Action No.: 2001-02304
E-File Name: CVQ22WESTERVELDS
Appeal No.:_____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

SHIRLEY WESTERVELD and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Plaintiffs

and

CINEPLEX ENTERTAINMENT CORPORATION, operating as CINEPLEX ODEON CROWFOOT CROSSING CINEMAS

Defendants

P R O C E E D I N G S

Calgary, Alberta
April 1, 2022

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N. Peermohamed (remote appearance)	For Cineplex Entertainment Corporation, Operating as Cineplex Odeon Crowfoot Crossing Cinemas
P. Mak	Court Clerk

Reasons for Judgment

MASTER MATTIS: So we are here this afternoon on the Westerveld and Her Majesty the Queen and Cineplex Entertainment Corporation matter. I am sure Mr. Clerk has this already on the record, but we have Mr. Peermohamed for the applicant/defendant and Mr. Frank for the respondent/plaintiff.

This is a personal injury action arising from a trip-and-fall incident at a movie theatre. The defendant, Cineplex Entertainment Corporation, operating as Cineplex Odeon Crowfoot Crossing Cinema (who I will call Cineplex) has brought this application for summary dismissal of the plaintiffs' claim. I heard the application on May 14, 2021, and I am giving my oral decision today.

For the reasons that follow, I allow the application.

I begin with a summary of the facts.

Shirley Westerveld attended a movie at the Cineplex Odeon Crowfoot Crossing Cinema (which I will call the premises) with her daughter on December 26, 2019. They attended the 7:30 PM showing of Little Women in Theatre 12 (which I will call the theatre). The theatre had recently been renovated to include reclining chairs. Ms. Westerveld and her daughter sat in two seats they had reserved in the middle of the front row. There was a railing in front of them. During the movie, Ms. Westerveld moved the footrest of her chair to the elevated position and the chair to a reclined position.

After the movie, Ms. Westerveld and her daughter left the theatre. Ms. Westerveld noted that the lighting was dim and that the credits for Little Women scrolled on a dark screen.

When they reached the lobby, her daughter went to the washroom. While waiting for her, Ms. Westerveld realized she had forgotten her cell phone in the theatre. Ms. Westerveld re-entered the theatre and returned down the row to her seats to find her cell phone. The theatre was still dark, as the credits were still rolling. She found her phone under the seat where she had been sitting by feel. She could not see it. She retrieved her phone and headed towards the exit, walking down the row again.

While exiting the row, she tripped and fell over a raised footrest of a recliner seat that had been left in the elevated position by another patron (and I will call this the accident). This was the second time she had exited the theatre that way, and the fourth time she had walked down the row that night.

When she fell, she badly injured her left knee. Ms. Westerveld said several people came to assist her and asked if she was okay. She found her daughter in the lobby, and her daughter drove her home. Ms. Westerveld did not speak with any of the Cineplex staff at this time. She left a message with Assistant Manager Austin Shaw, who returned her call later that evening. According to Ms. Westerveld, Mr. Shaw told her this had happened before.

Mr. Shaw's evidence is that this type of evidence has not happened before and that he has never had a complaint about house lighting or footrests not being put back in place.

In April 2019, eight months before Ms. Westerveld's accident, the premises underwent a retrofit to install reclining chairs and new lighting in some of the theatres, including the theatre where Ms. Westerveld's accident occurred. Cineplex has a system of inspection and maintenance at the premises.

For the purpose of this application, Cineplex does not dispute any of Ms. Westerveld's evidence and accepts her version of events, including facts that would otherwise be in dispute. This includes that the theatre lighting was dim at the time of the accident and Ms. Westerveld could not see properly due to the lighting, that a seat had been left reclined, and that she heard Mr. Shaw say this had happened before.

Therefore, for the purpose of this application, because Cineplex accepts that Mr. Shaw said to Ms. Westerveld that this had happened before, it acknowledges that it has a duty to take reasonable steps to prevent an accident from happening. Cineplex says it fulfilled that duty. The theatre seating and lighting complied with the required building permits and building code, and Cineplex argues it had implemented a reasonable system of inspection and maintenance. For these reasons, even accepting Ms. Westerveld's evidence in its entirety, Cineplex argues that there is no merit to the plaintiff's action and asks that it be dismissed summarily.

Ms. Westerveld argues that there are genuine issues for trial, as findings of fact and credibility are required to determine if Cineplex is liable for her accident. She says this matter may be appropriate for summary trial, but the matter is not appropriate for summary dismissal. She argues, alternatively, that Cineplex did not satisfy its duties owed to her. So for both those reasons, she asks that Cineplex's application be dismissed.

By way of overview of the action, Ms. Westerveld advances her claim for damages in negligence and under sections 5 and 6 of the *Occupiers' Liability Act.* As a preliminary matter, Ms. Westerveld asserts that it does not appear that Cineplex is seeking summary judgment dismissing her claim for common law negligence, as it did not apply rule 7.3(1) to a breach of common law duty of care. However, in both its written and oral submissions, Cineplex refers to the duties under the *Occupiers' Liability Act* and at common law. Its notice of application seeks an order summarily dismissing the action against it pursuant to rule 7.3 and broadly asserts grounds, including that there is no merit to the plaintiffs' claims against the defendant, there is no genuine issue that requires a trial, and that the defendant has discharged any duty of care it may have owed to the plaintiff.

I am satisfied that Cineplex is seeking a dismissal of both the *Occupiers' Liability Act* and common law negligence claims brought against it.

Cineplex does not dispute that it owes Ms. Westerveld a common law duty of care and does not make any separate submissions about satisfying that duty of care. Its submissions are made together for occupiers' liability and under the common law. Ms. Westerveld similarly makes no submissions to suggest the duty of care would be different under the common law, although does refer to the seminal cases on establishing a duty of care. I, therefore, also consider the occupiers' liability and common law together in my decision.

I now turn to the law of summary judgment in Alberta. A party may apply to the Court for summary judgment dismissing all or part of an action where there is no merit to a claim or part of it. That is from rule 7.3(1)(b) of the *Rules of Court.* The test for summary judgment was articulated by the majority of a five-member panel of the Alberta Court of Appeal in reasons for judgment reserved in *Weir-Jones Technical Services Incorporated v. Purolator Courier Limited* in 2019. *Weir-Jones* resolved conflicting appellate authority on the test for summary judgment in Alberta and held that the test must be predictable, consistent, and fair to both parties.

The key considerations on an application for summary judgment are concisely summarized at paragraph 47 of *Weir-Jones:*

> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do

> uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

The majority in *Weir-Jones* commented that there is no policy reason to continue to take a strict approach to summary judgment, as that would undermine the culture shift called for by the Supreme Court of Canada in *Hryniak v. Mauldin* in 2014, and that is referenced at paragraph 48 of *Weir-Jones.*

Weir-Jones was considered by the Court of Appeal in *Hannam v. Medicine Hat School District No. 76* in 2020, and leave to appeal that decision to the Supreme Court was refused. In *Hannam*, the Court of Appeal interpreted the key considerations set out in paragraph 47 of *Weir-Jones* to mean that a summary judgment court can make contested findings of material facts, that is at paragraph 147; that summary judgment courts should not be reluctant to make material fact findings, that is at paragraph 148; and at the same time, a dispute on material facts or a dispute that depends on resolving issues of credibility can leave genuine issues requiring a trial, that is at paragraph 149. If there is a genuine issue requiring a trial, summary disposition is not available, and that is paragraph 151.

In *Hannam*, the Court discussed the meaning of genuine issue requiring a trial, noting that the Court of Appeal had adopted the Supreme Court of Canada's position in *Hryniak* that:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious, and less expensive means to achieve a just result.

Further, the Court of Appeal noted that the no-genuine-issue concept no longer measures the merits of the parties' position; it now concentrates on procedural fairness. This is found in paragraphs 159 to 161 of *Hannam.*

There is no symmetry of burdens on application for summary dismissal. Cineplex must prove there is no merit to the claim, while Ms. Westerveld needs only to demonstrate that the record, the facts, or the law preclude a fair disposition and there is a genuine issue for trial. That is from *Weir-Jones* at paragraph 32.

Ms. Westerveld argues that there are genuine issues for trial relating to lighting and the design of the recliner chairs and whether there were previous incidents that would establish her accident was reasonably foreseeable. Ms. Westerveld challenges the credibility of Mr. Shaw and specifically his evidence that contradicts her recollection that he told her this type of incident had happened before and that two cast members, Cineplex staff, had followed up with her after she fell down.

As noted above, for the purpose of this application, Cineplex accepts all the facts asserted by Ms. Westerveld to be true. There are, therefore, no facts in dispute in respect of Ms. Westerveld's evidence and no credibility issues to be resolved. They are all resolved in her favour.

The record is complete with respect to the inspection records and design specifications for the chairs and lighting.

I am confident I can fairly determine this matter summarily based on the record given Cineplex's position that it accepts Ms. Westerveld's evidence for the purpose of this application.

I now consider whether Cineplex has discharged its burden to establish on a balance of probabilities that there is no merit to the claim. Cineplex relies on the affidavits of Mr. Shaw and Robert Brunett (phonetic) regarding both the theatre retrofit and compliance with city building permits and Alberta Building Code requirements, as well as conditions on the night of the accident and the system of inspection and maintenance that Cineplex follows.

In April 2019, the premises underwent a retrofit to install reclining chairs in some of its theatres, including the theatre where the accident occurred. The plans for the retrofit were drafted by an architect and submitted to the City of Calgary to ensure that they complied with the Alberta Building Code 2014 (which I will simply call the building code). The plans were approved, and a building permit was issued. The reclining chairs are used in other Cineplex locations. They were installed with clearance in the rows that exceeded the building code requirement of 15.75 inches of unobstructed clearance between each row of seating. The rows in the theatre had 17 inches of clearance when the footrest was open, except for the front row where Ms. Westerveld was sitting. That row had 20.625 inches between the edge of a fully reclined footrest and the handrail in front of the seats.

Patrons can recline their seats themselves with power buttons. The seats are electrically operated. When a seat reclines, a footrest automatically opens up. Ms. Westerveld argues that there should be a mechanism either to automatically reset or close any reclined seats en masse or through a weight mechanism that detects when a seat is empty. She notes that typical theatre seats close automatically when a patron stands up.

Cineplex argues that having an automatic mechanism to reset any reclined seats could cause other risks to patrons given that the recliners are electrically operated.

Following the accident and Ms. Westerveld's conversation with Mr. Shaw, Mr. Shaw checked the seats in the theatre and found no seats were malfunctioning or out of order on the evening of the accident. Mr. Shaw deposed that the seats are normally returned to their upright position with the footrest closed by patrons as they get up from their seats. He said it is on rare occasions that the chairs will be reclined and footrests left open and then they will be put back in place when the theatres are cleaned between showings. He stated his view that it would not be safe for the clean-up crew to enter the theatre against the flow of patrons leaving to perform their cleaning and maintenance duties.

Mr. Shaw's and Mr. Burnett's evidence addressed Cineplex's system of inspection and maintenance for the premises. This includes theatres are evaluated on a monthly basis for all operations, including cleanliness and safety; a joint health and safety committee meets regularly and makes recommendations on how to improve safety. On November 7, 2019, a manager at the premises recommended that staff be instructed to check floors or walking areas for cords or potential tripping hazards as well as ice outside, so there is continuous consideration of how to improve. Staff clean the theatre between showings, but they do so after all patrons have left, given the large brooms, garbage bags, and so on that they must carry, and so they are not going against the flow of people exiting the theatre. Staff are instructed to return any chairs that remain reclined to their normal position when they are doing the cleaning between showings. This circumstance is rare, as Mr. Burnett noted that

the chairs are difficult for adults to exit while in a reclined position.

More specifically relating to the accident, on December 26, 2019, there were at least three films shown in the theatre, and checks were performed prior, during, and after each of those showings. Regular safety checks did not reveal any problems with the operations of the lights.

The issue raised by Ms. Westerveld is that the lighting was dim, and for this particular movie, the credit screen was dark, making the theatre dark. As I have noted, Cineplex does not dispute that the theatre was dark for the purpose of this application. Ms. Westerveld suggests that the possibility that a seat could be left in a reclining position with the footrest open is a known danger in a darkened theatre. She says there should be warnings for patrons of the potential for seats to be left reclined with the footrests open.

The question is what are Cineplex's obligations under the *Occupiers' Liability Act* and in negligence at common law? Section 5 of the *Occupiers' Liability Act* states that an occupier of premises owes a duty to every visitor on the occupiers' premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or as permitted by law to be there.

Section 6 provides that the duty of care applies in relation to the condition of the premises, the activities on the premises, and the conduct of third parties on the premises. Courts have considered what is reasonable and what is required to meet the duty of care set out in section 5. For example, in *Nathan v. United Farmers of Alberta Co-Operative Limited,* a 2014 decision of this Court, Justice Shelley noted at paragraph 89:

> The *Occupiers' Liability Act* places an evidentiary burden on an occupier to demonstrate that it applied the degree of reasonable care, required by the foreseeable risk, sufficient to keep visitors reasonably safe.

She cites for that proposition *Swagar v. Loblaws Inc.*, a 2014 decision of this Court, where *Swagar* cites *Anderson v. Canada Safeway Limited,* a 2004 Alberta Court of Appeal decision.

Justice Shelley goes on in paragraph 89:

> It is a question of fact in the particular case as to whether an occupier was negligent or failed in its affirmative duty to take reasonable steps to protect those who enter its premises reasonably

> safe from foreseeable harm.

And, again, she cites *Swagar* for that proposition.

In *Swagar v. Loblaws,* Justice Campbell further comments at paragraph 68:

> The case law is clear that the standard of care to meet by an occupier is reasonableness, not perfection. It need not be shown that there was constant surveillance and instant response, constant dedicated supervision, or that the occupier remove every possibility of danger.

And I did not read the cites for each of those propositions.

In *Radovanovic v. Dubensky,* a 2018 decision of this Court, the Court noted that an occupier has an affirmative duty to make the premises reasonably safe from reasonably foreseeable risks of injury at paragraph 34, and that paragraph states:

> The Alberta Court of Appeal described the effect of the *Occupiers' Liability Act* on the common law in *Wood v. Ward,* indicating that at common law, the occupier only had a duty to protect the visitor from unusual dangers of which he was aware or ought to have been aware, and he could discharge his duty by warning of the unusual danger. The Court quoted *Preston v. Canadian Legion Kingsway Branch,* noting that under the *Occupier's Liability Act,* the occupier now has an affirmative duty to make the premises reasonably safe from reasonably foreseeable risks of injury.

I have not included the citations to those cases in that quote.

In *Wood v. Ward,* from 2009, the Alberta Court of Appeal summarizes an occupier's duties at paragraph 7. There the Court says:

> It does not follow that the occupier is automatically liable for any injury suffered as a result of a foreseeable risk. Foreseeability of the risk creates a duty to the visitor, but it is still necessary to show negligence on the part of the occupier to impose liability. The Act does not intend to create no fault liability. Further, the fact that the risk is foreseeable by the occupier, or that the occupier is negligent in failing to protect the visitor from the risk, does not mean that the visitor has no duty to have regard for his own safety. A duty or

> negligence by the occupier does not foreclose contributory negligence on the part of the visitor. It follows that the duty of the occupier is not only to protect the reasonably diligent visitor, but also to be aware that some visitors might themselves be careless, that is, contributorily negligent. The occupier's duty ends only when either the risk on the premises or the conduct of the visitor becomes reasonably unforeseeable.

Cineplex also relies on section 7 of the *Occupiers' Liability Act,* which deals with risks willingly accepted. That section provides that an occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor. Cineplex acknowledges that this section generally will not absolve a defendant of liability where the risk is not obvious or a hidden danger.

In *Lorenz v. Ed-Mon Developments Limited,* a 1991 decision of the Alberta Court of Appeal, Justice Kerans for the Court held that it is expected that a plaintiff would act with ordinary diligence, and that is at paragraph 8.

So Cineplex is required to act with reasonableness, not perfection, to ensure visitors will be reasonably safe, and Ms. Westerveld is required to act with ordinary diligence.

One final legal point arose in this matter. In oral argument, Cineplex stated that the fact it met or exceeded building code requirements necessarily meant that it met its duty of care in respect of the retrofit installing the reclining seats and that there was no negligence, therefore, in the occupiers' liability context. Cineplex referenced a case that was not before me during his argument, and that case was *Condominium Corporation No. 9813678 v. Statesman Corporation*, a 2009 decision of this Court.

I directed that Ms. Westerveld could provide a one-page submission and any case in response to that submission, to which Cineplex could then reply. It appears that there was a misunderstanding as to what I was looking for that has resulted in some further submissions that we will discuss a little bit later in the costs portion. Instead of proceeding in that way, Cineplex filed a two-page brief with eight cases, and then Ms. Westerveld filed a one-page submission and a case for my consideration.

Counsel for Ms. Westerveld asked that I not accept Cineplex's brief, as it was not in compliance with my direction, but in the event I did accept it, counsel provided a four-page response to the additional cases provided by Cineplex. In essence, in that response, Ms. Westerveld's position is that none of those cases are relevant to the narrow issue I asked about in oral argument.

I reviewed the parties' materials. Cineplex's supplemental brief includes the *Statesman* decision that was referred to in oral submissions, as well as additional cases and decisions, and I have considered Ms. Westerveld's response in its entirety, including the four-page response to the case law. Counsel for Cineplex indicated that he would not file a reply.

As I requested assistance from the parties on a point that arose during oral argument and Ms. Westerveld's counsel fully responded to the additional cases cited, I do not see any prejudice or unfairness in considering both parties' further materials, and I have done so.

Cineplex's supplemental cases on the issue of whether it is compliant with the building code requirements for the theatre chairs, the recliners, and lighting absolve it of liability in a personal injury context do not establish that principle. In that regard, I agree with counsel for Ms. Westerveld. The cases provided by Cineplex address a duty of care in respect of negligence in construction and setting minimum acceptable construction standards. They do not say that an occupier is absolved from liability where it is compliant with the building code.

For example, in *Statesman,* the Court concluded at paragraph 10:

> Case law establishes that the purpose of provincial building codes, which are modelled after the national building code, is to set minimum acceptable construction standards to meet the public interest in health and safety for occupants of buildings.

Counsel for Ms. Westerveld notes that *Statesman* was not a personal injury case or a case decided under the *Occupiers' Liability Act.*

Ms. Westerveld provided me with a 1985 decision of the Court of Appeal in *Houle v. City of Calgary.* There the Court found the City of Calgary liable for injuries to a child who had crawled inside a power transformer and was electrocuted. Liability was found even though the City of Calgary had complied with regulatory guidelines.

Ms. Westerveld submits that the authorities provided by Cineplex do not establish the principle that compliance with the building codes absolves the defendant of liability in negligence or under the *Occupiers' Liability Act* in the circumstances of this matter.

I agree. Compliance with the building code is a factor for the Court to consider, but it is not determinative.

I also note that the decision of *McNulty v. (Edmonton) City*, from 2011, which was a decision of this Court that was referred to in Ms. Westerveld's original brief, provides

support for that approach. There, one issue was whether a deck was built in compliance with the applicable building code where a step had been removed and the plaintiff fell. The Court held at paragraph 93:

> In this case, there is competing evidence regarding this deck's compliance with the Code. However, cases have suggested that compliance or non-compliance with the Code does not dispose of the question of whether a structure is "reasonably safe" under section 5 of the *Occupiers' Liability Act.* Instead, it is only one factor that should be considered, and the weight ascribed to such evidence must be dictated by the circumstances. For example, in *Vanaalst*, Park J. found the defendant was negligent, but noted, at paragraph 29, "That finding of negligence exists independently of any alleged breaches of the 1997 Alberta Building Code."

In that quote, I did not read out the citation to *Vanaalst* on the record for the purpose of this oral decision.

This approach of considering compliance with building codes as a factor but not being determinative is similar to the Court's approach to how to treat a lengthy safety record. In oral argument, counsel for Ms. Westerveld referred to Justice Shelley's decision in *Nathan,* where she commented at paragraph 66 that:

> While a lengthy safety record is a relevant consideration in determining whether an occupier did or did not breach its duty of care, it is not determinative of the issue of liability.

I will consider compliance with the building code and the safety inspections done by Cineplex as part of a factual matrix, but neither of them is determinative of liability.

Applying the law to the facts in this case, we have Ms. Westerveld returning to a darkened theatre to retrieve her phone, walking down the row where she previously exited, and then retrieving her phone. On exiting down the row a second time, she trips on an open footrest and injures her knee. She had previously sat in a recliner seat that evening with the footrest opened.

Cineplex has admitted for the purpose of this application that Mr. Shaw had indicated that these types of incidents have happened before, therefore admitting that they are reasonably foreseeable, but Cineplex has a regular system of inspection and maintenance. Staff clean the theatre after showings, and the theatre is inspected at other times. Staff do not enter the theatre until patrons have all exited and the credits are finished, as they would be going

against the flow of people with their cleaning implements and garbage bags. On the rare occasions that recliners are left in a reclined position, staff are instructed to return them to their upright position at this time, being when they are cleaning the theatre.

Ms. Westerveld had been in the theatre in the very row where the accident occurred and was aware that the seats had footrests. She re-entered the darkened theatre before the credits were done and the lights were turned up. The aisle width exceeded the building code requirements, and Ms. Westerveld must have made her way past the extended footrest when she left the theatre the first time and when she returned to retrieve her phone.

Ms. Westerveld argues that Cineplex should have built in a mechanism in its recliner chairs that would cause them to automatically return to their upright positions, but these are electronic chairs, unlike old-style theatre chairs, so it is not as simple as in respect of the manual old-style theatre chairs. Although the recliners represent a change in the type of theatre seating, Ms. Westerveld had sat in these types of seats in the past, including that evening. Ms. Westerveld was aware of how the reclining chairs operated, and she accepted the risk of re-entering a darkened theatre that she had only just left. She had an obligation to act with ordinary diligence and with regard for her own safety.

Given how this accident occurred and that Ms. Westerveld was aware that there were reclining chairs in the theatre and she had re-entered the dark theatre and walked down the same row, this was not a hidden hazard. Ms. Westerveld was familiar with the row and the theatre, and I do not see how a warning could have prevented this accident.

In these circumstances, I do not see what more Cineplex could have done. They have a regular system of maintenance and cleaning that includes cleaning after every showing in the theatre. They cannot be expected to continuously monitor the theatre, and they have a good rationale for the timing of their cleaning and inspections, when seats would be returned to their upright positions after patrons have left the theatre.

In my view, Cineplex has acted reasonably to keep the premises reasonably safe. This was a very unfortunate accident, but I am satisfied on the balance of probabilities that Cineplex did not breach the *Occupiers' Liability Act* and was not negligent.

I allow the application and dismiss the action.

So, counsel, I think now I am going to turn my camera back on, and we can proceed with costs.

Submissions by Mr. Peermohamed (Costs)

MR. PEERMOHAMED: Thank you, Ma'am. Appreciate the decision. So you have our response with respect to submissions on costs. We are of the view that costs for the entire action are to be awarded, so we have our bill of costs attached at, I guess it would be page 7 of our response. We are in --

MASTER MATTIS: Sorry. I just wanted to comment for the parties, because this did involve offers, that I just wanted you to know that I made my decision first before I looked at the costs submissions. I did not look at them until I was finished the decision. Sorry. I should have just made that preliminary comment.

So I did look at the submissions just an hour ago, before we attended in court, so I have seen your bill of costs, and I have seen Mr. Frank's submissions as well about the impact of the offers. Sorry. I should have made those preliminary comments because it might shorten your comments, Mr. Peermohamed, but I will continue to hear from you.

MR. PEERMOHAMED: Sounds good. So we are of the view that party/party costs are awarded on column 2 from the beginning of the action up until the formal offer sent on August 4, 2020. That's where double costs apply, so double costs only apply, in our submission, to the actual hearing of the application on May 14th, 2021, before you, so that's where double costs apply. And then disbursements are single, not double.

So we are requesting today costs in the amount of $12,381.48. And we do take the position that regardless of whether there was any miscommunication or any sort of misunderstanding, it's the duty of the parties to provide the Court with all the law, and it is then for the benefit of the Court, and then the Court can make their decision. And you have made your decision considering all the case law submitted, and you did indicate that you relied on *Swagar,* and *Swagar* was one of the cases we did submit at tab --

MASTER MATTIS: It was in your original brief as well, though, Mr. Peermohamed.

MR. PEERMOHAMED: It was. It was. And just in general, I think we're just of the view that you indicated there was no prejudice to the plaintiff, so we did inform the Court of everything. So we'd like $12,381.48.

MASTER MATTIS: I didn't see this, but just to confirm, you are not seeking any additional costs from those supplemental submissions in any event, are you? You are just seeking the tariff amount for a special, doubled because of the offer?

MR. PEERMOHAMED: That's right, and I'm not sure if you're going to award costs for today's hearing or not. I mean, it's just hearing your decision, so we're not

seeking costs for that if you're not inclined to award costs.

MASTER MATTIS: Right. Thank you.

Okay. Mr. Frank, I will hear from you.

Submissions by Mr. Frank (Costs)

MR. FRANK: Thank you, Master. So, Master, in our submission, costs under column 2, schedule C are appropriate in this case. I'm going to suggest that they're the only costs that should be awarded here.

Just reviewing column 2, schedule C, the defendant -- or the applicant in this application would then be entitled to costs: commencing documents, $1,000; preparation for questioning, $1,000; questioning at two half days, $2,000; disclosure of record, $1,000; and application with brief was required, $1,685. So in my submission, that would be costs to Cineplex for $6,685.

Now, as you've indicated, there is -- there is partial success here. The supplementary brief after the oral arguments was unnecessary. It really didn't add anything, and it was an undue burden on Ms. Westerveld. And then as you've indicated, Ms. Westerveld was successful on those points -- on that point of law, which, as I think you've correctly put, complying with building regulations just simply is not a defence to occupiers' liability. So under column 2, schedule C, I would suggest that reviewing of the parties' documents entitles Ms. Westerveld to $1,000 in costs and then $1,000 in costs for drafting responses.

So that would put us down, in my submission, to $4,685 in costs, which my submission will be that should be the costs award here.

Just in respect to the doubling of costs, and I have put that in my written submissions, I believe there was a direction for a three-page submission, so I was as brief as I could. My argument here is that if you look closely at the offers, I mean, I would concede that the Calderbank offer framework doesn't need to be formalistic, but the reason why I have issues with those costs is simply because they're costs that do not leave the applicant with any options. They're not -- they weren't genuine offers. They were no compromise, and I think the Court has to be very, very careful here.

There is a general policy consideration for why the Court awards costs in the first place. The main reason is to promote compromise and certainly see if parties can resolve issues before coming to court, but the real danger here, especially when we're dealing with individuals versus corporations, is that costs -- these sorts of offers can be used as a way to

pressure or intimidate genuine applicants from abandoning their genuine claims, which is very harmful to individuals, and it's very harmful to individuals who may be harmed by the system.

Excuse me for one second. I'm sorry. It's --

MASTER MATTIS: That is okay. Would you like to just take a few minute break?

MR. FRANK: No, I think I'm okay. I think I'm almost done. I think he just wants to join the proceedings.

MASTER MATTIS: Okay. My cat sometimes joins in, but he is a little easier to put down.

Mr. Peermohamed, what do you say about the submissions? And I notice you both cited the same case, the *ILI's Painting* that referred to the genuine compromise and then the policy reasons. The initial offer to settle was a dismissal without costs, but then in February there were a couple of monetary offers. They weren't formal offers, but the Court can also consider those. So what is your response to those submissions?

Submissions by Mr. Peermohamed (Costs)(Reply)

MR. PEERMOHAMED: So first of all, I disagree that there's been partial success. The Cineplex has been wholly successful in this matter. There has been no partial success.

With respect to prejudice, you even said in your decision there has been no prejudice to the parties. If my friend is going to say that, you know, submitting a brief and informing the Court about the law is an undue burden that the plaintiff had to respond to, I would submit that this entire lawsuit has been an undue burden to Cineplex to respond to. If you look at the materials submitted, the affidavit is quite lengthy, the briefs are quite lengthy. We had to respond to this. We did I think a very good job of responding to this -- to this action, and double costs should be awarded, especially when we warned both Mr. Frank and Mr. Nelson in front of their client that this case is going to be dismissed, this case has no merit. And we specifically asked, please tell us if your client has adverse costs insurance because we are going to be pursuing costs. And we did give an example of when we pursued costs against Ms. Biju (phonetic) in a trial on liability where Justice Brooker dismissed the entire case on liability and awarded double costs for the formal offer, and we recovered costs from Her Majesty the Queen.

So in this case, double costs should be awarded, and we can choose to recover against Ms. Westerveld or Her Majesty the Queen because they would be on the hook for their proportion of liability based on their -- based on their claim. That's how the Courts will apportion it.

So those are my submissions. We feel that double costs should be applied given adequate warning was given to both Mr. Frank and Mr. Nelson on the file in front of the plaintiff to make an informed decision.

MASTER MATTIS: Okay. Mr. Frank, my question to you -- I understand your submissions about the offer to discontinue without costs being something that doesn't really necessarily contain an element of compromise, but then what about the informal offers? Because I can take those into account too. The most recent one was $7,500 in February 2021. What are your submissions on that? You are muted, Mr. Frank.

Submissions by Mr. Frank (Costs)(Reply)

MR. FRANK: There we go. I can just answer your question in a moment. If I can just make one brief comment, though. My friend's comments about what he said in front of our client to myself and Mr. Nelson, I'm going to suggest that's entirely inappropriate here. There's nothing on there in front of you. There's nothing on there on the record, and if we are going to consider that, that's part of the issue of why costs -- the Courts should approach costs with caution here because, frankly, counsel for a large corporation shouldn't be trying to intimidate single individuals.

But in any event, my submission for especially the offer of $7,500, I mean, that really runs along the same submission as dismissed without costs in the fact that my friend would have been well-aware that Her Majesty the Queen did have a claim. I believe it's a claim of about 5 or $600, so that would have had to be paid. Costs just in -- there's about $1,000 to order an MRI, ordering medical records, pleadings. I think my friend and I have been on other files before, and I think we all know that a $7,500 offer is not an offer because it leaves the plaintiff with nothing and it leaves the plaintiff with -- well, it actually would probably leave the plaintiff with money to pay, which is why it's not a genuine compromise.

A genuine compromise has to be something where both parties are walking away with something, i.e. the plaintiff walks away with even a nominal sum, but a nominal sum to compensate her for injuries, and the defendant would walk away with not having to defend the action anymore and be able to proceed on with their business unhindered.

So in my submission there -- and that's in line with the authorities I think we have cited

and then the factors -- the offer was a reasonable, genuine compromise. I mean, that's also -- I'll just quote an earlier decision as well. I think that also quotes the decision from *Kent,* 2020 ABQB. It's just -- unfortunately, it's just not an offer that the plaintiff can consider because it's not a -- it's not a genuine compromise.

MASTER MATTIS: And then the other question I had for you, Mr. Frank, was just in your submissions, I think you identified commencement documents $1,000, but I think you and Mr. Peermohamed have the same tariff items. I don't think there is a dispute about that, but the tariff amount is $2,025 under column 2.

MR. FRANK: Okay. If I'm wrong about that, then of course -- of course I'm --

MASTER MATTIS: I just am looking at how the costs are so different.

So in this matter, under rule 10.29, the successful party is -- I guess I should just ask Mr. Peermohamed, you get the last word because you are the applicant. And then I will make my decision.

Submissions by Mr. Peermohamed (Costs)(Reply)

MR. PEERMOHAMED: Two things: One, the formal offer was for a discontinuance on a without-costs basis, which means that Cineplex was willing to walk away from all the costs that it had incurred up to today -- or up to the date of the formal offer. So if you look at the bill of costs, that would basically be one, two, three, four, five -- $7,025 that it was willing to walk away from. On top of that, if they're going to make an offer of $7,500, they're going to eat those costs and pay $7,500 to Ms. Westerveld. You can quantify that offer as basically $15,000 out of Cineplex's pocket.

Last thing I want to say is if double costs are not awarded in this case, then basically what's happening is you're awarding a plaintiff for failing in their -- in their lawsuit.

Ruling (Costs)

MASTER MATTIS: Okay. Well, with respect to costs, rule 10.29 says, subject to the Court's discretion, a successful party is entitled to costs against the unsuccessful party.

In this case, I do see that Cineplex has been wholly successful. I think, Mr. Frank, you are correct that I did not agree with their position on the law on that one point, but I did ask for

the additional submissions on that because it came up in oral argument. To me, it was an important issue that I did not know the answer to, so I needed to see if there was actually law out there that supported that position which, in my view, it didn't support it to the extent that I had understood it being argued in oral submissions, which may have just been also clarifying for me. So I don't think that that is something that I can fault the defendant for providing submissions on. They did file more extensive submissions which required a more significant response than was anticipated, but they are the successful party on the application, and so they are not seeking costs of those submissions, and nor would I award them costs if they had sought costs for an additional brief in these circumstances.

So I think that is an appropriate way to deal with that when it is a successful party, and I think Cineplex may be of that view as well because they did not seek costs for that item.

Where that leaves us, I think Cineplex is entitled to column 2 costs under the tariff and reasonable disbursements, which I don't think is disputed. I think there is just a little issue with what the tariff amounts might be, but I think Cineplex's bill of costs is in accordance with column 2 of the tariff.

Then the last issue is with respect to the formal offer and the other offers made. I am not sure that an offer to discontinue an action without costs in this circumstance would be considered a genuine offer along the lines of what the case law says, and by that I am just referring to *Express Lube and Car Wash v. Gill* in 2019. This Court said, in order to attract cost consequences, an offer must be genuine. A genuine offer must contain an element of compromise and realistically reflect the relative merits of the parties' positions.

Now, I understand in this case Cineplex's view is that it had a very strong position, and it made two subsequent offers that were informal offers, but as you both cited in *ILI's Painting,* I can take into account informal offers as well. I do see those offers as genuine offers and attempts to resolve the matter as the special application hearing was approaching.

I do think that it is appropriate to award double costs for the special application just on a different basis than perhaps Mr. Peermohamed was encouraging me. Rather than in respect to the formal offer, I am looking at the informal offers, and I do think that as the hearing approached and I guess the deadlines for the briefs, Cineplex did take an effort at trying to have this case resolved.

For all of those reasons, I will award costs to Cineplex pursuant to the tariff with double costs for the item 8(1) of the tariff.

I think for costs for today, because this is a costs hearing, that it is also was, again, a hearing

requested by me for the purpose of giving my decision, I think it is appropriate that the parties bear their own costs for today.

Are there any other issues? Mr. Peermohamed, I will ask you first as the applicant.

MR. PEERMOHAMED: Thank you, Ma'am. So I appreciate that. No issues. Just for the form of order, our office will be completing the draft form of order for Mr. Frank's endorsement. Can I just get the figure confirmed on the record as the amount that's in our bill, which is $12,381.48.

MASTER MATTIS: Okay. Mr. Frank, I am going to just ask you to look at the bill as well, and if you take any issue -- because we didn't really talk about disbursements, but the fees are $10,395, and I think they are the same items. There is item 1(1) for commencement documents, 3(1) for records, 3(2) for review of records, then 5(1) and 5(2) for preparation, and then two half days of questioning. But I think it is in line with what you have sought, and then 8(1) for the special, which I have allowed the double costs because of the offers made.

So that amounts to $10,395 for fees, and then the disbursements are the court filing fees, the court reporter and transcripts, and then some amounts for photocopying and court runner that look to be within a reasonable range to me.

So do you have any issues with -- I will just give you a moment, but I don't see any issues because I do think it is a good idea to confirm the amount on the record just so we don't have to come back. So we will just give Mr. Frank a moment.

MR. FRANK: The only -- the only issue I would take with it is the ordering of the transcripts, and the only reason I say that is because just I note when an application is made, only partial transcripts were provided. It was actually Ms. Westerveld who provided to the Court the full transcripts, so my submission we maybe take off the $829.15.

Other than that, everything I think is in accordance with your -- with your ruling and with schedule C.

MASTER MATTIS: Mr. Peermohamed, what do you say about the transcripts for the three questionings?

MR. PEERMOHAMED: Yes. So, Ma'am, when Master Robertson was sitting, he gave a presentation to the Canadian Bar Association Calgary Chapter, specifically with respect to applications, substantive applications, and said, even though

you've ordered the full questioning transcript, I don't want to see it. I want you to give me just what you're relying on. So when you cite the transcripts, we get that.

Now, of course, I can't order page 3 or page 7 or page 15. I don't know which page has the evidence that I need to be successful in the application. I have to order the whole transcript. If Mr. Frank had been successful here, I don't think I'd be successful in saying he should have only put page 1 or page 2 or page 3 of the transcript. We had to put the whole transcript. We had to get it. We had to figure out where the evidence was that we wanted to rely on and what we were going to use against Ms. Westerveld.

So I submit that the entire invoice is proper. I can't parse it out.

MASTER MATTIS: Okay. Well, I think in this case basically these costs -- I should have noted this as well -- they are for the action and the application. In summary judgment applications, it is if the applicant is successful, it usually finally disposes of an action, so they are costs of the action and the application. Whereas if they are unsuccessful, it is typically the costs of an application because the action continues, and then those kind of other costs are dealt with at the end of the day.

So having to order the transcripts I think is a cost of the action. Mr. Frank, I take your point that you both had to have them and you filed the full transcripts, but I also think typically a cross-examination transcript would be filed in its entirety. And, otherwise, if it is questioning for discovery transcripts, typically the parties just file the pages they are referencing and the other side has an opportunity if there are pages missing to do that.

All of that is a lengthy way of saying that I actually see the transcripts as being a cost of the action, so I think that is a proper disbursement for a successful party in an action. So I am going to fix the costs in accordance with the bill of costs at $12,381.48. That is inclusive of all fees, disbursements, and GST, and it is for the action and the application.

Thank you.

MR. PEERMOHAMED: Thank you, Ma'am. We'll prepare the form of order, and we will submit it to Mr. Frank's office for endorsement. And then we'll submit it to you for final signature, and then we'll file and serve it.

MASTER MATTIS: Okay. Actually, if you just submit it to QB filing, it will be uploaded and come to my attention that way, because they process the orders. So it actually is more difficult for me if you submit it directly to me than to QB filing, so if you can do that. Thank you.

MR. PEERMOHAMED: We will.

MASTER MATTIS: Okay. If there is nothing further, I will bid you both good afternoon.

MR. FRANK: No. Thank you.

MR. PEERMOHAMED: Thank you. Good afternoon, Ma'am.

MASTER MATTIS: Good afternoon.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Paul Mak, certify that this recording is the record made of the evidence in the proceedings, in the Court of Queen's Bench, held in courtroom 903, virtual courtroom 55, at Calgary, Alberta, on the 1st day of April, 2022, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Brandy Coyes, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in the transcript.

Brandy Coyes, Transcriber
Order Number: TDS-1004368
Dated: April 5, 2022