mr. Cosburn, by this letter, began to prepare the clients for his termination of the retainer. It is an important letter, and bears a little more review. First, he was frank in saying he learned little of CNRL's approach: "I am still unable to read in any definitive way what CNRL's agenda with respect to this matter may be". This is a surprising comment after pleadings were closed, document discovery (one hopes) completed, and a discovery of one's client done.
 - [38] The examination took all day when, it had been hoped, several examinations could be completed in that time. Ms. Blatz, in particular, was frustrated by what she saw as poor or inadequate planning and the expense of re-scheduling. She said as much openly, hardly a grievous sin for a litigant. Mr. Cosburn addressed this and after acknowledging that time was wasted "...by repetition of questions and questions that are clearly, as a matter of law, improper" he advised, in respect of CNRL, that "They are entitled to examine at great length on each issue if they wish to spend the time and money to do so even though the result is increasing your financial exposure to some extent."
 - [39] Worse, after the discovery Mr. Cosburn, angered by Ms. Blatz's expressed frustration, lectured her on having damaged her case strategically by demonstrating concerns, in Mr. Proudfoot's hearing, about the cost of litigation. This would, said Mr. Cosburn, simply reinforce his view that CNRL was waging a battle of economic attrition. This was hardly a fresh insight, and in my view the clients did not merit the scolding they got.
 - [40] Mr. Cosburn was also upset by "...the 'binder' approach..." whereby, I gather, the Blatzes brought to the examination documents which they felt corroborated their claim, costs, and damages. All I can conclude from all of this is that Mr. Cosburn had not properly canvassed and gathered the documentation and certainly had not organized and listed it as was his responsibility as counsel. Properly prepared counsel should not be surprised by documents his or her own client presents at discovery.
 - [41] Mr. Cosburn clearly felt (or at least expressed) that his role as counsel was unproductive and that the Blatzes frustrated his function
- ...by the tendency of the Plaintiffs to assume, incorrectly, what the law is or requires in any particular circumstance. The result has been a number of situations in which my function has been to try to work around things done or steps taken by the Plaintiffs without seeking or following my advice. I should be assembling a cohesive and persuasive evidentiary foundation for the claim based on the client seeking, and following, advice as to the elements of that evidence and their proof.

Having heard the oral evidence of both counsel and the clients and having reviewed the e-mail record of solicitor/client communications, I do not accept that the Blatzes were guilty of such egregious sins.

[42] Following on this lecture, Mr. Cosburn proceeded to tell the Blatzes that "There is a point at which I may find myself unwilling to continue with the file." He said that point would be reached if the clients, in his view, did not follow his advice, or evidenced a lack of faith in him. Amazing, to my view, was his further assertion that

...total accounts rendered in this matter...not including the accounts of the predecessor lawyers, are...some two to three times what they would have been in the absence of time required to be spent attempting to accommodate the file to the various counterproductive (from the point of view of efficient litigation) concerns that have arisen as a result of actions of the client. It gets to the point that it is embarrassing for me...Client issues such as those outlined in this letter interfere with achievement of that goal.

Later in the letter he said

I don't want to feel like I have to fight or debate with my own client, or do my job trammelled (sic) by a millstone created by the client's own actions.

Again, to justify such blunt accusations one would expect clear (and repeated) evidence of a client's interference, obdurateness, or independent actions. There are none of those in this case warranting such criticism. In his oral evidence Mr. Cosburn said that the Blatzes' having allowed CNRL onto the wellsite in July 2008 was an example of their frustrating his role as counsel, but his July 29th, 2008 e-mail[15] belies this. In his own words, Mr. Cosburn was "...not overly concerned". That incident, however, for Mr. Cosburn retrospectively became part of the justification for his subsequent withdrawal.

[43] Mr. Cosburn, perhaps summing up his entire view of his role as counsel, said

My function is to manage the flow of information to the other side. If you take it upon yourselves to "blurt" out information, whether verbally or in documents, it makes it difficult if not impossible for me to do the job you have hired me for, effectively.

This is an interesting summary. While it describes part of counsel's job, it surely does not define the entire role. Surely counsel's job is to ascertain as well as possible demonstrable and provable facts and to apply those facts and applicable law to the client's expectations and to advise accordingly? It is impossible, I suggest, to "manage the flow of information" to the extent Mr. Cosburn envisions. I suspect his view includes his understanding of the duties of document production (paras.34 and 35, above). Facts are like weeds in a sidewalk: they have a way of emerging despite one's best efforts. I doubt that Mr. Cosburn did a thorough and complete review of the facts, documents, and circumstances in this case. Had he done so he could have properly advised and prepared the Blatzes and avoided the embarrassment of which he complains.

[44] In the post-discovery note Mr. Cosburn proceeded to discuss, in fairly general terms, the duty on a plaintiff "to prove their losses". I would have assumed that, by the time his client was being examined, this aspect of the case would have been thoroughly examined by counsel and discussed with the client. I do not think this was the case.

[45] Finally, as always, Mr. Cosburn closed with more discussion of the cost of litigation (if the point had not, by now, sunk in with the Blatzes) and advised

I remain of the view, as earlier advised, that there is merit to your sitting back a bit with respect to the claim. You may be better served by waiting for CNRL to come to you as a result of its requirements to access its well, in terms of cost to you and leverage.

This "leverage" is suspect at best: see par. 6, above.

[46] The examinations were substantially complete, I gather, in the early spring of 2009 and Mr. Cosburn sent a note June 5 advising that he would be examining the transcripts "...in the next couple of weeks". He was concerned about questions Mr. Proudfoot objected to on the basis of privilege, and advised the Blatzes that "Those issues will need to be resolved before we can go further" and that he would decide if an application was necessary "...before the action is set for trial". Again, no trial date had been set, and again Mr. Cosburn demonstrates a curious linearity in litigation wherein it is not possible to set a trial date until discoveries are totally complete. These seem more to me to be convenient reasons for not setting a trial date.

[47] I cannot see that anything was done over that summer, but on August 17th Mr. Cosburn was still talking to the Blatzes about CNRL's claimed privilege. Once again, Mr. Cosburn offers the "either-or" approach:

There are two approaches that can be taken here - one is to ignore the apparent defaults on the part of CNRL with respect to the production requirements of the discovery process and simply set the matter for trial and proceed. The other is to pursue the discover answer/production issues by way of motion to the court.

and

It is a difficult call. On balance I lean towards making the application.

and

If you wish to proceed at this point in either respect I am going to advise you to instruct my (sic) to retain specific litigation counsel...capable court counsel who does a significant amount of work like this - taking matters to court for clients who are represented, up to the stage of required court attendances, by other lawyers. The practise of law has become very specialized, and his firm's activities are specifically focused on the court processes. The focus of this office is specifically on the property law issues involved in a file like yours. In my opinion you are better served, now that the property law issues have been considered and assessed, asking Mr. Tachell to become involved...The other factor that may be in play here is that because mine is not a

practice specifically oriented towards trial or motion matters there may well be less concern on the part of CNRL with respect to that aspect of the file than there should be.

(emphasis added)

[48] Ms. Blatz's response, a week later, was to request a letter from Mr. Tatchell confirming his agreement with Mr. Cosburn on "...the statutory right of ways (sic) being invalid." She also said "We think the matter should be set for trial".

[49] Mr. Cosburn's reply was fascinating in the larger context of this entire action:

I will remind you that it makes no difference to your claim for damages and costs resulting from the weed infestation if the srw's (sic) are valid or not. You can review the statement of claim and see the alternative pleadings - nuisance if the srw's are valid, trespass if they are not.

He then declined to ask Mr. Tatchell his opinion on the SRWs: "It would cost you some money for no useful purpose that I can see."

[50] The Blatzes' reply, two days later, was, as usual clear and emphatic: "The bottom line is - do what is necessary with Mr. Tatchell and Mr. Proudfoot to set it for trial." No trial date was set after that instruction.

[51] Rather than set a trial date, Mr. Cosburn on September 11th 2009 sent another e-mail to the Blatzes musing about the discovery questions still unanswered, the cost of the proceedings to date, CNRL's recalcitrance, and the advisability of having new counsel. A surprising development did occur, however: CNRL's counsel told Mr. Cosburn that CNRL wished to retain an expert who would, naturally, have to visit the wellsite. Mr. Cosburn's responded by requesting of Mr. Proudfoot the proposed expert's CV so Mr. Cosburn "...could determine if he had sufficient credentials to be able to give expert testimony...and his degree of separation or objectivity from CNRL and these proceedings". Since there was no indication that the expert was to be jointly instructed, it seems a curious response. In any event and, in my view, inevitably it occasioned more delay and more waiting: "I'll be back to you when I hear further from Proudfoot." A month later, not surprisingly, he advised the Blatzes "I haven't heard anything from Mr. Proudfoot. I suggest we leave the matter until the end of the month, to allow time for Dr. Wikeem[16] to report to Proudfoot...If nothing is heard by then I will contact Proudfoot to get a feel for the status...".

[52] A little over another month passed, and, again, there was more desultory talk between counsel. No expert report had been received by CNRL, apparently, and, again, Mr. Cosburn delegated, essentially, carriage of the matter to his clients:

At this point there is a decision to be made by the Plaintiffs - whether to go ahead at this point and refer the matter to (trial counsel), with a view to pursuing the discovery issues...and setting the matter for trial or to wait for CNRL to initiate "discussions"...It think it is simply a question of whether or not you wish to take further proceedings, and incur the cost of doing so, at this stage. If there are to be settlement discussions taking a firm stand will be helpful, but that in my view

can be done now, or during the course of negotiations if any offer made by CNRL is not satisfactory. Let me know what you wish to do in this respect...Waiting for any offer that may appear, and negotiating against the alternative of pursuing the discovery issues and setting for trial requires patience at this stage, but minimizes your costs.

Frankly, this is mystifying. The clients had systematically and repeatedly instructed counsel to set a trial date and push the matter. Some 33 months prior to the 'expert e-mail' (par. 51 above) they had given him clear instructions to retain his own expert if negotiations were not successful. Negotiations were not successful; indeed, there were no negotiations. But Mr. Cosburn seemed content to allow the defendant to gather the only expert evidence and to allow the defendant, basically, to control the speed (surely an ironic word in this context) of the litigation. Despite Mr. Cosburn's constant refrains re: the cost and expense to the Blatzes, there is no evidence, either *vive voce* in the hearing or in the e-mail and correspondence record, that the Blatzes ever held back or instructed hesitation on Mr. Cosburn's part owing to financial concerns.

[53] Broadly stated, it is the function of clients, having received advice and counsel from their lawyer, to instruct the lawyer what to do. It is counsel's job to decide how to do that. The Blatzes clearly held up their side of the bargain. Mr. Cosburn did not. His involvement seems almost passive. At almost every turn he seemed content to sit and wait in the expectation that, somehow, the defendant would act. Why, indeed, would the defendant, in the face of such inactivity, both in the litigation and, apparently, in the gas well's operation, do anything?

[54] One last example: three months later (i.e. February 18, 2010) the Blatzes asked of Mr. Cosburn "Do you think CNRL had enough time? Are they going to give us a copy of Dr. Wikeem's report?", to which he replied

...they haven't done so. We can't force them to directly. It may be that further formal steps, in this case referring the matter to (trial counsel)...and setting the matter for trial and motion relief with respect to the Examination for Discovery issues will be necessary to prompt any action in that regard.

After discussing access to the expert's report (if any), he repeated his usual advice

You can decide whether or not you wish to push the matter in time terms, which will involve professional time and costs, or continue to wait it out. CNRL may be playing a tactical game here, or may not be viewing the matter as urgent. The choice is again between spending time or money at this point.

I would have to ask at this point: why would the defendant, given the carriage of the plaintiffs' case to that point, "view the matter as urgent"? In respect of the elusive expert's report, he advised

...we can't require production of the report. It is CNRL's property, to put forward or not prior to trial if they see fit...

In fact, of course, the defendant was obliged, should it wish to use the report at trial, to deliver it to the plaintiffs at least 60 days before being used in evidence[17] . Moreover, Mr. Cosburn and the plaintiffs were entitled to the data, objective measurements taken, or the facts upon which the opinion is based[18].

[55] To sum up:

- from the very start the Blatzes made it clear they expected Mr. Cosburn to carry their case through to its finish, including doing the trial if necessary;
- they consistently, repeatedly, and emphatically instructed him to push the matter, to do what was necessary to press the defendant, and in particular to set a trial date;
- they paid every account and sent every retainer requested of them over a period of 38 months;
- they instructed Mr. Cosburn to interview the witnesses they offered (Hadland, Copes, Colwell, and Vince);
- they instructed Mr. Cosburn to negotiate a resolution;
- if negotiations were not fruitful, they instructed him to retain the experts he felt necessary to prove their case.

In fact:

- having assured the clients that he intended to see the matter through to completion, Mr. Cosburn made it clear after 29 months that he did not intend to take the matter to trial (or, perhaps, even to bring a chambers motion to compel discovery responses);
- instead of pressing the matter Mr. Cosburn consistently recommended and, I find chose, delay and waiting;
- a trial date was never set nor, from what I can see, ever discussed with the defendant;
- there is no indication Mr. Cosburn ever interviewed the Blatzes' witnesses;
- Mr. Cosburn gave clearly incorrect advice to the Blatzes regarding document production and discovery. In fact, I am not satisfied that he properly reviewed, organized, or discussed the Blatzes' documents. The frustrations that apparently arose at Mr. Blatz's examination (paras.39-42 above) lead to this inference. Nor do I think Mr. Cosburn properly advised the Blatzes on the question of damages or prepared them for that aspect of their examination.
- I can see no evidence that Mr. Cosburn ever began negotiations in the sense of taking the initiative. He seemed, to the contrary, content to constantly discuss the possibility with the clients, but to wait for the defendant to make an offer which, of course, was never forthcoming.

- Despite instructions to seek and retain the requisite experts (par. 23 above) Mr. Cosburn took no steps whatsoever and seemed content that any expert opinion would come from the defendant's side. There is not even evidence of preliminary enquiries or letters, e-mails, or telephone calls to potential experts.

[56] Mr. MacInnis, for the Blatzes, argues two essential points:

- a) Mr. Cosburn had no reasonable cause whatsoever to resign from his retainer so that he is entitled to no fee at all or, in the alternative
- b) the usual considerations that apply would justify, at the maximum, a fee of \$10,000.00.

[57] I agree that Mr. Cosburn had no basis for terminating the retainer, and that by late 2009 and early 2010 he was laying the groundwork for his withdrawal, all after longstanding assurances to the Blatzes of his commitment to seeing their case through to its finish. Nothing the Blatzes said, instructed, or did justified his withdrawal.

[58] Having found that to be the case, however, the Blatzes accepted that Mr. Cosburn intended to, and was taking steps to, withdraw. If nothing else they seemed to accede to the matter being transferred to other counsel. They asked, for example, that the new counsel confirm his agreement with Mr. Cosburn's interpretation and advice regarding the SRWs. Perhaps their acceding to a file transfer was the simple result at frustration with nothing being done. Perhaps they concluded that Mr. Cosburn was not committed to fully litigating their case. But in the end they impliedly accepted that he intended to withdraw. I cannot conclude, therefore, that Mr. Cosburn's withdrawal negated any entitlement whatsoever to a fee.

[59] The Legal Profession Act requires^[19] that in fee reviews the court consider

- (a) the complexity, difficulty or novelty of the issues involved,
- (b) the skill, specialized knowledge and responsibility required of the lawyer,
- (c) the lawyer's character and standing in the profession,
- (d) the amount involved,
- (e) the time reasonably spent,
- (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
- (g) the importance of the matter to the client whose bill is being reviewed, and
- (h) the result obtained.

I will consider each in turn.

- [60] Complexity. I cannot see that the fundamental issue presented by the Blatzes i.e. a weed infestation and CNRL's potential liability for it, was overly complex. To be sure, the status of the SRW and the jurisdiction of the MAB presented concerns, but again I cannot see that these in any way justified the delay in moving the matter forward. Within five months of his retainer Mr. Cosburn had chosen the Supreme Court as his venue, resolving any jurisdiction issues.
- [61] Skill or specialized knowledge. I have no doubt that Mr. Cosburn has specialized knowledge, but I doubt that it had any real application in this case. His specialty seems to be gas and oil leases and surface rights, not tort litigation. There is an old cliché, that if you're a hammer everything looks like a nail. It is interesting to me that Mr. Cosburn, at the very outset and for a significant time of his total retainer, focussed on the efficacy of the SRW, rather than simply push the claim (in both trespass and negligence) in the Supreme Court, yet by April 8th, 2010 he had changed his view and significantly reduced the importance of the SRWs to the Blatzes' real concern, the weed. It is clear, however, that in at least one very important respect, the discovery and disclosure of documents Mr. Cosburn's understanding of the law was sorely lacking. Discovery is such a fundamental aspect of civil litigation that it leads to the logical inference that counsel who does not understand it probably does not understand other aspects of litigation either.
- [62] Character and standing. Mr. Cosburn is a member of several legal associations, all of which, it seems, deal with gas and oil rights, licenses, and tenure. There is little in this that relates to this matter.
- [63] Amount involved. No clear indication of potential damages was given. In his direct evidence Mr. Cosburn said that the Blatzes in 2007 had calculated their damages to be approximately \$200,000.00, but he seems to have done nothing to confirm or challenge that estimate, or to determine his own estimate of damages. He seems instead to have criticised the Blatzes for their efforts to quantify their costs or losses. Given what I heard of the tenacity and aggressive aspects of Scentless Camomile, I think that control and eradication would have been relatively expensive.
- [64] Time reasonably spent. Mr. Cosburn's recorded time was not challenged. On the other hand, much of that time did very little to advance the Blatzes' case. In fact the 38-month delay may well have hurt their case. More particularly, however I have reviewed the 13 accounts before the court. They record 257 individual time entries. Very few of them actually indicate what was done. The vast majority are simply generic entries in the nature of "e-mail to clients...letter to counsel...telephone call..". A few that actually tell how the time was spent are:
- March 7, 2007: "LTO searches" (.8 hour)
 - March 22, 2007 "rev. file docs, draft opinion letter (4.6 hours)
 - July 18, 2007 "TF from lands" (.7 hour)

"land docs" (.5 hour)

- January 17, 2008 "rev. client docs, List of Docs, collate..." (6.1 hours)
- February 8, 2008 "finalize collation..." (2.1 hours)
- March 10, 2008 "prepare for e for d, collate docs and info"(2.3 hours)
- March 13, 2008 "rev docs" (1.9 hours)
- March 13, 2008 "conduct e for d" (4.1 hours)
- September 8, 2008 "finalize lt Proudfoot re: photos..." (.3 hours)

"finalize spreadsheet..." (.6 hours)

- December 2, 2008 "review client docs, prep for e for d..." (1.3 hours)
- December 3, 2008 "prepare e for d docs" (.9 hours)

I do not offer these as an exhaustive list of all the time, for example, Mr. Coburn recorded reviewing documents or preparing for examinations, but the list does incorporate most of the time described as such. It is interesting that in the 257 entries I did not see any reflecting meetings, interviews, or telephone conversations with any witnesses other than the Blatzes themselves.

[65] Given my view of the ineffectiveness of Mr. Cosburn's time spent in the litigation process I had hoped that it might be possible to address the time recorded that seemed to be ineffective. Given the generic aspect of most time entries, I do not think that possible.

[66] Reasonableness of fee rate. Had the matter concerned the area in which Mr. Cosburn seems experienced, namely gas and oil licensing, tenure, surface rights and the like, his rate (\$300.00 per hour) would be appropriate. It was not, in my view, appropriate to charge that rate for Supreme Court litigation, as his skills were simply not in evidence. He as much as admitted this when, despite earlier assurances to the Blatzes of his constancy, he insisted after almost 2 ½ years that the matter be transferred to litigation counsel.

[67] Importance to the client. There is no doubt the infestation was a serious problem to the Blatzes. The SRW/access issue was far less important in their minds, as the well was inactive. I think they were right in that. But the weed posed a real threat to their ranch and had to be addressed.

[68] Results. This is perhaps the most obvious and singular failing on Mr. Cosburn's part. I cannot see that his 38 months' representation of the Blatzes significantly advanced their case. Despite repeated instructions from them to push the matter forward, retain experts, set a trial date or the like he did none of these things. It is hard to see how, after 38 months, their position had improved in any marked way. As I say, it may have actually worsened by the delay brought on through counsel's inactivity.

[69] I have concluded from all of the above that, at most, 40 hours of Mr. Cosburn's total time might reasonably have assisted the Blatzes. His account will be allowed, therefore at \$12,000.00 and the total (\$52,020.00, par. 5 above) reduced accordingly together with the appropriate reduction in tax thereon.

[70] As the accounts have been reduced by more than 1/6th, the Blatzes are entitled to the costs of these proceedings[20].

"Master D. Baker"

[1] S.B.C. 1998 c. 9

[2] constituted under s. 16 of the Petroleum and Natural Gas Act, R.S.B.C. 1996 ch. 361, now repealed

[3] Cosburn/Dellow e-mail March 7, 2007 Ex. 3

[4] Ibid

[5] Exhibit 3, Tab 17

[6] "I have not, for the purposes of this letter, gone through your file materials in great detail. Doing so...would be very time consuming and expensive...I have not reviewed the contents of the cd included..." Par. 4.

[7] "e-Quest and Golder" par. 6 of the e-mail

[8] In fact, that is exactly what Mr. Cosburn said in an e-mail to the Blatzes August 27, 2009, and how he described the case when he first consulted Mr. Tatchell as trial counsel:
"...essentially a nuisance action for damages resulting from the spread of a noxious weed from a CNRL wellsite onto the Plaintiffs' bison grazing lands." No reference to SRWs, title, or surface leases. By April 8, 2010 Mr. Cosburn is far more blunt: "I have advised you with respect to the srw validity issue, and its irrelevance to your claims for damages arising out of the weed infestation...from the beginning of the file...". With respect, his initial opinion and approach would not reflect that.

[9] Exhibit 3 tab 40, e-mail to clients December 5, 2007

[10] (1981) 34 B.C.L.R. 7

[11] (1978) 86 D.L.R. (3d) 671

[12] (1882), 11 Q.B.D. 55

[13] 2004 Cont. Legal Ed. Soc. of B.C. (2nd Ed.), Lyle G. Harris Q.C.

[14] Exhibit 5, tab B

[15] Exhibit 3, tab 48

[16] CNRL's proposed expert

[17] Rule 40A(2) Rules of Court (B.C. Reg. 221/90) as applying at the time.

[18] Milne v. Dorais (1999) Civ. L.D. 292

[19] s. 71(4)

[20] s. 72(1)(a), Legal Profession Act.

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