

THE SUPREME COURT OF BRITISH COLUMBIA



THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.
1985, C. C-36, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
CANADIAN DEHUA INTERNATIONAL MINES GROUP INC., WAPITI COKING COAL
MINES CORP., AND CANADIAN BULLMOOSE MINES CO., LTD.

PETITIONERS

APPLICATION RESPONSE

Application response of: Karen Fellowes, K.C., of Stikeman Elliott LLP

This is a response to: The 31 Dec 2024 notice of application of Qu Bo Liu, and the Service List set out in **Schedule "A"**

The application respondent estimates the application will take 1.5 days, insofar as it relates to the relief sought against the application respondent.

This matter is **not** within the jurisdiction of an Associate Judge. Justice Walker is seized of the CCAA proceeding.

PART 1: ORDERS CONSENTED TO

1. The application respondent consents to the granting of **NONE** of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms:
NIL

PART 2: ORDERS OPPOSED

2. The application respondent opposes the granting of the orders set out in **paragraph 2** of Part 1 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

3. The application respondent takes no position on the granting of the orders set out in **paragraphs 1 and 3** of Part 1 of the notice of application.

PART 4: FACTUAL BASIS

4. By application filed December 31, 2024, Qu Bo Liu, a shareholder and director of the debtor in these CCAA proceedings, seeks an order that counsel appearing for a time in this matter for TaneMahuta Capital Ltd. (“TMC”) personally pay “*full indemnity*” costs potentially totalling hundreds of thousands of dollars but without assessment.¹
5. The basis for seeking that extraordinary relief is said to be twofold:
 - a. Counsel for TMC sought to “*deceive the court into believing that TaneMahuta was the actual bidder and conceal the involvement of West Moberly*”²; and
 - b. Counsel for TMC made “*numerous, unfounded... allegations... of serious misconduct*” against Mr. Fraser and Mrs. Liu.³
6. While not entirely clear, it appears from her application that Mrs. Liu seeks not only to have her costs paid by counsel (on a “*full indemnity*” basis, and without assessment) but also those of the monitor, the debtor and their counsel, for the period between August 30 (or October 30⁴), 2024 and resolution of the December 31 motion. Neither the debtor CDI nor the monitor have applied for similar relief.
7. This application respondent respectfully asks for the portion of the application concerning costs to be adjourned.
 - a. January 13 and 14, 2025 were set aside to address sale approval.⁵ While that appears a reasonable estimate (particularly in light of the time occupied by the October motions), the cost sanctions Mrs. Liu now seeks will undoubtedly require additional time not yet reserved.
 - b. Karen Fellowes is not a party to this proceeding. She has not appeared in this proceeding since October 2024, and was replaced as counsel mid-November 2024.
 - c. Mrs. Liu’s unfiled materials were emailed to Ms. Fellowes on December 30, 2024 at 7:17 p.m. Filed copies were sent by email the next day. But Ms. Fellowes is not a party in these proceedings. She had no email address for delivery in the matter. This presumably caused Mrs. Liu to send the process server to Ms. Fellowes’ office on the afternoon of Monday, January 6, 2025, where Mrs. Liu’s material was left with a Stikeman Elliott records clerk.

¹ Liu Notice of Application, paras. 78 and 88

² Liu Notice of Application, para 84

³ Liu Notice of Application, para 95

⁴ Liu Notice of Application, contrasting paras. 2 and 78

⁵ Monitor’s Report #20 (Supp) at paras 9 and 29

- d. The allegations made against Ms. Fellowes concern her role as counsel and thereby engage issues of privilege not within her purview to waive or ignore.
 - e. Mrs. Liu has made serious allegations of misconduct against Ms. Fellowes relating to the October hearings in this matter but has not placed a transcript of those proceedings before the court.
 - f. Mrs. Liu seeks to tie her bid to the financial implications of the costs orders she seeks. There is no intrinsic reason why that must be so, particularly where the amount at stake is substantial, and the cost orders sought are so exceptional.
8. Ms. Fellowes respectfully submits that she should be afforded a reasonable opportunity to prepare a full defence to the allegations now levelled against her once the sales process is resolved.

PART 5: LEGAL BASIS

A. Adjournment

9. Adjournments are granted on the basis of the court's assessment of the interests of justice in the circumstances presented. The analysis involves a review of the prejudice occasioned by proceeding as scheduled with the prejudice resulting from the adjournment. The paramount consideration is to preserve a fair hearing on the merits. Courts are generous, not overly strict, in granting adjournments.

Navarro v. Doig River First Nation, 2015 BCSC 2173

10. Here, on very little notice and no personal service, Mrs. Liu seeks an order that Ms. Fellowes personally pay costs potentially amounting to several hundred thousand dollars. That is truly an extraordinary order sought, respectfully, on an unnecessarily tight schedule and a limited record.
11. Mrs. Liu has not included any transcript of court proceedings in her motion materials. Rather, she relies on general allegations concerning counsel's submissions at a hearing that occurred two months ago.
12. The allegations Mrs. Liu makes against Ms. Fellowes concern the latter's role as counsel and therefore engage privilege.
13. Fairness must be the hallmark of a hearing seeking to fix counsel with costs. That point was made recently by the Court of Appeal, where Justice DeWitt -Van Oosten quoted from Justice Gascon as follows:

[38] In my view, the procedural fairness mandated by Rule 14-1(35) should be approached in a manner consistent with the fairness requirements at common law, discussed in *Jodoin*. Moreover, this should be the

case whether the potential for a costs award against counsel arises before, during or after the proceeding at issue:

[35] ... a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards... However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.

[36] Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against [them] and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

[original emphasis]

Walsh v. Muirhead, 2020 BCCA 225 at para. 38

B. Serious Allegations / Significant Issues

14. Mrs. Liu's application represents an amalgam of various claims involving serious allegations and significant legal issues:

a. **Costs against counsel.** Whether involving scale costs or special costs, an order fixing counsel with liability for costs is an exceptional order, used sparingly and only in rare cases. The order is reserved for conduct that seriously undermines the authority of the court or seriously interferes with the administration of justice. Counsel's duties to respect privilege, guard confidentiality and bring forward with courage unpopular causes means the courts must be extremely cautious in awarding costs personally against a lawyer. Only where there has been demonstrated a breach of

counsel's duty to the court bordering on contempt should an order of that sort be made. An error of judgment is not a basis for an order of costs against counsel.

Walsh v. Muirhead, 2020 BCCA 225 at para. 34
Young v. Young, (1990) 50 B.C.L.R. (2d) 1, 1990 CanLII 3813 (C.A.)
Kent v. Thiessen, [1990] B.C.J. No. 2615, 1990 CarswellBC 1334 (C.A.)
Hannigan v. Ikon Office Solutions Inc., 116 B.C.A.C. 304, 1998 CanLII 6141
Pierce v. Baynham, 2015 BCCA 188
Nuttall v. Krekovic, 2018 BCCA 341

b. Information not presented. In *ex parte* applications, where counsel is required to make full and fair disclosure, the required disclosure is governed by relevance. Special costs are not automatic even where there has been a failure to make full disclosure of relevant facts.

Pierce v. Baynham, 2015 BCCA 188 at paras. 40–47

c. The materiality (or lack thereof) of the information not placed before the court is an important consideration, as is the professional judgment of counsel.

Regal Constellation Hotel Ltd., Re, 2004 CanLII 206 (ON CA)

d. In a CCAA context, the well-known factors for assessing a bid do not involve an analysis of those potentially behind the bidder (apart from the question of whether the bidder has the funds to complete the sale) or the proposed use of the assets. Counsel acting for a bidder – a non-party – may well have to disclose if a bidder had an economic interest in the debtor or an interest in the outcome of the proceedings (for example, had acquired a creditor's position by assignment). But that was not the case here. The bidder was a stranger to the proceedings and had no interest or role in the estate or outcome of the CCAA proceedings; its interest was simply to acquire assets being offered for sale. Mrs. Liu suggests that counsel had a pro-active obligation to disclose funding sources and connections of a bidder *who has no economic interest or stake in the proceedings*. She has cited no authority for that novel proposition.

e. Nor has Mrs. Liu placed evidence before the court to demonstrate counsel deliberately withheld information believed to be relevant. Indeed, the evidence Mrs. Liu has tendered indicates West Moberly's involvement was just not considered to be relevant.⁶ Respectfully, that was a judgment call that cannot support an order of special costs against counsel.

Pierce v. Baynham, 2015 BCCA 188 at paras. 40–47

f. Unfounded Allegations. Allegations of fraud or dishonesty will not warrant an order of special costs merely because the allegations are not ultimately made out.

⁶ Transcript attached as Exhibit "E" to the affidavit #2 of Elyssa Boongaling, at (i) transcript p 9; line 30 to p 10 line 13; (ii) transcript p 11 line 17 to line 33; (iii) transcript p 48 line 46 to p 49 line 32; and (iv) transcript p. 80 line 46 to p 84 line 29.

To warrant a sanction in special costs, the allegations, at the time they were made, must have been obviously unfounded, known to be baseless or spiteful.

Animal Welfare International Inc v W3 International Media Ltd., 2016 BCCA 372
at paras 46 and 49

g. While it is unclear precisely what allegations Mrs. Liu suggests were unfounded, there was ample evidence before the court on the October applications to justify the position then taken by counsel. Mrs. Liu's own evidence (in response to the facts surfaced by TMC) was that the coal licenses had been transferred to Pioneer, a company involving her son, at a time that raised fair questions as to whether the transfer was appropriate.

h. Mrs. Liu's evidence was that a lawyer "*recommended that Pioneer should transfer the 9 mineral licenses back to Wapiti to avoid any suggestion of impropriety.*"⁷ Her evidence did not contest the fact of the transfers but, instead, she offered a benign explanation for them, viz., "*we felt entitled to transfer its assets to my son, who runs his own coal development company, to assist him with the development of his business. The transfer was not done to avoid Shougang or any other creditor.*"⁸

i. The monitor was unaware of the transfers and considered them worthy of investigation.⁹

j. **Indemnity costs.** The court cannot award a cost sanction not provided for in the *Supreme Court Civil Rules* unless specifically authorized by an agreement or provided for in legislation. The Civil Rules do not contemplate indemnity costs and granting them in the present circumstances would be an error in principle:

[95] I would at the outset note that in the British Columbia cases the judges in *Paterson, Williams* and *Blue Mountain* awarded special costs. The judges in the case at bar, Tanious and Kane awarded either a full indemnity or costs on a solicitor-and-own-client basis. As noted in para. 64 above, a judge cannot impose costs sanctions that are not authorized by the *Rules*. Full indemnity or solicitor-and-own-client costs awards are not authorized by the *Rules* and accordingly the costs awards in this case, Kane and Tanious are, at least to that extent, wrong in principle, as is West Van's submission that it is entitled to receive a full indemnity. The matter for

⁷ Liu affidavit #2 para 14

⁸ Liu affidavit #2, para 11

⁹ Monitor's reports 19 and 20

determination is whether the insureds are entitled to an award of special costs.

West Van Holdings Ltd. v. Economical Mutual Insurance Company, 2019 BCCA 110 at para. 95

k. Insolvency proceedings do not operate under a special cost regime that permits cost orders the Civil Rules do not.

Hy's North-Transportation Ltd. v. Yukon Zinc Corporation, 2014 BCSC 2291

l. **Costs without assessment.** Mrs. Liu seeks special costs against counsel for the period of time between either August 30, 2024 (or October 30, 2024¹⁰) and the entry of the order she now seeks (a period that extends months beyond the duration of Ms. Fellowes' brief). Those costs potentially total several hundred thousand dollars yet Mrs. Liu seeks to persuade this court to dispense with the assessment process and make a summary award.

m. An order of special costs against counsel without assessment is not available to Mrs. Liu. A litigant favoured with a special costs order must still lead evidence to allow the court and the respondent to test whether the fees are reasonable. The process is typically conducted by a registrar:

[154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge... A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

[155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must

¹⁰ Liu Notice of Application, para 78

conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).

[156] A special costs assessment, whether before a judge or a registrar, cannot proceed in absence of evidence of the amount of legal fees incurred. Usually this will be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. This is necessary to allow a court to inquire as to the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. Where production of a bill of special costs would lead to a loss of solicitor-client privilege, the party seeking special costs must either waive privilege or can elect to preserve privilege by having its costs assessed after all appeals are exhausted.

Gichuru v. Smith, 2014 BCCA 414 at paras. 154–156

C. Costs of Mrs. Liu’s Application

15. Mrs. Liu’s application, brought on minimal notice, relies on generalities about counsel’s submissions and evidence falling short of the required threshold to fix counsel with any costs, let alone special costs. The evidence does not support the extreme allegations Mrs. Liu has placed on the public record that Ms. Fellowes engaged in a “*charade*”¹¹ and “*made an extraordinary effort to deceive the court.*”¹² The TMC motion heard in October raised fair issues. The monitor found them worthy of investigation and Mrs. Liu’s evidence demonstrates the allegation was in no way unfounded.

16. The application respondents respectfully ask for an opportunity to speak to the costs of Mrs. Liu’s December 31 application following the determination of it on its merits.

PART 6: MATERIAL TO BE RELIED ON

17. The application respondent will rely on:

¹¹ Liu Notice of Application, para 87

¹² Liu Notice of Application, para 84

- a. the TMC notice of application filed October 15, 2024, and such of the record on that application as counsel may advise, including the affidavit #2 of Qu Bo Liu, filed herein October 31, 2024;
- b. the affidavit #1 of San Chan, sworn January 10, 2025;
- c. the affidavit #3 of Elyssa Boongaling sworn January 8, 2025;
- d. reports 19, 20 and 20 (supplemental) from the Monitor, together with such of the pleadings and proceedings had and taken herein as counsel may advise; and
- e. such other materials as counsel may advise and this Honourable Court may allow.

The application respondent's address for service is:

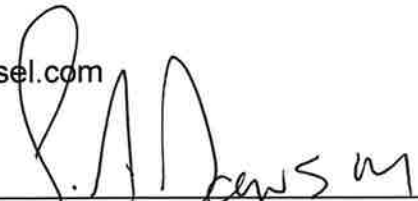
Dennis Dawson James Aitken LLP
Unit 770-666 Burrard Street,
Vancouver, BC V7C 2X8

Attention: S. A Dawson or C. P. Dennis, KC.

Email address for delivery: cdennis@djacounsel.com

Date:

January 10, 2025



Signature of lawyer for Dennis Dawson
James Aitken LLP, counsel for Karen
Fellowes, K.C., per Scott Dawson

SCHEDULE "A"

No. S-224444
Vancouver Registry

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PETITIONERS

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