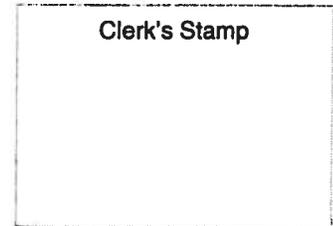


COURT FILE NUMBER 1301-14429
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF DIANA DAUNHEIMER & DEREK
(RESPONDENT) DAUNHEIMER
DEFENDANT ANGLE ENERGY
(APPLICANT) INCORPORATED



DOCUMENT **BRIEF OF ARGUMENT OF THE RESPONDENTS DIANA DAUNHEIMER & DEREK DAUNHEIMER**
APPLICATION OF ANGLE ENERGY INCORPORATED FOR SECURITY FOR COSTS TO BE HEARD ON APRIL 13, 2015

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The effect of a security-for-costs order on access to justice values is comparable to a court fee structure which requires a complainant to pay the registry \$100,000 to file a commencement document. This would convert the courthouse into a service provider for a very small segment of the community.

Amex Electrical Ltd. v. 726934 Alberta Ltd., 2014 ABQB 66 at para 44.

An order for security has another significant feature. It requires the plaintiff to post security for a debt which has not yet been determined to exist; the order may be made before there has been any determination that the plaintiff is liable for costs. In this respect, it is a form of execution before judgment.

Wall v. Horn Abbot Ltd., [1999] N.S.J. No. 124 at para 50.

PART I: INTRODUCTION

1. The Defendant Angle Energy Incorporated (“**Angle Energy**”) brings an Application seeking an order for security for costs of the action related to Questioning in the amount of \$33,000.00 against the Plaintiffs Diana Daunheimer and Derek Daunheimer (the “**Application**”). In addition to the amount sought, the Defendant also seeks leave to periodically return to court to obtain further security for costs.¹ It is unknown how much security for costs the Defendant will seek over the course of this action, though it is likely to be in the hundreds of thousands of dollars.

2. The Defendant’s Application must fail for the following reasons:

- a. **A security for costs order is not necessary:** The Defendant has come nowhere close to meeting its burden of establishing that it is likely that Daunheimers will be unable to pay a potential costs award should such an order be made at trial. On the contrary, the evidence demonstrates that given both the Daunheimers’ current assets and income, the risk of non-payment of a currently hypothetical costs award is very low.
- b. **A security for costs order is neither reasonable nor just:** A security for costs order would impose an unnecessary and substantial burden on the Daunheimers by taking a very substantial amount of money out of their control for some unknown amount of time in order to protect Bellatrix against the mere *risk* that the Daunheimers will not be able to pay a future cost award that is at present merely hypothetical. The Daunheimers will suffer substantially more immediate prejudice, hardship and unfairness if they are ordered to pay security for costs than Bellatrix would suffer if

¹ Application of Angle Energy Incorporated, dated December 19, 2014 (“**Bellatrix Application**”).

such an order was not made.

- c. **Security for costs would prevent the average Albertan from accessing the Courts:** The Daunheimers are in a better financial position than the average Albertan. If a security for costs order is justified against the Daunheimers in this lawsuit on these facts, then surely a security for costs is justified against the average Albertan whenever she seeks access to the courts. This cannot be a just result.

PART II: FACTS

The Parties

3. Derek and Diana Daunheimer (the “**Daunheimers**” or the “**Plaintiffs**”) are landowners who reside with their two children on an acreage near Didsbury, Alberta.² Mr. Daunheimer works as a drilling rig manager in the oil and gas industry, while Mrs. Daunheimer is a stay-at-home mother who also runs a small 10.5 acre farm consisting of a large garden, a small green house, several beehives and some chickens.³ Mrs. Daunheimer sells some eggs, honey, seeds and vegetables, while the rest are either gifted to local schools or used by the Daunheimers and their extended family.⁴

4. The Defendant Angle Energy was an oil and gas company operating in the area around Didsbury, Alberta. Between 2008 and 2010, Angle Energy drilled five oil wells directly adjacent to the Daunheimers’ property and within a few hundred metres of the Daunheimer family home.⁵ These oil wells continue to operate.

5. In December 2013, Bellatrix Exploration Ltd purchased all of the shares of Angle Energy and Angle Energy was combined with and amalgamated into Bellatrix Exploration Ltd. Bellatrix Exploration Ltd. is therefore Angle Energy’s legal successor. For all intents and purposes, Angle Energy and Bellatrix Exploration Ltd. are the same company. For purposes of this Brief, the Defendant will be referred to as the “**Defendant**” or by its present name, “**Bellatrix**”.⁶

² Affidavit of Diana Daunheimer sworn March 6, 2015 (“**Daunheimer Affidavit**”) at para 3 [Daunheimer Authorities (“**DA**”), Tab 9].

³ Daunheimer Affidavit at paras 9-10 [DA, Tab 9].

⁴ Daunheimer Affidavit at para 10 [DA, Tab 9].

⁵ Daunheimer Affidavit at paras 4-5 [DA, Tab 9]; Amended Statement of Claim at paras 3-7 [DA, Tab 8].

⁶ Daunheimer Affidavit at para 4 [DA, Tab 9].

6. The Defendant Bellatrix is a large, publicly-traded corporation with very substantial financial resources. Bellatrix was worth \$672.6 million as of February 20, 2015.⁷ Bellatrix's revenue for the first nine months of 2014 (January 1 - September 31) was \$453.3 million, and its net profit over this same period was \$108.3 million.⁸

The Action and its merits

7. The Daunheimers' claim relates to five oil wells drilled and operated by Bellatrix (then Angle Energy) within a few hundred metres of the Daunheimer family home. The Defendant's operations substantially interfered with the Daunheimers' use and enjoyment of their property, and made the Daunheimers and their animals sick. The lawsuit pleads nuisance, negligence, negligent misrepresentation, deceit and other related causes of action.⁹

8. The Daunheimers have a strong case on the merits. Their claim is supported by significant documentary evidence. Specifically:

- a. The Defendant repeatedly breached regulations governing the safe operation of oil wells in Alberta and was accordingly issued various "High Risk Enforcement Actions" and other non-compliance notices by the Alberta Energy Regulator for regulatory violations at the five wells that surround the Daunheimer property.¹⁰
- b. The Defendant continuously released extremely high volumes of dangerous and poisonous sour gas containing H₂S and other toxic chemicals directly next to the Daunheimer family home between late 2010 and June 2013.¹¹

⁷ Investor Information Regarding Bellatrix Exploration Ltd, dated February 20, 2015, attached as Exhibit "H" to the Daunheimer Affidavit [DA, Tab 9H]; Daunheimer Affidavit at para 20 [DA, Tab 9]

⁸ Bellatrix Exploration Ltd 2014 Third Quarter Report, attached as Exhibit "F" to the Daunheimer Affidavit at p 3 [DA, Tab 9F]; Daunheimer Affidavit at para 18 [DA, Tab 9].

⁹ Amended Statement of Claim [DA, Tab 8]; Daunheimer Affidavit at paras 5 & 23-26 [DA, Tab.].

¹⁰ Daunheimer Affidavit at paras 42-43 & 50-58 [DA, Tab 9]; High Risk Enforcement Action dated November 26, 2013, attached as Exhibit "O" to the Daunheimer Affidavit [DA, Tab 9O]; High Risk Enforcement Action Full Suspension of Activities dated November 7, 2012, attached as Exhibit "P" to the Daunheimer Affidavit [DA, Tab 9P]; High Risk Enforcement Action, dated March 12 2013, attached as Exhibit "Q" to the Daunheimer Affidavit [DA, Tab 9Q]; Inspection Detail Report dated October 21, 2013, attached as Exhibit "T" to the Daunheimer Affidavit [DA, Tab 9T].

¹¹ Daunheimer Affidavit at paras 27-33 [DA, Tab 9]; Well Log for Well 07-15, dated October 2010, attached as Exhibit "J" to the Daunheimer Affidavit [DA, Tab 9J]; Extended Gas Analysis for Well 07-15, dated January 8, 2013 attached as Exhibit "K" to the Daunheimer Affidavit [DA, Tab 9K]; Alberta Energy Regulator, Sour Gas publication, attached as Exhibit "M" to the Daunheimer Affidavit [DA, Tab 9M]; Chemical Profile of H₂S, Canadian Centre for Occupational Health, attached as Exhibit "L" to the Daunheimer Affidavit [DA, Tab 9L].

- c. The Defendant incinerated very high volumes of waste gases (including H₂S) and fracturing fluids next to the Daunheimer property, and repeatedly broke regulations regarding safe incineration when doing so. Alberta Energy Regulator issued a “High Risk Enforcement Action” regarding some of these violations.¹²
- d. The Defendant specifically and intentionally withheld information from the Daunheimers regarding the fact that it was releasing large quantities of poisonous sour gas directly next to the Daunheimer family home, and instead maintained that it was not venting any gas whatsoever. Alberta Energy Regulator issued a “High Risk Enforcement Action” for misleading the Daunheimers.¹³
- e. The Defendant illegally stored toxic drilling waste containing toxic chemicals in improperly constructed and permeable earthen sump pits located directly adjacent to the Daunheimer property. Alberta Energy Regulator issued a “High Risk Enforcement Action - Full Suspension of Operations” for this violation.¹⁴

9. As a result of the above, the Defendant has substantially interfered with the use and enjoyment of the Daunheimer property, and caused serious health harms to the Daunheimers and their animals. In particular, as a result of the release of toxic sour gas and other contaminants, and improper incineration of waste gases, the Daunheimers suffered headaches, nausea, dizziness, severe and long-standing sinus infections, and general respiratory illness and irritation.¹⁵ Similarly, the Daunheimers’ livestock, including goats, horses, chickens and pigs, developed chronic respiratory illnesses, and in the fall of 2010, goats and pigs suffered a very high rate of stillbirths (50%).¹⁶

10. Until recently, the Daunheimers were self-represented litigants, and accordingly the statement of claim was drafted by Mrs. Daunheimer. Klippensteins Barristers & Solicitors has

¹² Daunheimer Affidavit at paras 53-58 [DA, Tab 9]; High-Risk Enforcement Action dated March 12 2013, attached as Exhibit “Q” to the Daunheimer Affidavit [DA, Tab 9Q].

¹³ Daunheimer Affidavit at paras 40-49 [DA, Tab 9]; Notice of High-Risk Enforcement Action dated November 26, 2013, attached as Exhibit “O” to the Daunheimer Affidavit [DA, Tab 9O]; Angle email dated January 15, 2013, attached as Exhibit “N” to the Daunheimer Affidavit [DA, Tab 9N].

¹⁴ Daunheimer Affidavit at paras 51-52 [DA, Tab 9]; High-Risk Enforcement Action Full Suspension of Operations dated November 7, 2013, attached as Exhibit “P” to the Daunheimer Affidavit [DA, Tab 9P].

¹⁵ Daunheimer Affidavit at paras 35-39 [DA, Tab 9].

¹⁶ Daunheimer Affidavit at para 34 [DA, Tab 9]; Transcript of Questioning of Diana Lynne Daunheimer held March 6, 2015 (“Daunheimer Transcript”) at p 115, lines 2-8.

since been retained to act on behalf of the Daunheimers in this Action. In accordance with the order of Master Hanebury, Klippensteins, acting on behalf of the Daunheimers, intends to seek leave add the Daunheimer children to the statement of claim and to make amendments to the statement of claim to clarify the legal claims being pursued.

The Daunheimers' assets and income

11. The Daunheimers have net assets in Alberta worth approximately \$760,000.00 and a yearly income of approximately \$280,000.00.¹⁷

The Daunheimers' income

12. Mr. Daunheimer is a rig manager in the oil and gas industry in Alberta with a current income of approximately \$280,000.00 a year.¹⁸ Over the past three years, Mr. Daunheimer's income was \$284,501.79 (2014), \$275,529.00 (2013) and \$176,403.00 (2012).¹⁹

13. Despite the recent downturn in Alberta's economy, Mr. Daunheimer's job is stable, and the Daunheimers have no reason to think that their income will significantly decrease over the coming few years. In particular, Mr. Daunheimer's supervisors have informed him that his company has recently entered a two year guaranteed contract that provides financial stability for the Daunheimers during the current economic downturn.²⁰

14. Mrs. Daunheimer is a stay-at-home mother who also runs a small farm. While the farm provides a great many benefits to the Daunheimers, it does not currently turn a profit, and does not provide net income to their family. The highest Mrs. Daunheimer's income has been over the past five years is \$1,985.00, almost none of which came from farm-related income.²¹

The Daunheimers' Assets

15. The Daunheimers' assets (which total close to \$760,000.00) include the following:

¹⁷ Daunheimer Affidavit at paras 9-15 [DA, Tab 9].

¹⁸ Daunheimer Affidavit at para 9 [DA, Tab 9].

¹⁹ Daunheimer Affidavit at para 9 [DA, Tab 9]; Canadian Revenue Agency Five-Year Comparative Review for Derek Daunheimer attached as Exhibit "B" to the Daunheimer Affidavit [DA, Tab 9B]; Answers to Undertakings and Questions Taken Under Advisement dated March 17, 2015 ("Answers to Undertakings") at p 2 [DA, Tab 10].

²⁰ Daunheimer Affidavit at para 11 [DA, Tab 9]; Daunheimer Transcript at p 77 lines 8-17 & p 80 lines 2-4 & 12.

²¹ Daunheimer Affidavit at para 10 [DA, Tab 9]; Canadian Revenue Agency Five-Year Comparative Review for Diana Daunheimer attached as Exhibit "C" to the Daunheimer Affidavit [DA, Tab 9C].

- a. a fully-owned acreage consisting of 10.5 acres and a home located near Didsbury, Alberta, bought in 2002 for \$234,500.00, with a current worth conservatively estimated at \$400,000.00;²²
- b. savings and investments totaling \$263,348.25;²³
- c. vehicles, including a 2011 Ford F350, a 2006 Nissan Pathfinder and a 2001 Chevy Silverado, with a total current estimated value of \$75,000.00 for all vehicles;²⁴ and
- d. assets related to the farm including livestock, equipment and tools worth approximately \$21,500.00.²⁵

The Daunheimers have no debts or liabilities

16. The Daunheimers do not have any significant debts or liabilities.²⁶ Their mortgage is entirely paid off,²⁷ and the only remaining vehicle payments for their 2011 Ford F350 truck will end in September of this year.

The Daunheimers have paid all previous costs awards in full

17. There are no outstanding cost award orders against the Daunheimers in this or any other Action. Where costs have been awarded in this Action (for example, Master Hanebury's order of December 9, 2014), the Daunheimers have paid the cost award promptly and in full.²⁸

PART III: ISSUES RAISED BY THIS APPLICATION

18. Bellatrix's Application raises only one issue: is it just and reasonable to order the Daunheimer family to post security for costs?²⁹

²² Daunheimer Affidavit at para 12 [DA, Tab 9]; Land Title Certificate, attached as Exhibit "D" to the Daunheimer Affidavit [DA, Tab 9D].

²³ Daunheimer Affidavit at para 13 [DA, Tab 9]; Bank Account Statements, attached as Exhibit "E" to the Daunheimer Affidavit [DA, Tab 9E].

²⁴ Daunheimer Affidavit at para 14 [DA, Tab 9]; Answers to Undertakings at pp 2 & 4 [DA, Tab 10].

²⁵ Daunheimer Affidavit at para 15 [DA, Tab 9].

²⁶ Daunheimer Affidavit at para 16 [DA, Tab 9].

²⁷ Daunheimer Affidavit at para 12 [DA, Tab 9]; Daunheimer Transcript at p 59, line 1-16; Answers to Undertakings p 2 [DA, Tab 10].

²⁸ Daunheimer Affidavit at para 17.

²⁹ *Alberta Rules of Court*, r. 4.22; *Amex Electrical Ltd. v. 726934 Alberta Ltd.* 2014 ABQB 66 ("*Amex Electrical*") at paras 5 & 56 [DA, Tab 2].

PART IV: LAW AND ARGUMENT

Test on a security for costs application

19. Bellatrix seeks an order requiring the Daunheimers to post security for costs in the amount \$33,000.00 pursuant to r. 4.22,³⁰ which reads:

Considerations for security for costs order

4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it **just and reasonable** to do so, taking into account all of the following:

- (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
- (b) the ability of the respondent to the application to pay the costs award;
- (c) the merits of the action in which the application is filed;
- (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
- (e) any other matter the Court considers appropriate. [Emphasis added].³¹

20. In addition to the amount sought in this Application (which covers only the costs of the Action associated with Questioning), Bellatrix also seeks leave to periodically return to court to obtain further security for costs.³² It is unknown how much security for costs Bellatrix will seek over the course of this action, though it is likely to be in the hundreds of thousands of dollars. Bellatrix further seeks an order directing that if security is not paid in the time provided, that this Action be dismissed without further notice.

21. A review of the case law reveals three overall considerations that should guide a security for costs application.

A security for costs order is the exception to the norm

22. First, a security for cost order against a plaintiff is an exception to the norm. In the vast majority of cases in Alberta (especially involving individuals rather than corporations), there is no security for costs order, and instead, each party bears their own legal costs until the conclusion of the action. In other words, cases where security for costs is appropriate are rare. Courts should be careful not to interpret r. 4.22 so that security for costs orders become routine

³⁰ Bellatrix Application at para 1.

³¹ *Alberta Rules of Court*, r 4.22.

³² Bellatrix Application at para 1.

and issued as a matter of course. An interpretation of r. 4.22 that would result in the ordering of costs in the majority of lawsuits brought by ordinary Albertan families would mark a radical departure from past law, and would greatly restrict access to justice.

An order for security for costs is a substantial burden on the party asked to pay

23. Second, a security for costs order is a substantial and onerous imposition on the plaintiff against whom it is made, especially when that plaintiff is an ordinary family rather than a corporation. This Court has described that heavy burden in the following terms: a “security-for-costs order compels a person to use some of his resources in a manner which he would not of his own free choice select. He must put them in a place where they are no longer under his control for an unknown period of time.”³³ Further, and as noted by the Nova Scotia Court of Appeal, a security for costs order “requires the plaintiff to post security for a debt which has not yet been determined to exist. . . . In this respect, it is a form of execution before judgment.”³⁴

24. In this case, the security for costs order sought by Bellatrix would require the Daunheimer family to pay tens of thousands of dollars into court at a preliminary and interlocutory phase simply for the right to continue their lawsuit. Moreover, if successful, this security for costs application will no doubt be followed by future security for costs applications requesting further tens if not hundreds of thousands of dollars in pre-trial security. While the action is ongoing, a security for costs order would take substantial financial resources out of the control of the Daunheimers for some unknown amount of time (likely years), and prevent the Daunheimers from using these funds as they see fit (for example, by investing, by engaging in business ventures, by planning for retirement etc). This is no small imposition. Given the substantial burden a security for costs order places on an individual plaintiff, the court’s power to order security for costs should be exercised judiciously, only in circumstances where it is actually required, and only when the order can be said to be “reasonable and just” in the circumstances.

Security for costs is discretionary

25. Third, the test is discretionary. Security should not be granted automatically; rather the

³³ *Amex Electrical* at para 39 [DA, Tab 2]

³⁴ *Wall v. Horn Abbot Ltd.* [1999] N.S.J. No. 124 (CA) (“*Wall*”) at para 50 [DA, Tab 6]

court's discretion must be exercised in accordance with what is "just and reasonable" in the individual circumstances of the case. As noted by Justice Côté of the Alberta Court of Appeal in the case of *Crothers v Simpson Sears Ltd*:

F. General "discretion" of the court

[24] Courts should not automatically order security for costs. . . . Since the 1700's the courts have given or withheld security because of the justice of the individual case, and the modern Rule was worded to reverse a decision casting doubt on that principle: *ibid*. The word "may" . . . is permissive not mandatory.... Many authorities hold that security is "discretionary", i.e. that the court looks at the justice of the individual circumstances. [Emphasis added].³⁵

Rule 4.22 Factors: An order for security for costs unnecessary, unreasonable and inappropriate in the circumstances

The Applicant bears the onus of establishing an order for security for costs is just and reasonable

26. The applicant (in this case Bellatrix) bears the onus of establishing, through evidence, that the plaintiff is not likely to be able to pay a cost award and that a security for costs order is just and reasonable in the circumstances.³⁶ As noted by this Honourable Court, the "onus is on the Applicant to make out a basis for security for costs; *otherwise there would be an application in almost every case* [emphasis added]".³⁷ Bellatrix has come nowhere close to meeting this burden. On the contrary, the bulk of the evidence clearly demonstrates that the Daunheimers' family finances are good, and there is, in fact, no real risk that the Daunheimers would be unable to pay a costs award should such an order be made against them at trial.

27. According to Chief Justice Wittman, on an application for security for costs, the Court is "required to take into account the five factors itemized in Rule 4.22 to determine whether security for payment of a costs award is just and reasonable".³⁸ Accordingly, each factor will be assessed before turning to the more general consideration of what is "just and reasonable".

³⁵ *Crothers v. Simpson Sears Ltd.*, 1988 ABCA 155 ("*Crothers*") at para 24, [DA, Tab 4] quoted with approval in *590863 Alberta Ltd. v. Deloitte and Touche Inc.*, 2012 ABQB 98 ("*590863 Alberta*") at para 26 [DA, Tab 1].

³⁶ *Xpress Lube & Car Wash Ltd. v. Gill*, 2011 ABQB 457 ("*Xpress Lube*") at paras 10 & 18 [DA, Tab 7]; *Amex Electrical* at para 56 [DA, Tab 2].

³⁷ *Xpress Lube* at para 18 [DA, Tab 7].

³⁸ *Attila Dogan Construction v. AMEC Americas Limited*, 2011 ABQB 175 ("*Attila Dogan*") at paras 9-10 [DA, Tab 3].

Factor 4.22 (a): whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta

28. Bellatrix has not led any evidence which suggests that it is likely that the Defendant will not be able to enforce a costs order against assets in Alberta. On the contrary, the evidence clearly shows that it is actually very likely that the applicant would be able to enforce a costs order against the Daunheimer's assets. As noted above in paragraph 15, the Daunheimers' assets in Alberta total close to \$760,000.00 and include an acreage with a current worth conservatively estimated at \$400,000.00;³⁹ savings and investments totaling \$263,348.25;⁴⁰ vehicles with a total current estimated value of \$75,000.00;⁴¹ and farm related assets worth approximately \$21,500.00.⁴² The Daunheimers' assets alone are more than sufficient to cover a costs award even if the full amount of \$250,000.00 as estimated by Bellatrix were to be ordered against them.

29. Bellatrix takes issue with how the Daunheimers arrived at the values for their assets, arguing that the value of the Daunheimers' assets have not been "sufficiently proven".⁴³ It is to be remembered that Bellatrix bears the evidentiary onus of establishing that it is unlikely that the Daunheimers can pay a costs award, not the other way around. In fact, a Plaintiff need not submit any evidence in response to an application for security for costs at all.⁴⁴ In this case, the Daunheimers have been extremely forthcoming and transparent regarding their personal finances by disclosing their income, a list of assets, and their own conservative estimates regarding the value of those assets. Notably, Bellatrix does not challenge the estimated value of the assets, but rather simply complains about the process by which the Daunheimers arrived at their estimates. If Bellatrix was actually concerned that the assets were being over-valued, it could have valued the assets itself; it has not done so.

30. In reality, the estimates provided by the Daunheimers are both reasonable and conservative. For example, the Daunheimers bought their house and 10.5 acre property near

³⁹ Daunheimer Affidavit at para 12 [DA, Tab 9].

⁴⁰ Daunheimer Affidavit at para 13 [DA, Tab 9]; Bank Account Statements, attached as Exhibit E to the Daunheimer Affidavit [DA, Tab 9E].

⁴¹ Daunheimer Affidavit at para 14 [DA, Tab 9].

⁴² Daunheimer Affidavit at para 15 [DA, Tab 9].

⁴³ Brief for Security for Costs Application by Angle Energy Incorporated in Masters Chambers April 13, 2015 ("Bellatrix Brief") at para 5.

⁴⁴ Xpress Lube at para 10 [DA, Tab 7].

Didsbury in 2002 for \$234,500.00.⁴⁵ In the intervening 13 years, Alberta's housing market has gone through a long period of sustained growth, with regular and large year-over-year housing price increases. If anything, the Daunheimers' estimate of \$400,000.00 is very likely too low.

31. Bellatrix also states incorrectly that there is "an unexplained mortgage" on the Daunheimer property. This is a misrepresentation of the facts. In fact, there is no mortgage on Daunheimer property; as Mrs. Daunheimer deposed in her affidavit and maintained in questioning, the mortgage was paid off in full several years ago.⁴⁶ However, despite the fact that the Daunheimers paid off their mortgage in full in 2007, the Lands Title Certificate still lists the original 2002 mortgage as an encumbrance on the property. This is because the Daunheimers did not take the formal step of filing the Discharge of Mortgage form with the Lands Title Office when the mortgage was paid off. After questioning, Mrs. Daunheimer followed up with their mortgage company and confirmed that the mortgage was paid off in full in August 2007. The Daunheimers are now taking steps to file the form with the Lands Title Office.⁴⁷

Factor 4.22 (b): the ability of the respondent to the application to pay the costs award

32. Similarly, the Defendant cannot point to any evidence which suggests that the Daunheimers would not have the ability to pay a hypothetical future costs award through sources other than assets. In fact, even setting their assets aside, the Daunheimers clearly have the ability to pay the costs award based on their continuing income. As noted above, the Daunheimers have an annual family income of approximately \$280,000.00. Derek Daunheimer works in the oil and gas industry as a drilling rig manager.⁴⁸ In 2014, his annual salary was \$284,501.79.⁴⁹ On the basis of the Daunheimers' annual income alone, there is little risk that the Daunheimers would be unable to pay a potential costs award.

33. In its brief, Bellatrix appears to be confused regarding factor 4.22(b). Bellatrix argues that because the Daunheimers have not "adduced any evidence to suggest that [they] will be

⁴⁵ Daunheimer Affidavit at para 12 [DA, Tab 9]; Land Title Certificate, attached as Exhibit D to the Daunheimer Affidavit [DA, Tab 9D].

⁴⁶ Daunheimer Affidavit at para 12 [DA, Tab 9]; Daunheimer Transcript page 59, lines 1-16 and page 61, lines 15-23.

⁴⁷ Answers to Undertakings at p 2 [DA, Tab 10].

⁴⁸ Daunheimer Affidavit at para 9 [DA, Tab 9].

⁴⁹ Answers to Undertakings at p 2 [DA, Tab 10].

unable to pay a costs award”, that somehow this is a factor that *supports* an order for security for costs.⁵⁰ In fact, the opposite is true – the fact that a Plaintiff *can* show that she will likely have the ability to pay (in this case on the basis of future expected income) is a factor that provides grounds for *refusing* an order for security for costs, not granting one.⁵¹

34. Moreover, Bellatrix relies on the case of *Attila Dogan* for a proposition that it does not stand for. In its brief, Bellatrix states that *Attila Dogan*, and in particular paragraphs 12-13, stands for the proposition that “a party who fails to bring evidence of an inability to pay a costs award – and in fact demonstrates a limited ability to pay—risks having the security for costs application go against them”.⁵² In fact, *Attila Dogan* says no such thing. On the contrary, that case dealt with situation where an out of jurisdiction corporate plaintiff failed to forward any financial information whatsoever – a very different context than the present case. In that context, Court stated at paras 12-13:

AD has elected not to provide any evidence with regard to its ability to pay costs. . . . There is no evidence with respect to the financial condition of AD at all. It seems to me that, where a plaintiff advances a claim of this magnitude, and does not dispute that it has no assets in this jurisdiction, that plaintiff risks having this factor weigh against it if it declines to bring any evidence with regard to its ability to satisfy an award of costs.⁵³

35. Moreover, it is important to note that the Daunheimers are not arguing that security for costs should not be awarded on the basis of impecuniosity (generally considered under factor 4.22(d)). On the contrary, the Daunheimers are arguing that they have the ability to pay a costs award should one be ordered against them at trial, and because of this ability, an order for security for costs is unnecessary, unreasonable and inappropriate in the circumstances.

Bellatrix’s argument regarding Factors 4.22 (a) & (b)

36. To counter significant evidence demonstrating that the Daunheimers do, in fact, have the ability to pay a potential costs award through both assets and income, Bellatrix points to two further factors, neither of which come close to meeting the Defendant’s onus of proving that a security for costs order is required.

⁵⁰ Bellatrix Brief at para 53.

⁵¹ *Xpress Lube* at para 9 [DA, Tab 7].

⁵² Bellatrix Brief at para 53.

⁵³ *Attila Dogan* at paras 12-13 [DA, Tab 3].

37. First, Bellatrix speculates that because of the current general economic climate in Alberta, there is a hypothetical risk that the Daunheimers' income might in future significantly decrease. As Bellatrix argues in its brief "even the most experienced oil and gas pundits would say that they are super nervous about this economy and it could be brutal."⁵⁴ Bellatrix can point to no evidence that suggests that there is a specific risk that Daunheimers income will be significantly reduced in the coming years – on the contrary, the Daunheimers have produced specific evidence that Mr. Daunheimer's employment and income over the next couple of years is secure.⁵⁵ Instead, Bellatrix relies on a general "in-the-air" argument that the Daunheimers should be ordered to pay security for costs simply because "experienced oil and gas pundits" are "super nervous about this economy".

38. This is a dangerous argument. If the Daunheimers are ordered to pay security for costs solely on the basis of fears regarding general economic conditions in Alberta, then there is nothing to stop this logic from being used to award security for costs in all cases against all Albertans (and indeed all Alberta companies) simply because of the general state of Alberta's economy. This cannot be a "reasonable and just" result.

39. Next, Bellatrix says that because Mrs. Daunheimer runs a small farm (consisting of vegetable gardens, chickens and bees), it would not be able to enforce a potential costs award against either the acreage or the farm equipment owing to the exceptions to enforcement regarding farm property contained within s. 88 (f) and (i) of the *Civil Enforcement Act*.⁵⁶

40. This argument also falls far short of establishing a proper basis for a security for costs order. First, the acreage is only one of the Daunheimers' assets, and seizing land is only one of a myriad of different ways open to Bellatrix to enforce a hypothetical costs award. Notably, the Daunheimers have non-farm related assets totaling almost \$340,000.00. Moreover, in addition to seizing assets, the Defendant could garnish the Daunheimers' other sources of income, including wages. As noted by Justice Côte of the Court of Appeal defendants in Alberta have substantial powers to enforce costs awards against Alberta-based plaintiffs,⁵⁷ all of which Bellatrix would no

⁵⁴ Bellatrix Brief at para 42.

⁵⁵ Daunheimer Affidavit at para 11 [DA, Tab 9]; Daunheimer Transcript at p 77 lines 8-17 & p 80 lines 2-4 & 12.

⁵⁶ Bellatrix Brief at paras 37-39; *Civil Enforcement Act*, s. 88.

⁵⁷ *Crothers* at para 7 [DA, Tab 4]; *Civil Enforcement Act*; *Alberta Rules of Court*, r. 9.1-9.39.

doubt bring to bear against the Daunheimers in the unlikely event that both costs were awarded against them and the Daunheimers did not pay voluntarily.

41. Second, according to the definition of “exigible assets” set out by this Court and relied upon by the defendant, exigible assets are assets that are “real and readily available or convertible to cash so he can pay costs if ordered to do so by the court”.⁵⁸ Based on the Defendant’s own definition of exigible, all of the Daunheimers’ assets are exigible, including all of their farm assets, as all of these assets can be liquidated either through sale or by use as collateral to a loan.

42. Third, to date the Daunheimers have been responsible participants in the court system, including for example, by paying all costs orders issued against them promptly and in full. The Daunheimers fully intend to continue to participate responsibly in this Action for the remainder of the legal process. If, in the end, the Daunheimers lose at trial, and a costs award happens to be made against them, the Daunheimers fully intend to voluntarily meet their legal obligations by paying that costs award without the need for the Defendant to resort to enforcement proceedings. If this requires liquidating some of their assets, or raising the necessary funds by taking out a loan or placing a mortgage on their property, the Daunheimers will do so at that time.

43. Fourth, there is considerable uncertainty whether the exceptions contained within s. 88 (f), (g) and (i) of the *Civil Enforcement Act*⁵⁹ would actually serve to protect the Daunheimers’ land, home and farm equipment in any event. For the exemption contained within s. 88(f) to apply, the Daunheimers would be required to show that their “primary occupation is farming” (which, on the facts, might be possible for Mrs. Daunheimer, but very likely is not for Mr. Daunheimer). Moreover, while s. 88(f) protects “up to 160 acres” of farmland, it does not appear to protect the debtor’s residence. Instead, the debtor’s principal residence is partially exempted under s. 88(g), but only to the “value prescribed in the regulations”, which is currently a mere \$40,000.00.⁶⁰ Under s. 88 (i), farming equipment is protected if the debtor’s primary occupation is farming, but only for a period of 12 months. There is little doubt that if it came to enforcement proceedings against the Daunheimers, and the Daunheimers’ only assets were farm related (which

⁵⁸ Bellatrix Brief at para 34; *Jedynak v Wheatland (County)*, 2007 ABQB 384 at para 21 [Bellatrix Authorities, Tab 7].

⁵⁹ *Civil Enforcement Act*, s. 88.

⁶⁰ *Civil Enforcement Regulation*, Alta Reg 276/1995, s 37(1)(e).

is extremely unlikely), Bellatrix would use these arguments and others to vigorously argue that the Daunheimers' home and land are not protected by these or any other exemptions.

Factor 4.22(c): merits of the action

44. The Defendant Bellatrix bears the burden of establishing it has a “reasonably meritorious defence”.⁶¹ The Defendant has failed to do so. In particular, the Defendant has specifically failed to forward any evidence whatsoever regarding the merits of their claim. Instead, Kelly Nichol, a vice-president of Bellatrix, baldly states in his affidavit (with no reference to evidence whatsoever), “I have read the pleadings filed in this Action and I believe that Angle has a good defence on the merits”.⁶² Similarly, in its Brief, Bellatrix simply relies on the boilerplate denials contained in its Statement of Defence.⁶³

45. In contrast to the complete lack of evidence forwarded by Bellatrix, the Daunheimers, through a detailed affidavit (on which Mrs. Daunheimer was questioned for four hours) and voluminous documentary evidence, can establish that they have a very strong *prima facie* claim on the merits. For this reason alone, the Defendant’s application should be dismissed.

46. The Defendant acknowledges that its operations at the five wells adjacent to the Daunheimers were “not perfect”.⁶⁴ This is somewhat of an understatement. The detailed evidence forwarded by the Plaintiffs establishes the following:

- a. Bellatrix (then Angle) repeatedly breached the regulations governing the safe operation of oil wells in Alberta and was accordingly issued various high risk and other non-compliance notices by the Alberta Energy Regulator for violations at the five wells that surround the Daunheimer property.⁶⁵
- b. The Defendant continuously released extremely high volumes of dangerous and

⁶¹ *Attila Dogan* at para 17 [DA, Tab 3].

⁶² Affidavit of Kelly Nichol, sworn December 19, 2014 at para 9.

⁶³ Bellatrix Brief at paras 20 & 48.

⁶⁴ Bellatrix Brief at para 48.

⁶⁵ Daunheimer Affidavit at paras 41-43 & 50-58 [DA, Tab 9]; Notice of High Risk Enforcement Action dated November 26, 2013, attached as Exhibit “O” to the Daunheimer Affidavit [DA, Tab 9O]; High Risk Enforcement Action Full Suspension of Activities dated November 7, 2012, attached as Exhibit “P” to the Daunheimer Affidavit [DA, Tab 9P]; High Risk Enforcement Action, dated March 12 2013, attached as Exhibit “Q” to the Daunheimer Affidavit [DA, Tab 9Q]; Inspection Detail Report dated October 21, 2013, attached as Exhibit “T” to the Daunheimer Affidavit [DA, Tab 9T].

poisonous sour gas containing H₂S and other toxic chemicals directly into the atmosphere and directly next to the Daunheimer family home between late 2010 and June 2013, including at Angle well 100/05-15-031-02W5/00 (referred to in the records interchangeably as 05-15, 07-15 and 08-15 despite being the same well; this well will be referred to in this brief as “Well 07-15”). Well 07-15 is located 377m from the Daunheimer family home, and 25m from the field where the Daunheimers’ animals graze.⁶⁶ According to the Defendant’s well log for Well 07-15, the Defendant vented 2,930,300L of sour gas in October 2010 alone.⁶⁷ According to an Extended Gas Analysis completed at Well 07-15, the sour gas vented at Well 07-15 had an H₂S concentration of 300 parts per million (“ppm”).⁶⁸ As noted below, an H₂S concentration of 0.1 ppm is enough to cause health problems.⁶⁹

- c. The Defendant incinerated very large quantities of sour gas and other waste gases, and in so doing, repeatedly broke regulations regarding the safe incineration of waste gases and fracturing fluids. In particular, according to the Alberta Energy Regulator, no flame is visible from an incinerator that is operating properly. On several instances, the Defendant’s improperly operating incinerators roared like jet engines and sent flames several metres into the air. In March 2013, the Defendant was issued with a “High Risk Enforcement Action” for operating incinerators with an exposed flame.
- d. The Defendant specifically and intentionally withheld information from the Daunheimers regarding the fact that it was releasing large quantities of poisonous sour gas directly next to the Daunheimer family home. The Defendant was issued a “High-Risk Enforcement Action” for this misrepresentation.⁷⁰
- e. When the Daunheimers made repeated and specific complaints about a “rotten egg” or “propane-like” smell, they were repeatedly told by the Defendant that the

⁶⁶ Daunheimer Affidavit at paras 27-33 [DA, Tab 9].

⁶⁷ Well Log for Well 07-15, dated October 2010, attached as Exhibit “J” to the Daunheimer Affidavit [DA, Tab 9J].

⁶⁸ Extended Gas Analysis for Well 07-15, dated January 8, 2013 attached as Exhibit “K” to the Daunheimer Affidavit [DA, Tab 9K].

⁶⁹ Chemical Profile of H₂S, Canadian Centre for Occupational Health, attached as Exhibit “L” to the Daunheimer Affidavit at p 10 [DA, Tab 9L].

⁷⁰ Daunheimer Affidavit at paras 40-49 [DA, Tab 9]; Notice of High Risk Enforcement Action dated November 26, 2013, attached as Exhibit “O” to the Daunheimer Affidavit [DA, Tab 9O].

Defendant's operations were safe, and that the odours were not coming from Defendant's operations.⁷¹ The Defendant's attitude is summed up by an internal email written by Dave Johnston, the Defendant's main contact with the Daunheimers, in which he wrote regarding the Daunheimers "I will continue to ignore all requests for information".⁷²

- f. The Defendant illegally stored toxic drilling waste in improperly constructed and permeable earthen sump pits located adjacent to the Daunheimer property.⁷³ The Alberta Energy Regulator issued a "High-Risk Enforcement Action" against the Defendant in which it noted:

The sumps have been constructed above ground level with material built up for containment. The area is known to have a high water table The top half of the sumps shows obvious signs of hydraulic conductivity. The walls are cracking apart considerably. The walls have weathered; material has lots of sand, large rocks and is very crumbly in nature. The containment does not appear to be impermeable.

Inspection of the furthest east sump showed staining on top of the cement and a bathtub ring around the earthen containment walls. The west sump material was picked up and smells heavily of invert/hydrocarbon based mud. Material from each sump smells heavily of hydrocarbon based drilling fluids. The sumps are not constructed with a liner.

- g. Between late 2010 and 2013, both Diana and Derek Daunheimer⁷⁴ suffered headaches, nausea, dizziness, severe and long-standing sinus infections, and general respiratory illness and irritation.⁷⁵ Similarly, the Daunheimers' livestock became sick, and suffered high rates of stillbirths.⁷⁶
- h. The symptoms suffered by the Daunheimers and their livestock are entirely consistent with the expected health effects of exposure to sour gas. Sour gas is a poisonous and dangerous toxin. The Alberta Energy Regulator defines sour gas as "natural gas that

⁷¹ Daunheimer Affidavit at paras 45-49 [DA, Tab 9].

⁷² Angle email dated January 15, 2013, attached as Exhibit "N" to the Daunheimer Affidavit [DA, Tab 9N].

⁷³ Daunheimer Affidavit at paras 51-52 [DA, Tab 9]; High-Risk Enforcement Action Full Suspension of Operations dated November 7, 2013, attached as Exhibit "P" to the Daunheimer Affidavit [DA, Tab 9P].

⁷⁴ The Defendant states in its Brief at para 27(j) that the Daunheimers are not claiming for health impacts felt by Derek Daunheimer. This is not correct. See, for example, Amended Statement of Claim at para 9 [DA, Tab 8], and the Daunheimer Affidavit at para 35-38 [DA, Tab 9]. Mrs. Daunheimer did acknowledge during questioning that, because Derek Daunheimer worked in the oil and gas industry, it was possible that health impacts suffered by Mr. Daunheimer might have been caused at work. This is not, however, tantamount to abandoning the claim against the Defendant. Far from it. Daunheimer Transcript at page 120 lines 1-15.

⁷⁵ Daunheimer Affidavit at para 35-39 [DA, Tab 9].

⁷⁶ Daunheimer Affidavit at para 34 [DA, Tab 9]; Daunheimer Transcript at p 115, lines 2-8.

contains measurable amounts of hydrogen sulphide (H₂S). It is a colourless, flammable gas that smells like rotten eggs and is **poisonous to humans and animals**" [emphasis added].⁷⁷

- i. According to the Canadian Centre for Occupational Health, "Hydrogen sulfide (H₂S) is a **very toxic gas . . . It poses a very serious inhalation hazard**" [emphasis added].⁷⁸ The Canadian Centre for Occupational Health further notes:

Effects at various exposure levels are believed to be as follows: . . . 1-5 ppm - moderately offensive odour, possibly with nausea, or headaches with prolonged exposure; 20-50 ppm - nose, throat and lung irritation, digestive upset and loss of appetite, sense of smell starts to become "fatigued", odour cannot be relied upon as a warning of exposure; 100-200 ppm - severe nose, throat and lung irritation, ability to smell odour completely disappears; 250-500 ppm - potentially fatal buildup of fluid in the lungs (pulmonary edema) in the absence of central nervous system effects (headache, nausea, dizziness), especially if exposure is prolonged; 500 ppm - severe lung irritation, excitement, headache, dizziness, staggering, sudden collapse ("knockdown"), unconsciousness and death within 48 hours, loss of memory for period of exposure; 500 -1000ppm - respiratory paralysis, irregular heart-beat, collapse, and death.⁷⁹

- j. According to Emergency Response Planning Guidelines, exposure limits for one hour are as follows: above 0.1ppm H₂S, individuals may start to experience adverse health effects that are more than "mild and transient"; above 30ppm H₂S, individuals may start to experience or develop irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action"; and above 100ppm H₂S, individuals may "experience or develop life-threatening health effects".⁸⁰
- k. The Daunheimers property is located in a depression. H₂S is heavier than air, and, as a result, accumulates in low-lying areas.⁸¹

⁷⁷ Alberta Energy Regulator, Sour Gas publication, attached as Exhibit "M" to the Daunheimer Affidavit [DA, Tab 9M].

⁷⁸ Chemical Profile for H₂S, Canadian Centre for Occupational Health, attached as Exhibit "L" to the Daunheimer Affidavit at p 4 [DA, Tab 9L].

⁷⁹ Chemical Profile for H₂S, Canadian Centre for Occupational Health, attached as Exhibit "L" to the Daunheimer Affidavit at p 4 [DA, Tab 9L].

⁸⁰ Chemical Profile for H₂S, Canadian Centre for Occupational Health, attached as Exhibit "L" to the Daunheimer Affidavit at pp 10 [DA, Tab 9L].

⁸¹ Daunheimer Affidavit at para 30 [DA, Tab 9]; Chemical Profile for H₂S, Canadian Centre for Occupational Health, attached as Exhibit "L" to the Daunheimer Affidavit at p 3 [DA, Tab 9L].

47. Bellatrix has filed no affidavit or other evidence in response to Mrs. Daunheimer's extensive affidavit and voluminous documentary evidence. Moreover, despite questioning Mrs. Daunheimer on her affidavit for over four hours regarding all manner of subjects, counsel for Bellatrix failed to ask one question related to sour gas – a key component of the Daunheimers' claim. Instead, Bellatrix has attempted to shift the onus that it bears and it has entirely failed to meet by alleging that the Daunheimers do not have the evidence they will need to prove isolated aspects of their claim at trial (particularly related to water), while ignoring wholesale all other key portions of the claim. The Plaintiffs make three points in response. First, as evidenced above, on the whole, the Daunheimers *do* have substantial evidence regarding their claim, and moreover, this much of this evidence stands uncontested. Second, as outlined in the Amended Statement of Claim and based on the Defendant's irresponsible operations (including, for example, storage of toxic materials in unlined sump pits), there is very good reason to be concerned about the impact of the Defendant's operations on water.⁸² Third, further testing will be conducted on the Daunheimers' water as part of this Action; this testing, however, cannot be undertaken until the Defendant provides records indicating what specific chemicals that the Defendant used in its operations. The Defendant has failed to produce these records to date.⁸³

48. Bellatrix also baldly asserts that "there is the very real prospect" that the claim is barred in whole or in part by the *Limitations Act*.⁸⁴ This speculative defence does not stand up to scrutiny. A large portion of this claim deals specifically with the fact that the Defendant actively misled the Daunheimers regarding the true nature of their operations. It was not until November 26, 2013, when the AER issued a high-risk non-compliance against Angle Energy directly related to the fact that the Defendant had misled the Daunheimers, that it finally became clear that the Defendant was doing precisely what it repeatedly said that it was not doing.⁸⁵

49. In sum, Bellatrix has not shown that it has a defence on the merits; on the contrary, the preponderance of evidence shows the Daunheimers' claim is strong on the merits. Bellatrix's security for costs application should be dismissed based on this factor alone.

⁸² Amended Statement of Claim at paras 5, 11, 13 & 14 [DA, Tab 8].

⁸³ Transcript of Diana Daunheimer at p 96, line 9-12 & page 98, lines 14-17.

⁸⁴ Bellatrix Brief at para 50.

⁸⁵ Daunheimer Affidavit at paras 40-49 [DA, Tab 9]; Notice of High Risk Enforcement Action, dated November 26, 2013 attached as Exhibit "O" to the Daunheimer Affidavit [DA, Tab 90].

What is just and reasonable in the circumstances

50. Even if there were some risk that Bellatrix would have some trouble enforcing or collecting a costs award (which, as set out in detail above, is manifestly not the case here), the court must still be satisfied that a security for costs order is “just and reasonable” in the circumstances. Again, and as noted above, “[c]ourts should not automatically order security for costs. . .the court looks at the justice of the individual circumstances”.⁸⁶

51. In this case, and in others similar to it, there are substantial reasons that ordering an ordinary family who are engaged in responsible litigation to pay the security for costs of a large, publicly traded corporation at the beginning of the litigation cannot be considered “reasonable and just”.

Access to justice and the average Albertan family

52. Before ordering the Plaintiffs to pay security for costs, the court must be cognizant of the message that ordering the Daunheimers to pay security for costs in the circumstances would send to other Albertans who may wish to seek access to the court in similar cases. The Daunheimers are in a better financial position than the average Albertan. According to Statistics Canada, the income of the average Albertan family in 2012 was \$94,460.00;⁸⁷ in contrast, the Daunheimers’ income last year was over \$280,000.00. Moreover, unlike most Albertans, the Daunheimers do not have a mortgage or any other loans, and have considerable savings.⁸⁸ If a security for costs order is justified against the Daunheimers solely on the grounds that it is likely they will not be in a financial position to pay a potential costs order, then surely a security for costs order is justified whenever the average Albertan seeks access to the courts in similar circumstances. This result cannot be countenanced.

53. Our courts have become increasingly and justifiably concerned with the fact that the high costs of lawsuits means that ordinary Canadians do not have access to courts. In the 2014 case

⁸⁶ *Crothers* at para 24 [DA, Tab 4].

⁸⁷ Daunheimer Affidavit at para 21; Statistics Canada, Median total income, by family type, by province and territory, attached as Exhibit “I” to the Daunheimer Affidavit [DA, Tab 9I].

⁸⁸ Daunheimer Affidavit at paras 9-16 [DA, Tab 9].

of *Hryniak v Mauldin*,⁸⁹ the Supreme Court of Canada sounded a clarion call regarding the dire state of access to justice for the average Canadian:

Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. **Most Canadians cannot afford to sue when they are wronged** or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

Increasingly, there is recognition that **a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system.**

....

The full trial has become largely illusory because, except where government funding is available, **ordinary Canadians cannot afford to access the adjudication of civil disputes.** The cost and delay associated with the traditional process means that. . . the trial process denies ordinary people the opportunity to have adjudication.

54. Ordering security for costs in favour of a large corporation and against a regular family at the beginning of a lawsuit takes an already dire access to justice crisis and makes it substantially worse by increasing the up-front costs to access a justice system that is already financially out of reach for the majority of Albertans. As noted by this court, there is a real risk security for costs “would convert the courthouse into a service provider for a very small segment of the community”⁹⁰ – namely the very rich, and well-resourced corporations – while the average Albertan is entirely shut out.

Improper use of security for costs to inappropriately stifle meritorious litigation

55. Related to the above access to justice concerns, the court must also guard against the improper use of the security for cost rule to unnecessarily erect roadblocks which serve to stifle, delay and increase the costs of proper litigation brought by regular Albertans. As noted by this court, in the past, defendants have used “the security for costs rule strategically to create an obstacle they hoped the Plaintiff could not overcome.”⁹¹

56. The court should be alive to the very real possibility that Bellatrix has brought this application not because it is particularly worried about getting security for their potential costs

⁸⁹ *Hryniak v. Mauldin*, 2014 SCC 7, at paras 1-2 & 24 [DA, Tab 5].

⁹⁰ *Amex Electrical* at para 44 [DA, Tab 2].

⁹¹ *590863 Alberta Ltd.* at para 21 [DA, Tab 1].

(after all, Bellatrix has not shown that there is actually a need for security for costs) but rather as a litigation tactic in the hopes that a court order for security for costs in the amount of tens of thousands of dollars (with the opportunity to return to court for ever more security) will prove too much to bear for the Daunheimers and will snuff out a meritorious and potentially embarrassing lawsuit against Bellatrix before it gets going. Even if its application is not successful, Bellatrix has already succeeded in delaying the Daunheimers' action and increasing the Daunheimers' legal costs.

57. Concerns regarding inappropriate tactical uses of security for costs applications are greatest where, as here, there is a very significant imbalance in resources between the parties. Bellatrix has a net worth of \$672.64 million, and made a *net profit* of \$108.3 million in the first nine months of 2014 alone.⁹² The security sought by Bellatrix of \$30,000.00 amounts to less than 0.01% of Bellatrix's income in the first 9 months of 2014. Another way of looking at it is that Bellatrix made \$30,000.00 *in profit* every 1 hour and 49 minutes in the first three quarters of 2014. Even if Bellatrix was not able to secure its costs, and it won at trial it would be out of pocket an amount that would barely register on its balance sheet. Moreover, the prejudice to Bellatrix in not ordering security for costs is merely hypothetical at this point, and would only be felt in the unlikely event that a) the claim does not settle before trial; b) Bellatrix is entirely vindicated at trial; c) the Daunheimers do not voluntarily pay the cost award issued against them; and d) Bellatrix is unable to collect on the hypothetical cost award using the substantial powers available to them under the *Civil Enforcement Act* and the *Alberta Rules of Court* – a very unlikely set of circumstances indeed.

58. In contrast, if ordered, the security sought by Bellatrix would impose an immediate and substantial hardship on the Daunheimers – they immediately must pay tens of thousands of dollars (amounting to over 12% of their total income for 2014) into court where it is beyond their control for an unknown time. Further security for costs orders would not doubt follow. Simply put, the Daunheimers suffer substantially more immediate prejudice, hardship and unfairness if they are ordered to pay security for costs at an interlocutory stage than Bellatrix would suffer if

⁹² Daunheimer Affidavit at paras 18 & 20 [DA, Tab 9]; Investor Information Regarding Bellatrix Exploration Ltd, dated February 20, 2015, attached as Exhibit "H" to the Daunheimer Affidavit [DA, Tab 9H]; Bellatrix Exploration Ltd 2014 Third Quarter Report, attached as Exhibit "F" to the Daunheimer Affidavit [DA, Tab 9F].

such an order is not made.

Conclusion

59. In sum, a security for costs order is unnecessary, unreasonable and inappropriate in the circumstances. Bellatrix has come nowhere near close to meeting its onus of proving that it is likely that the Daunheimers would not be able to pay a costs award if ordered at trial, nor has Bellatrix shown that such an order would be “reasonable and just” in the circumstances. Bellatrix’s application for security for costs must fail.

60. This is an application that should never have been brought. It has served only to delay the action and increase costs on all sides. It is the Plaintiffs’ view that Bellatrix brought this application for inappropriate tactical reasons that constitute an abuse of process of this court and a breach of the Foundational Rules. Such an approach, which appears intended more to harass the Plaintiffs than to secure actual security for costs, is deserving of a costs sanction. It should not escape the court’s notice that Bellatrix originally brought this application for substantial security against a self-represented party just prior to Christmas (December 21, 2014), improperly scheduled it for early January as a regular application (instead of as a clearly more appropriate special application), and then refused all reasonable requests by Mrs. Daunheimer to adjourn the original application to allow her to prepare or to seek legal counsel (this despite the fact that a security for costs application could have been brought at any time over past year).

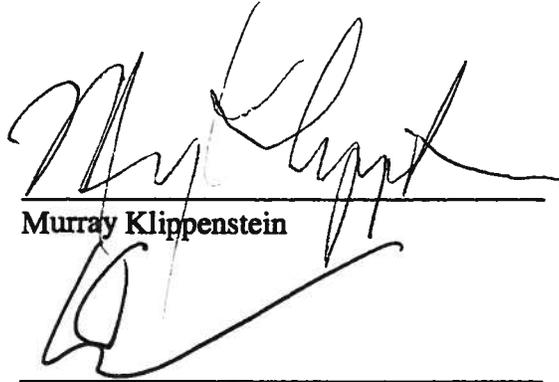
61. In light of the above, the Plaintiffs request substantial indemnity costs.

PART V: RELIEF SOUGHT

62. The Plaintiffs/Respondents Diana and Derek Daunheimer respectfully request the following relief:

- a. An Order dismissing the Application brought by Bellatrix;
- b. An Order granting substantial indemnity costs against Bellatrix;
- c. Such further and other relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st day of April, 2015.



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SCHEDULE "A" – LIST OF AUTHORITIES

1. *590863 Alberta Ltd. v. Deloitte and Touche Inc.*, 2012 ABQB 98, [2012] A.J. No. 158 (QL).
2. *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, 2014 ABQB 66, [2014] A.J. No. 100 (QL).
3. *Attila Dogan Construction v. AMEC Americas Limited*, 2011 ABQB 175 (CanLII).
4. *Crothers v. Simpson Sears Ltd.*, 1988 ABCA 155 (CanLII).
5. *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (CanLII).
6. *Wall v. Horn Abbot Ltd.*, 176 N.S.R. (2d) 96, [1999] N.S.J. No. 124 (CA) (QL).
7. *Xpress Lube & Car Wash Ltd. v. Gill*, 2011 ABQB 457 (CanLII).

SCHEDULE "B" – STATUTES

Alberta Rules of Court, Alta Reg 124/2010

Division 4 Security for Payment of Costs Award

Considerations for security for costs order

4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:

- (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
- (b) the ability of the respondent to the application to pay the costs award;
- (c) the merits of the action in which the application is filed;
- (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
- (e) any other matter the Court considers appropriate.

Civil Enforcement Act, RSA 2000, c C-15

Exempted property

88 Subject to section 89, the interest of an enforcement debtor in the following is exempt from writ proceedings:

- (a) the food required by the enforcement debtor and the enforcement debtor's dependants during the next 12 months;
- (b) the necessary clothing of the enforcement debtor and the enforcement debtor's dependants up to the value prescribed by the regulations;
- (c) household furnishings and appliances up to the value prescribed by the regulations;
- (d) one motor vehicle up to the value prescribed by the regulations;
- (e) medical and dental aids that are required by the enforcement debtor and the enforcement debtor's dependants;
- (f) in the case of an enforcement debtor whose primary occupation is farming, up to 160 acres of land if the enforcement debtor's principal residence is located on that land and that land is part of that enforcement debtor's farm;
- (g) the principal residence of an enforcement debtor, including a residence that is a mobile home, up to the value prescribed by the regulations for that residence but if the enforcement debtor is a co-owner of the residence, the amount of the exemption allowed under this provision is reduced to an amount that is proportionate to the enforcement debtor's ownership interest in the residence;
- (h) in the case of an enforcement debtor whose primary occupation is not farming, personal property up to the value prescribed by the regulations that is used by the enforcement debtor to earn income from the enforcement debtor's occupation;
- (i) in the case of an enforcement debtor whose primary occupation is farming, the personal property that is necessary for the proper and efficient conduct of the enforcement debtor's farming operations for the next 12 months;
- (j) any property as prescribed by the regulations.

Civil Enforcement Regulation, Alta Reg 276/1995

General exemptions

37(1) The following are the maximum amounts allowed for exempt property under section 88 of the Act:

- (a) the maximum exemption for clothing referred to in section 88(b) of the Act is \$4000;
- (b) the maximum exemption for household furnishings and appliances referred to in section 88(c) of the Act is \$4000;
- (c) the maximum exemption for the motor vehicle referred to in section 88(d) of the Act is \$5000;
- (d) the maximum exemption for personal property referred to in section 88(h) of the Act is \$10 000;
- (e) the maximum exemption for a principal residence referred to in section 88(g) of the Act is \$40 000.