

Court File No: 03-CV-23500

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

UNITED MEXICAN STATES

Applicant

-and-

MARVIN ROY FELDMAN KARPA

Respondent

SUBMISSIONS ON COSTS OF THE APPLICANT,  
THE UNITED MEXICAN STATES

1. The following is the response of the United Mexican States (the "Applicant") to the revised Bill of Costs Submissions delivered by the Respondent, Marvin Roy Feldman Karpa (the "Respondent") on December 15, 2003.

**The Respondent's Costs should be fixed on a Partial Indemnity Basis**

2. The Applicant submits that the costs of this matter should be fixed on a partial indemnity basis for the following reasons:
  - (a) This Application was the second of its kind and involved matters of domestic, foreign and international law.
  - (b) It is well established that costs on a solicitor-client or substantial indemnity scale should not be awarded unless special grounds exist to justify a departure from the usual scale. In *Orkin, The Law of Costs*, the authors summarize an award of costs on

a solicitor-client scale as follows:

Costs on the solicitor-and-client scale should not be awarded unless special grounds exist to justify a departure from the usual scale.

Such orders are not to be made by way of damages, or on the view that an award of damages should reach the Plaintiff in fact, and are inappropriate where there has been no wrongdoing.

Costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:

[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of punishment.

**M. Orkin, *The Law of Costs*, 2<sup>nd</sup> ed. (Aurora: Canada Law Book Inc., 2002), p. 2-148-2-149 [Tab 1]**

- (c) The Plaintiff's Offer to Settle, which effectively amounted to an agreement to forego interest accrued from August 31, 2003, did not amount to a genuine offer of compromise. It amounts to an Offer to Settle for very slightly less than the amount claimed. The Court of Appeal has recently held that such offers generally will not trigger costs on a substantial indemnity basis.

*Walker Estate v. York/Finch General Hospital*, [1999] 43 O.R. (3d) 461(C.A.) [Tab 2]

- (d) In any event, the Respondent did not "beat" its Offer to Settle dated September 17, 2003, in accordance with the principles recently established by the Ontario Court of Appeal in *Rooney et al v. Lee et al* (2001), 53 O.R. (3d) 685. At paragraph 58-60 of the decision, a majority of the Court of Appeal held as follows:

The difficult question is what cost comparison to make when the offer includes, as it does here, a provision for solicitor-and-client costs from the date it was made. In my view, for the period following the date of the offer, the proper comparison is between solicitor-and-client costs in the offer and party-and-party costs in the judgment (other than the rare case in which the losing party's conduct would justify an award of solicitor-and-client costs). In other words, for the purpose of comparing the offer with the judgment under rule 49.10, the court must compare the cost provisions in the offer with the trial judge's usual award of party-and-party costs to the successful litigant. In practice, some trial judges do not make an order for costs until they have seen the Rule 49 offers. In those cases, for the purpose of comparison under rule 49.10, the court has to assume party-and-party costs of the action. This approach is consistent with the

reasoning of Borins J. In *Daniels v. Crosfield (Canada) Inc.*, *supra*. To assume solicitor-and-client costs from the date of the offer is to assume a result that is only obtained by applying Rule 49.

I can understand why Rooney included a provision for ongoing solicitor-and-client costs in her offer to settle. As I said earlier, she did so to ensure that the value of her offer was not diluted over time and to encourage the defendants to settle early. However, by including this provision, she ran the risk that she would lose the benefit of rule 49.10 if the other terms of the offer were close to, though higher than, the corresponding terms of the judgment. Apart from Rule 49, the defendants' conduct in this case did not justify a solicitor-and-client cost award. Therefore, to obtain the benefit of rule 49.10, Rooney had to show that her offer to settle, including its provision for costs, was as favourable as or more favourable than the judgment she obtained against Hnatiuk. For the purpose of that comparison, apart from Rule 49, the judgment must be assumed to provide only for party-and-party costs.

Unfortunately, Rooney led no evidence of her solicitor-and-client costs from the date of the offer, and the trial judge did not analyze Rooney's offer in the way that I have suggested. Still, apart from costs, Rooney's judgment against Hnatiuk exceeded her offer by nearly \$200,000. Rooney made her offer in October 1996 and the jury entered its verdict in December 1997. I find it inconceivable that the difference between solicitor-and-client and party-and-party costs for that 14-month period would come close to, let alone exceed, \$200,000. The judgment was therefore more favourable than the offer to settle. Accordingly, I would uphold the trial judge's award of costs to Rooney by applying rule 49.10.

*Rooney et al v. Lee et al* (2001), 53 O.R. (3d) 685 (C.A.) [Tab 3]

The Respondent's offer of September 17, 2003 included a provision for costs payable on a substantial indemnity basis from September 17, 2003. Based on the *Rooney* analysis, there can be no question that the very modest reduction on account of interest in the Plaintiff's Offer to Settle was significantly outweighed by the differential between the Respondent's partial indemnity versus substantial indemnity costs after September 17, 2003.

- e) In these circumstances, it is submitted that it is not an appropriate case for an award of costs on a substantial indemnity basis and that the Respondent's costs should be fixed on a partial indemnity basis.

### **The Hourly Rates Claimed by the Respondent on a Partial Indemnity Basis**

3. The Applicant does not take issue with the hours claimed in respect of the preparation for and

attendance at the Application for Judicial Review. However, it submits that the hourly rates claimed on a partial indemnity basis are too high. In this context, it is well established that costs on a partial indemnity basis should be between 2/3 and 3/4 of the amounts actually charged to the client. The following chart outlines the appropriate rates on a partial indemnity basis calculated at both the 66.6% and 75% ratio:

Lawyer	Actual Hourly Rate	Hours	Rate (Partial Ind.) (66.6%)	Rate (Partial Ind.) 75%	Total (at a rate of 66%)	Total (at a rate of 75%)
Barbara A. McIsaac (2002)	\$360	6.4	\$240	\$270	\$1,536	\$1,728
Barbara A. McIsaac (2003)	\$400	78.1	\$270	\$300	\$21,087	\$23,430
Colin S. Baxer	\$295	32.8	\$200	\$225	\$6,560	\$7,380
Mary L. Caldbick	\$170	4.6	\$115	\$130	\$529	\$598
R. Benjamin Mills (2002)	\$150	21.2	\$100	\$115	\$2,120	\$2,438
R. Benjamin Mills (2003)	\$160	155.9	\$110	\$120	\$17,149	\$18,708
Student at Law	\$110	77.7	\$60	\$60	\$4,662	\$4,662
<b>Total</b>					<b>\$53,643</b>	<b>\$58,944</b>

4. The Applicant states that the counsel fees for the appearances for November 3 and 4<sup>th</sup> are properly assessed as follows on a partial indemnity basis:

Lawyer	Fee for November 3, 2003 (full day)	Fee for November 4, 2003 (1/2 day)	Total
Barbara McIsaac	\$2,100	\$1,200	\$3,200
Colin Baxter	\$1,400	\$750	\$2,150
R. Benjamin Mills	\$1,000	\$300	\$1,300

#### Disbursements

5. The Applicant does not take issues with the majority of the disbursements claimed by the Respondents
6. The only disbursements with which the Applicant takes issue are the amounts claimed in respect of the expert opinion (Loperena Affidavit) and the amounts claimed on behalf of the consulting Mexican counsels' fees and disbursements.
7. With respect to the disbursements claimed on account of the expert opinion (Loperena Affidavit), paragraph 76 of the Reasons for Order reads:

I do not propose to consider either affidavit in my Reasons. With respect to the issue of confidentiality as it relates to Section 69 of the FCC, I think it is improper that the affidavits be admitted at this stage. Also there has been no testing of the credibility or reliability of the deponents of the affidavit by cross-examination. Further, there must be finality to the Tribunal hearing.

Accordingly, the \$3,008.86 in costs with respect to this Affidavit are not properly recoverable from the Applicant.

8. With respect to the consultation fees, no particulars of any invoices submitted have been provided. In any event, it is submitted that the application involved an interpretation of the

NAFTA by an Arbitration Tribunal and its review under the law of Ontario. In these circumstances, it is submitted that any work performed by Mexican counsel dealing with Mexican law was not relevant to the issues raised in the Application. Accordingly, it is submitted that the amounts claimed on account of the Mexican counsel are improper and not properly recoverable from the Applicant.

### Conclusions

9. Accordingly, the Applicant's position on the costs claimed by the Respondent is as follows:
  - (a) the Applicant does not take issue with the amount of time claimed by the Respondent's Canadian counsel in preparing for and arguing the application;
  - (b) the Respondent's costs are appropriately assessed on a partial indemnity basis;
  - (c) based on a partial indemnity rate of 2/3 of the actual rates charged to clients, the Respondent's costs for preparing for the application are properly assessed at \$53,643.
  - (d) at a rate of 75% of the amounts actually charged to the client, the Respondent's partial indemnity costs for preparing for the application are properly assessed at \$58,944; and
  - (e) with respect to the counsel fees the charge as set out above, the Respondent is properly entitled to \$6,650 on a partial indemnity basis.
10. The Applicant does not take issue with the disbursements claimed by the Respondent save and accept for the expert opinion, Loperena Affidavit and the consulting Mexican counsels' fees and disbursements. Accordingly, the disbursements properly recoverable from

the Applicant are \$2,087.20.

11. In these circumstances, the Applicant submits that the Respondent's fees should be fixed on a partial indemnity basis at \$70,000.00.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16<sup>TH</sup> DAY OF DECEMBER,  
2003.



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