
CANADA / JUDGMENT

Krafta v. F.L.E.X. Excavating Ltd.

2012 BCSC 616

COURT

Supreme Court of British Columbia

DECIDED

30 April 2012

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2012 BCSC 616 Krafta v. F.L.E.X. Excavating Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Krafta v. F.L.E.X. Excavating Ltd.,

2012 BCSC 616

Date: 20120430

Docket: 1138453

Registry: Prince George

Between:

Frank Krafta

Plaintiff

And

F.L.E.X. Excavating Ltd.

Defendant

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment on Costs

Counsel for Plaintiff:

J. M. Duncan

Counsel for Defendant:

J. L. W. Haines

Place and Date of Hearing:

Prince George, B.C.

December 8, 2011

Place and Date of Judgment:

Prince George, B.C.

April 30, 2012

- [1] On December 8, 2011, I refused the plaintiff's application to add James Linton as a defendant to this action. These supplementary reasons will address the question of costs arising from that order.
- [2] The plaintiff commenced this proceeding against the defendant for damages related to a breach of contract and negligence in the faulty installation of a concrete septic system on his land. Subsequently, he made this application to add Mr. Linton as a defendant alleging that he was personally liable for damages caused by his negligence in the design and installation of the septic system.
- [3] The plaintiff was unsuccessful in the application and now opposes an order for costs in favour of Mr. Linton.

Issues

- 1. Should costs of this application be made payable to Mr. Linton personally or to the corporate defendant?
- 2. If costs are awarded to Mr. Linton, should they be paid forthwith or at the conclusion of trial?

Facts

- [4] Mr. Krafta started this action with a notice of civil claim against F.L.E.X. Excavating Ltd. ("FLEX") on January 13, 2011. He was seeking damages for breach of contract and negligence. The summary of his notice of claim is as follows:

The Plaintiff's claim is against F.L.E.X. Excavating Ltd. for breach of contract and for damages for breach of contract and negligence arising out of and in relation to a contract between the parties wherein F.L.E.X. Excavating Ltd. agreed to supply and install a septic system on the Plaintiff's property but failed to do so in a reasonable and workmanlike manner.

- [5] Mr. Krafta applied to add Mr. Linton as a defendant in the proceeding under R.6-2(7)(c). The proposed amended claim alleged that Mr. Linton had breached a duty of care he owed to the plaintiff in that he failed to meet the requisite standard of care in the design and installation of the septic system resulting in loss and damage to the plaintiff.

- [6] The notice of application was directed only to FLEX, the corporate defendant, and was not served separately on Mr. Linton. The application response was advanced on behalf of both FLEX and Mr. Linton.

Rules

Definitions

R.1-1(1) In these Supreme Court Civil Rules, unless the context otherwise requires:

...

"party", in relation to a proceeding, means a person named as a party in the style of proceeding;

Object of Rules

R.1-3(1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Adding, removing or substituting parties by order

R.6-2(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

...

- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

Procedure if party added, removed or substituted by order

R.6-2(8) Unless the court otherwise orders, if an order is made under subrule (7) adding, removing or substituting a party,

...

- (c) if a person is made a party under the order,
 - (i) the person may apply to the court to vary or discharge the order within 21 days after the date on which the order is served on the person under paragraph (b) of this subrule, ...

Service of application materials

R.8-1(7) The applicant must serve the following, in accordance with subrule (8), on each of the parties of record and on every other person who may be affected by the orders sought:

- (a) a copy of the filed notice of application;
- (b) a copy of each of the filed affidavits and documents, referred to in the notice of application under subrule (4) (d), that has not already been served on that person;
- (c) if the application is brought under Rule 9-7, any notice that the applicant is required to give under Rule 9-7 (9).

Application of which notice is not required

R.8-4(1) An application of which notice is not required may be made by filing

- (a) a requisition in Form 31,
- (b) a draft of the proposed order in Form 35, and
- (c) affidavit or other evidence in support of the application.

Costs of applications

R.14-1(12) Unless the court hearing an application otherwise orders,

...

- (b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

Costs of whole or part of proceeding

R.14-1(15) The court may award costs

- (a) of a proceeding,
- (b) that relate to some particular application, step or matter in or related to the proceeding, or
- (c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

Analysis

Plaintiff's Position

- [7] The plaintiff acknowledges that the court has the discretion to award costs against the plaintiff as an unsuccessful applicant in these proceedings. The plaintiff argued that costs should only be awarded for reasons connected with the case. He cites McKenzie J. in *Bauer v. Insurance Corporation of British Columbia* (1989), 38 B.C.L.R. (2d) 232 (S.C.) at 238:

The court has a wide discretion in awarding costs but the discretion must be exercised judicially and for reasons connected with the case.

- [8] He says that there must be special circumstances to warrant the exercise of the court's discretion to award costs against a non-party (*United Savings Credit Union v. 631252 B.C. Ltd.*, 2003 BCSC 545 at para 23).

- [9] The plaintiff argues that key considerations to this application for costs include the following:

- Mr. Linton was not given notice of the application and the Court should conclude that he did not incur expenses in preparing for and attending the application;
- Mr. Linton was represented by counsel for FLEX;
- Mr. Linton did not incur any additional expense;
- Mr. Linton did not take a position adverse to or independent of FLEX; and finally,
- there was nothing exceptional about the case.

- [10] The plaintiff argues that because notice was not required under the rules and no notice was given, the proposed defendant ought not to be awarded costs.

- [11] The plaintiff argues that on an application to add a party, there is no lis between the applicant and proposed defendant (*Hartoft v. Bell*, 2005 BCSC 1723 at para. 8-11, *aff'd* 2006 BCSC 413 at para. 15). I infer from this argument that costs can only be awarded after the new party is added as a defendant.

- [12] He says that R.6-2(8) does not become engaged until a party has been added and has exercised his right to challenge the order. He also acknowledges that the proposed defendant would be entitled to costs if he was successful in vacating the order.

- [13] The plaintiff argues that a non-party can recover costs only if he has a substantial independent interest in an application (*Pacifica Papers Inc. (Re)*, 2001 BCCA 464). He argues that Mr. Linton would not have had an independent and distinct interest in the subject matter of the application until he was a "party" and, therefore, costs ought not to be awarded on an unsuccessful application to add Mr. Linton as a defendant. The plaintiff says that the response to the application on behalf of both Mr. Linton and FLEX does not alter Mr.

Linton's status; he argues Mr. Linton did not have the type of interest that would justify an order for costs.

- [14] The plaintiff argues that the exercise of discretion to award costs against a non-party is to be done only in special circumstances and such circumstances do not exist in this case. Mr. Krafta argues that if he had succeeded in this application, he would not have been entitled to an order for costs against Mr. Linton because there was nothing exceptional with respect to the application and the normal rule would not have allowed for an order of costs.
- [15] Finally, the plaintiff argues that the policy considerations are against an award of costs in the circumstances of this application. He says that a costs award could result in double indemnification, by which I understand he means costs might be ordered in favour of the corporate defendant and Mr. Linton resulting in an unreasonable indemnity.
- [16] The plaintiff argues that if costs are payable to Mr. Linton, payment should be delayed until the conclusion of the trial (*Powell Estate v. Workers' Compensation Board*, 2011 BCSC 1595).
- [17] In summary, the plaintiff submits the absence of a substantial connection between Mr. Linton and the claim against FLEX coupled with the fact that Mr. Linton was not served with a copy of the application are factors militating against a costs order.

Mr. Linton's Position

- [18] Mr. Linton submits that the court has discretion to award costs under R.14-1 of the Rules of Court, and should do so in accordance with common sense and justice.
- [19] He states this discretion should be used in his favour for the following reasons. First, he and his solicitor were served under R.8-1(7) and participated in the proceedings. Consequently, this Court has jurisdiction to award costs in favour of Mr. Linton. I observed that Mr. Linton was not named in the notice of application and there was no evidence that it was served personally on him.
- [20] Mr. Linton relies on several authorities including:
- (a) *Martel v. Wallace*, 2008 BCSC 436, which involved a credit union non-party to the proceedings in a matrimonial action that was granted costs of attendance on a motion. In *Martel*, the credit union had been served as a person with an interest in the proceedings.
 - (b) *Manufacturers Life Insurance Company v. Dahl Estate*, 2005 BCSC 1800, a case where it was found possible to award costs against a non-party.
 - (c) *Tirling Sheet Metal Ltd. v. Troutman Estate*, 2010 BCSC 958, where creditors opposed a plaintiff's application for money owing due to a purported equitable assignment of sale proceeds. It was held that the creditors had a clear economic interest because if the application succeeded there would be insufficient funds to pay their outstanding claims.

- (d) *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, where a non-party successfully obtained special costs. The court said at para. 83:

Bhora Mayer did not stand as a volunteer (as suggested by Mhinder Mayer) or akin to an intervener (as was argued in *Re Pacifica Papers Inc.*, 2001 BCCA 464). I accept Mr. Fraser's submission that Bhora Mayer is entitled to special costs in respect of VA S907716 even though he was not a named defendant in that action because:

- (a) he had special knowledge that was necessary to put before the Court (e.g., the Bhagwan Mayer action, the Bhagwan Mayer Settlement Agreement, and Mhinder Mayer's proposed amendments concerning the Brothers' Trust);
 - (b) many of the allegations made and some of the proposed amendments sought to be made in VA S097716 were the same or similar to those sought in VA S073324; and
 - (c) Bhora Mayer was successful in having abusive or meritless claims made against him barred and successful in resisting all but one of Mhinder Mayer's proposed amendments because they were abusive or without merit.
- [21] Finally, Mr. Linton says the proposed pleadings included allegations against him personally and he incurred costs that resulted in a final resolution of his personal involvement in the litigation. In defending the application, he did not need to address the issues between the parties which were separate and distinct from the question of his joinder to the proceeding.

Discussion

- [22] The ordinary rule is for costs to be awarded to the successful party on an application, unless otherwise ordered: R.14-1(12). The plaintiff acknowledges it is possible to award costs to a non-party (see *Manufacturers Life Insurance*).
- [23] In *Powell Estate*, a non-party obtained costs after successfully resisting an application to be added as a party. The application was made under R.6-2(7) as was the application in this case; this was not an application following a desk order as occurred in *Hartoft*. As stated in *Powell Estate*:
- [6] Both [parties] agree that Mr. Bates should have his costs in any event. This result would ordinarily follow an unsuccessful attempt to add a party as a defendant in spite of the potential party's objections.
- [24] The plaintiff argued that being a proposed defendant is not, by itself, enough to entitle Mr. Linton to costs; instead, he must be an interested party with a distinct interest in the outcome of the application. In *Pacifica Papers*, cited in *Mayer* above, the applicant Norkse Skog had made an agreement to buy the equity of *Pacifica*. Norkse had a vital interest in the approval of the transaction and made submissions in favour of the order being pursued by *Pacifica*. The Court held:

- [7] It appears to me that it can fairly be said that here Norske Skog occupied a position more vitally involved in the issue before the Court than would normally be the case with an intervener. Norske Skog had entered into an agreement, (requiring subsequent approvals), to acquire the equity of Pacifica with a view to Pacifica becoming a subsidiary of Norske Skog. In these circumstances, Norske Skog had a clear economic interest in seeing the proposed arrangement proceed to completion. It was no doubt legally possible for it to stand aside from and take no part in these proceedings but it is wholly understandable that Norske Skog would feel it was appropriate for it to participate in and lend assistance to the successful petitioner, Pacifica. I believe its participation in the Chambers proceedings in both courts was quite appropriate. It might well have sought status as a party but there was no particular necessity for it to do so since it had already been served with process and was undoubtedly an interested party with a stake in the outcome of the proceedings. Given its interest in the outcome of the proceedings, it seems doubtful that a court would refuse to hear submissions from Norske Skog.
- [25] Full costs were not awarded because Pacifica had advanced a comprehensive argument and carried the main burden of the application. Norske Skog was awarded two thirds of its costs and full disbursements because there was less necessity for it to advance full argument.
- [26] Hartoft is not a decision about costs; it is a case dealing with the obligation to give notice of an application to add a defendant to the claim. In this application, the plaintiff chose to make the application to court rather than seeking a desk order. Notice was given to FLEX and the allegations advanced against Mr. Linton were identical to those advanced against his company. It was, in my view, reasonable for Mr. Linton to appear to the motion, together with the corporate defendant, and resist the application. Often, parties will argue the substantive issues of an application to add a party in the first instance rather than following to the two-step process of applying for a desk order to add the party and leaving the substantive issue to be raised by the new party under a R.6-2(8) application to vacate the order.
- [27] In Hartoft, the court observed that on becoming a party, that person was entitled to apply to vary or discharge the order. In those circumstances, a successful application to discharge the order would attract an order of costs against the plaintiff.
- [28] I observe that the language of R. 6-2 provides that an application to add a party to a proceeding is to be made by a "person" and not a "party". It is unclear to me why the rule allows for such applications to be made by person who are not themselves parties to the proceeding but the implication is that there may not be a "lis" between the two, even after an order is made.
- [29] If Mr. Linton had not appeared on the application or if he had been added as a defendant by desk order, then he would have been entitled to make application to have the order set aside. It seems to me that, having appeared on the application, the issue of whether the plaintiff was entitled to the order has been resolved in Mr. Linton's favor. If it had been resolved

against Mr. Linton, he would not have been entitled to reargue the issue on an application to vacate the order and would have been subject to an order of costs in favor of the plaintiff. His only remedy would have been on appeal.

- [30] In each of the decisions relied on by the defendants, including Martel, Manufacturers Life Insurance, and Pacifica Papers the non-party applicant for costs had been served with the notice of application. On that basis these cases are distinguishable from Mr. Linton's claim. Nevertheless, on this application Mr. Linton and the plaintiff engaged in a fulsome argument on the question of whether it was appropriate to add him as a defendant.
- [31] In my view, it would offend the principles described in R.1-3 to suggest that a person successfully opposing an application to be added as a party cannot recover costs unless he brings an application to vary an existing order under R.6-2(8)(c)(i) made without notice to that person. The application I dismissed dealt with the substantive issue of whether it was appropriate to add Mr. Linton as a defendant. The argument as to costs would have engaged the same issues if it had been made following a desk order to add the defendant. The economy of having the issue resolved in a single application obviously addresses the object of achieving an "inexpensive determination" of the issue of joinder.
- [32] I also think it can be fairly said that Mr. Linton had a clear economic interest in the proceedings, as an application was made to add him as a defendant, where significant litigation costs and potential damages were avoided in the result. Although he was not yet a named party, he appeared to argue the application without objection from the plaintiff. I think this is what Silverman J. was considering in Manufacturers Life Insurance, (quoting Master Horn) with the following remarks:
- [21] I reject Ms. Billsborough's argument that Rule 37 is inapplicable because neither she, nor Mr. Dahl, is "a party of record". My reasons for rejecting this argument are:
- a) The phrases "party to a proceeding", "party of record" and "party" must be interpreted to allow Rule 37 to have its intended effect.
 - b) The litigants conducted themselves as if they were "parties to a proceeding" and "parties of record", even if they may not have fit the literal definitions of those phrases.
 - c) The most sensible interpretation of Rule 37 is that these litigants are in the category of persons who were intended to be able to use Rule 37.
- ...
- g) In C. (P.T.), supra, Registrar Horn states the following at ¶ 11-15:

While the words "party of record" are defined in s. 1(8) the word "party" is not. The words "party of record" are generally used with precision (see for example Rules 36(1) and 40A(2)).

The word "party" is often used without precision. Sometimes it is clear that the word refers to a person who is named as a party to a proceeding and is not a party of record (see, for example, Rules 14(1) and 15(5)) and sometimes it refers to a party of record (see for example Rules 34(1) and 35(1)).

I conclude that in interpreting any Rule no great significance can be attached to the use of the word "party" as opposed to the word "person" or to the words "party of record" and that the context dictates whether a Rule applies to someone named as a party but who has neither entered appearance nor taken formal steps in the proceeding.

Costs are not awardable only to parties of record. An examination of the tariff of costs under Appendix B shows that some items of costs may be allowed for activities in a proceeding which only a party of record could properly undertake. But not all. A party proceeding under Rule 13(10) for example, may do so without entering appearance, and may be awarded costs of an application to decline jurisdiction.

In my opinion, Rule 36(4) is designed to allow costs to a party who has incurred fees or expenses in taking a step in a proceeding or preparing to do so, after being served with notice of the proceeding. Here Ms. S. did have notice and did participate, without objection, even though she did not enter appearance. She is a party and she has incurred costs which she is entitled to have assessed.

[22] I agree with and adopt the comments of Registrar Horn.

[Emphasis added.]

[33] The Court of Appeal in *Pacifica Papers* observed that the intervener could have applied to become a party to the proceeding. The Court concluded there was no need for *Pacifica* to take that step because it had been served with the process and clearly had economic interest in the outcome.

[34] The decision in *Powell Estate* suggests that costs payable to the proposed defendant in an unsuccessful application to add him as a party "ordinarily follow" an unsuccessful attempt to add that person.

[35] There may have been an issue as to whether Mr. Linton had standing at the application to argue against the motion to add him as a defendant; this issue was not raised and the plaintiff did not object to Mr. Linton taking a personal position on the application. It seems to me that the context in which the application was brought and argued falls within the principle established in *Pacifica Papers*, *Powell Estate* and *Manufacturers Life Insurance*. In my view, where the application to add a party is argued on the merits before a chambers judge and the proposed defendant appears and takes a position, that proposed defendant has an interest in the application and should be entitled to costs if he or she is successful. The approach taken by Silverman J. should be taken in this case; although Mr. Linton is not a party to the proceeding, the litigants conducted themselves as if they were "parties to a proceeding" and "parties of record", even if Mr. Linton did not fit the literal definition of the

term "party". The most sensible interpretation of R. 14-1(15) and R. 1-3 is that successful non-party litigants are in the category of persons who were intended to be able to use Rule 14.

- [36] Mr. Linton had an obvious interest in the outcome of the application and would have been entitled to apply to vacate a desk order under R. 8-2; if he had been successful in that application, he would have been entitled to the costs to extricate himself from the proceeding. In my view, Mr. Linton's successful opposition in response to the application should trigger the Court's discretion to award costs to him.

Measure of Costs

- [37] The plaintiff relies on Pacifica Papers to say that the corporate defendant advanced arguments on behalf of Mr. Linton and it would not be appropriate to indemnify Mr. Linton for such costs. Put another way, Mr. Linton did not incur costs that were warranted beyond whatever the corporate defendant incurred.
- [38] The foregoing is similar to the plaintiff's fourth argument. He points out that an award of costs to both the defendant and Mr. Linton would result in double indemnification. In Pacifica Papers, Pacifica Papers Inc. made very full submissions and Norske's involvement was, in part, redundant. The Court of Appeal said:
- [8] I believe that Norske Skog should be found to be entitled to an award of costs in this Court. I observe that the argument advanced by counsel for Pacifica was a comprehensive one which resulted in less necessity for counsel for Norske Skog to advance as elaborate a submission as might otherwise have been appropriate. While Norske Skog had, as I have observed, an interest to advance, the main burden in the case, (for the petitioner, Pacifica), rested upon counsel for that petitioner. In these circumstances, it appears to me that a fair disposition of costs relative to the appellant and Norske Skog would be to award to Norske Skog 2/3 of its taxable costs and its full disbursements on the usual scale in this Court.
- [39] I accept that the submissions at the application were defended by Mr. Linton and that FLEX did not have a unique or distinct position to advance. The plaintiff is correct that if a similar situation has occurred here, then a reduction in costs would be warranted. Care must be taken to make sure double counting does not occur.
- [40] In *Ashby v. 2076 Holdings Ltd.*, [1990] B.C.J. No. 509 (S.C.), not directly cited by either party, Master Halbert states as follows:

The foregoing summarizes the law where two or more defendants are separately represented. It is trite, however, that where one solicitor represents two or more Defendants who are awarded costs, only one Bill can be submitted for taxation. In this case, only one Bill of Costs should have been submitted for the Defendants. Consequently, neither of the present two separate Bills can be taxed and they are both dismissed with liberty to counsel to prepare and submit a single Bill of Costs for both Defendants.

- [41] In *Digital.Doc Services (Canada) Inc. v. Future Shop Ltd.*, [1997] B.C.J. No. 2468 (S.C.), also not directly cited by either party, multiple corporate and personal defendants were represented by the same solicitor. Warren J. stated as follows:
- [12] Where there are multiple defendants who are represented by one solicitor and they defend the same statement of defence raising the same defences common to all then, save and except for unique steps taken against a particular defendant, there should be but one bill of costs. The costs of these defendants will be a factor in determining the costs that will be awarded following the conclusion of the remainder of the action in which the corporate defendant remains the only defendant.
- [42] The foregoing demonstrates the terms that can be included in an order to avoid the duplication of costs. It may be advisable to have a single bill of costs as Mr. Linton and the corporate defendant share the same solicitor, notwithstanding the fact that Mr. Linton is not a named defendant.

Conclusion on Costs being Awarded to Mr. Linton or the Corporate Defendant

- [43] I conclude that Mr. Linton should be awarded costs. A single bill of costs is desirable given that Mr. Linton and the corporate defendant share one solicitor, to avoid double indemnification. Presumably that single bill would be produced by the corporate defendant.
- [44] In *Pacifica Papers*, the Court of Appeal reduced the amount of fees to which *Norske Skog* was entitled to two thirds plus full disbursements. In the circumstances of this case, it does not appear that the argument was, in any meaningful way, advanced by the company. The argument in this case was, for all practical purposes, the argument of Mr. Linton. Accordingly, Mr. Linton will recover costs of the application. However, Mr. Linton and FLEX were represented by the same counsel and there was no separate interest advanced on behalf of FLEX. In view of my order that Mr. Linton recover his costs, FLEX will not be entitled to any separate order for costs of this application if it should succeed at trial.

When to Pay Costs

- [45] The plaintiff states costs are awarded to follow the event. The plaintiff cites *Powell Estate* at paras. 10-18 for the proposition that costs are normally payable at the conclusion of trial. In that case, the plaintiff's application to add a party, Mr. Bates, as a defendant was dismissed. Mr. Bates sought costs payable forthwith but the court held his costs should be payable at the conclusion of the action.
- [46] Mr. Linton submits that the costs of an application may be made payable forthwith because the application and order is separate and distinct from the substantive aspects of the case. As stated in *Sinclair v. Sutton Resources Ltd.* (1996), 24 B.C.L.R. (3d) 96, cited by Mr. Linton,

[12] In my judgment costs should not be in the cause and the court should order to the contrary, that is, that they be paid forthwith after taxation. My reason for this is that Mr. Rubinstein's application with respect to preventing Ladner Downs from acting in the proceeding is a discrete issue which does not advance the issues between the parties to the petition: *Nyquvest v. Rutkowski* (1994), 33 C.P.C. (3d) 326 (Alta. Q.B.). The separate nature of the application is also referred to by Mr. Justice Bouck in *Kaiser Resources*, above, at p. 240 et seq.

[47] Rule 14-1(13) of the Rules of Court provides as follows:

When costs payable

(13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

[48] As stated in *Chances Housing Cooperative v. Progressive Homes Ltd.*, 2000 BCSC 596 at para. 17, cited in *Powell Estate*, costs awarded separately on an interlocutory proceeding are not normally payable until the conclusion of the litigation. There are three reasons for this policy.

[49] First, an order for costs payable forthwith may prevent or hinder an unsuccessful litigant from proceeding with litigation. Second, it is preferable to have only a single assessment of costs in an action where the assessment officer is in a position to consider all aspects of the litigation. Third, the party against whom costs are granted may be unduly penalized if, after the trial, it appears that a different view should have been taken of the interlocutory proceeding.

[50] In *Powell Estate*, the judge at para. 16 noted several factors that led to his decision for costs to be made payable at the end of trial. Mr. Bates would continue to be integral to the existing defendants' case, and that the defendant stated an intention to indemnify Mr. Bates, so that he was not out of pocket in the interim. In addition, there was a chance that the defendants' blanket assurance of indemnity of Mr. Bates would change in the course of the trial, and Mr. Bates could conceivably become a party to the action. As a result, the judge found it fair to have costs payable at the conclusion of the action, when those issues would have been settled. At para. 13, he noted that the joinder issue was not completely discrete and severable from the main issues between the existing parties.

[51] Mr. Linton will continue to be involved in the litigation on behalf of FLEX.

[52] In *Sinclair* at para. 12, the judge found that the application for which costs were ordered payable forthwith after taxation because the issue was a discrete one, which did not advance the issues between the parties to the petition.

[53] In *Martel*, Chamberlist J. summarized the test for ordering costs payable forthwith:

[28] On the basis of the cases I have cited, I would summarize the following principles that courts have recognized when dealing with costs of motions -

- (1) Costs in the cause serve generally to maintain the balance that should be preserved between litigants until final judgment is rendered;
- (2) It is preferable to have only a single assessment of costs, at which time all aspects of the litigation may be considered by the assessing officer;
- (3) However, if the circumstances warrant, the court may order that costs be payable forthwith in any event of the cause in order to control its own process. For example, the court may make the order to deter unnecessary or unreasonable conduct in the proceedings;
- (4) Costs may also be payable forthwith if it is unlikely that the matter will proceed to trial, or if the motion deals with a discrete issue that is severable from the remaining claims; and
- (5) In making such an order, the court must remember that the order may prevent or hinder a meritorious claim from proceeding.

[54] Considering the policy considerations in *Chances Housing Cooperative*, *Powell Estate*, *Martel* and *Sinclair*, it is inappropriate to award costs payable by the plaintiff forthwith.

Conclusion as to When to Pay Costs

[55] I conclude that costs should be paid at the conclusion of the proceeding. Although the application against Mr. Linton was a discreet issue which is now resolved against the plaintiff, there is possibility that he might be added as a party to the proceeding. In view of the decision in *Powell Estate*, the joinder issue may yet be revisited and the main issues between the existing parties might involve him. Mr. Linton is the controlling mind of the corporate defendant and he will remain actively involved in all aspects of the litigation. As a result, I conclude it is not appropriate that costs to be payable forthwith.

[56] Mr. Linton will have the costs of the application payable to him at the conclusion of the proceeding. FLEX will not be entitled to costs of the application.

"Armstrong J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/12/06/2012BCSC0616.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/krafta-v-f-l-e-x-excavating-ltd-2012-bcsc-616>

Prepared on 26 October 2026 · Esheria