

Federal Court of Appeal



Cour d'appel fédérale

Date: 20250113

Docket: A-361-23

Citation: 2025 FCA 5

**CORAM: DE MONTIGNY C.J.
STRATAS J.A.
MACTAVISH J.A.**

BETWEEN:

**STEELHEAD LNG (ASLNG) LTD. and
STEELHEAD LNG LIMITED
PARTNERSHIP**

Appellants

and

**ARC RESOURCES LTD., ROCKIES LNG LIMITED PARTNERSHIP,
ROCKIES LNG GP CORP., and BIRCHCLIFF ENERGY LTD.**

Respondents

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on January 13, 2025.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

**DE MONTIGNY C.J.
MACTAVISH J.A.**

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Court has delivered its reasons from the Bench dismissing this appeal: 2024 FCA 212 (*per* Stratas J.A.). After it did so, the respondents stood up in Court and asked us to fix the costs of this appeal. In brief oral submissions, the respondents proposed \$100,000. The

appellants countered with oral submissions of their own and proposed \$25,000. The Court invited the parties to file further written submissions on the point. The parties have done so and the Court has read and considered their submissions.

[2] The Court has “full discretionary power over the amount...of costs”: Rule 400(1) of the *Federal Courts Rules*, S.O.R./98-106. In setting the amount, many factors may be considered. Rule 400(3) lists 15 factors and adds that the Court may take into account “any other matter that it considers relevant”. This is as broad a discretion as can be imagined. However, depending on the circumstances of the particular case, some factors may take on considerable significance, others less so, and still others, not at all.

[3] Tariff “B”, which guides the amount of costs in standard cases, is part of the *Federal Courts Rules* and, thus, is part of the law that governs us. The Court has considered it. In this appeal, the high end of Tariff “B” leads to an award to the respondents of approximately \$6,500 plus reasonable disbursements.

[4] Both sides agree this falls well short of the mark. The appellants are prepared to accept an award against them that is roughly four times that amount. The respondents want one that is over fifteen times that amount—but one that is less than one-third of their actual legal costs.

[5] The respondents point to three main factors: the litigation conduct of the appellants before the infringement trial in the Federal Court; the use of the proceedings in the Federal Court

and this Court “as a cudgel against the [r]espondents and the LNG industry”; and the lack of merit in the appeal.

[6] The first two factors took place mainly before and during the litigation in the Federal Court. The Federal Court’s award of costs—an elevated one—must be taken, at least in part, as dealing with those factors (2023 FC 1684 at para. 320). As well, the Federal Court’s reasons totally vindicated the respondents and likely arrested any harm. To the extent there was any ongoing harm during the appeal, it was likely small and would have been minimized by the parties’ efficient prosecution and defence of the appeal.

[7] However, the third factor, the lack of merit in the appeal, really matters. In some cases, it is reasonable for appellants to pursue a low-chance case. But this was less than a low-chance case, especially given the strict and demanding appellate standard of review of “palpable and overriding error”. Close this case was not. Awarding the respondents the upper end of Tariff “B” falls way short of the mark. It simply does not do justice. The respondents deserve an elevated award of costs.

[8] However, the amount sought by the respondents is too high. Their claim to elevated costs comes very late in the day. Upon receiving the notice of appeal and seeing its lack of merit, the respondents could have offered the appellants a no-costs dismissal, the non-acceptance of which would have likely triggered a significant costs award—perhaps even complete indemnity—on the day of judgment. Instead, the respondents did nothing. Indeed, in their responding memorandum of fact and law, written after the weakness of the appellants’ case was on full

display, they did not ask for elevated costs: they were content to receive the standard costs award of a few thousand dollars or so plus reasonable disbursements. Only after hearing this Court's reasons for judgment did they pounce.

[9] With these considerations in mind and balancing them all, I would award costs of the appeal to the respondents in the elevated, fixed amount of \$40,000, all inclusive.

“David Stratas”

J.A.

“I agree.

Yves de Montigny C.J.”

“I agree.

Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-361-23

STYLE OF CAUSE: STEELHEAD LNG (ASLNG)
LTD. AND STEELHEAD LNG
LIMITED PARTNERSHIP v. ARC
RESOURCES LTD., ROCKIES
LNG LIMITED PARTNERSHIP,
ROCKIES LNG GP CORP., AND
BIRCHCLIFF ENERGY LTD.

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: DE MONTIGNY C.J.
MACTAVISH J.A.

DATED: JANUARY 13, 2025

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