IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trottier v. Derrickson (dba RMD Group),* 2025 BCSC 587

Date: 20250331
Docket: S133903
Registry: Kelowna

Between:

Tara Trottier

Plaintiff

And

Ronald M. Derrickson doing business as RMD Group

Defendant

Corrected Judgment: The text of the judgment was corrected on the face page on April 1, 2025

Before: The Honourable Justice Wilson

On appeal from: An order of an Associate Judge of the British Columbia Supreme Court, dated November 18, 2024 (*Trottier v. Derrickson*, Oral 24680, KE 133903)

Reasons for Judgment

Counsel for the Respondent (Plaintiff):	B. Tarnow
Counsel for the Appellant (Defendant):	T. Young M. Moorhouse
Place and Date of Hearing:	Kelowna, B.C. February 3, 2025
Place and Date of Judgment:	Kelowna, B.C. March 31, 2025

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[1] This is an appeal of an associate judge's decision arising from an application to adjourn a trial. The appellant, who is the defendant in the underlying action, successfully applied to adjourn the trial, but takes issue with the costs order, which provides that the defendant will pay the plaintiff's cost thrown away for trial preparation on a “full indemnity basis".

[2] The appellant argues that:

a) the court does not have jurisdiction to order costs on a “full indemnity basis"; and

b) that if such language is intended to be synonymous with special costs, this was not a case of reprehensible conduct rising to the level where special costs would be appropriate.

[3] For the reasons that follow, the appeal is allowed.

Background

[4] This was a last-minute application to adjourn brought by the appellant. It was heard on a Monday morning on a busy chambers day, with the trial scheduled to commence the following morning. The associate judge had another matter already scheduled to start at noon which was delayed to allow the adjournment application to be heard.

[5] The underlying claim is an employment claim in which the appellant employed the respondent, who is the plaintiff in the underlying action.

[6] The chronology of events leading to the request for an adjournment is as follows.

[7] A previous trial date was lost because a trial brief was filed out of time. The previous trial had been scheduled for 10 days. The parties subsequently discussed a new trial date, and a second notice of trial was taken out for the assize of November 18, 2024, for eight days.

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[8] On September 20, 2024, the respondent filed her trial brief. She expected the trial would take eight days.

[9] The appellant filed his trial brief on September 27, 2024. The appellant's trial brief included the following statement:

> The filing party expects the trial to require 10 days, and the filing party and counsel are available to continue for two consecutive days following the currently scheduled completion date.

[10] On October 30, 2024, appellant's counsel was before another judge on an unrelated matter (the “Unrelated Matter”). The Unrelated Matter involves various proceedings and multiple counsel. Appellant's counsel advised the assigned judge on the Unrelated Matter that she had the trial of this matter already scheduled to proceed for eight days during the weeks of November 18 and 25. However, the judge scheduled the Unrelated Matter to proceed over four days, from Tuesday, December 3 to Friday, December 6, 2024.

[11] On November 1, 2024, counsel for the appellant filed a trial certificate.

[12] On November 13, 2024, Supreme Court Scheduling contacted counsel regarding their time estimates as the respondent had estimated eight days, but the appellant had estimated 10 days. Appellant's counsel then wrote to respondent's counsel, stating the following:

> I received a call from Trial Scheduling about our time estimates. Those set out in our trial briefs put us at 10 days. And I am no longer available on November 28 and 29.

[13] Respondent's counsel responded as follows:

> You represented on page 1 of your trial brief that this trial requires 10 days, and that you were available for 2 consecutive days following the 8 day trial scheduled to begin on November 18. Can you please advise what has arisen since then that makes you unavailable on November 28-29? Further, kindly advise when you became aware of the same.

[14] Having received no response, respondent’s counsel followed up as follows:

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> Further to my email below, I have not received from a response from you with respect to your change of availability the week before our scheduled trial. I note I have received other correspondence from your office late yesterday, however that correspondence was silent as to my request for your explanation of a change of availability for the trial of this matter, despite representations to the Court in your prior filed materials that you were available for 2 consecutive days following the currently scheduled trial dates. Please advise immediately so that we can inform the court today. As you know, costs are being incurred in the preparation of this trial so it is critical that the court is informed as to counsel's availability as soon as possible.

[15] Counsel for the appellant then responded as follows:

> . . .
>
> We have eight court days scheduled. Until scheduling advises us that ten court days are available, my availability on November 28 and 29 is irrelevant.
>
> My trial brief advises the court that I was available for two consecutive days following the currently scheduled trial dates. That was true at the time of filing the trial brief. My availability changed when Mr. Justice Loo scheduled a hearing on another matter that requires my attendance. I note that my trial brief does not represent to the court that I would hold those two consecutive days open.

[16] Counsel concurrently worked on trimming the time estimates to fit within eight days. Although they had not wholly accomplished this at the time of the application to adjourn the trial, the time estimates had been reduced to the point where the parties expected they might need one-and-a-half hours on a ninth day.

[17] Later, on November 14, 2024, Supreme Court Scheduling advised the parties that there was an eight-day judge available, November 19-21 and November 25-29. In other words, the trial would start on the Tuesday of the first week of the assize and would proceed for three days only during the first week, followed by all five days of the following week.

[18] Counsel for the appellant then advised counsel for the respondent as follows:

> I am not available November 28-29. Mr. Justice Loo, who is seized of that matter, scheduled the hearing with my schedule before him. I have had conduct of this file from the beginning; Ms. Moorhouse will not be conducting the trial in my absence.

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[19] Supreme Court Scheduling then confirmed there was a judge available on the dates previously indicated, and that the trial was to proceed on those dates, unless adjourned by consent or court order.

[20] The appellant filed an application to adjourn the trial on Friday, November 15, returnable before the associate judge on Monday, November 18, being the morning prior to the first day of trial.

[21] In his necessarily brief oral reasons for judgment, the associate judge in granting the adjournment observed the following:

a) There was significant prejudice to the plaintiff given the application was brought at the "absolute last minute";

b) the adjournment application could have been brought earlier; and

c) counsel are expected to be available for the whole 10-day assize when an 8-day trial is scheduled.

[22] The associate judge adjourned the trial, but awarded the plaintiff her costs thrown away for trial preparation on a full indemnity basis.

Standard of review

[23] The parties agree that the standard of review on this appeal is whether the associate judge's decision was clearly wrong. Costs are a matter of discretion, and a judge hearing an appeal will not substitute their discretion for that of the associate judge: *Kondori v. New Country Appliances Inc.*, 2017 BCCA 164 at para. 16.

[24] The test for the standard of review on an appeal of an associate judge was set out in *Abermin Corp. v. Granges Exploration Ltd.* (1990), , 45 B.C.L.R. (2d) 188 (S.C.) at p. 193:

> An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal [...] In those latter situations, even

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> where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the master.

Costs generally

[25] Costs are a matter for the exercise of discretion by the judge at first instance. Accordingly, the scope of interference with a costs order is limited. In *Discovery Enterprises Inc. v. Ebco Industries Ltd*., 1999 BCCA 749, Madam Justice Newbury observed:

> [17] Obviously, the judge who heard the leave application is in the best position to assess those factors - a principle that is recognized in the broad discretion given by the Rules of Court to trial judges, and in the narrow scope for appellate interference. However, where the Chambers judge misstates the nature of the issues previously before him and their relationship to the issues to be tried, and where the result of his order is to skew substantially the balance that should be preserved between litigants until final judgment is rendered, appellate interference is required, at least in the unusual circumstances of this case . . .

[26] An appeal court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.,* 2004 SCC 9 at para. 27; cited in *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 at para. 72.

[27] The appellant points out the following provisions of the costs rules in the *Supreme Court Civil Rules*, none of which are disputed.

[28] First, the presumptive rule under Rule 14-1(12) is that the party who succeeds on the application is presumptively entitled to its costs:

> 14-1(12) Unless the court hearing an application otherwise orders,
>
> (a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and
>
> (b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

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[29] Next, Rule 14-1(1) provides that the successful party will presumptively be entitled to their costs at Scale B:

> 14-1(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
>
> (b) the court orders that
>
> (i) the costs of the proceeding be assessed as special costs, or
>
> (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
>
> …

[30] Finally, Rule 14-1(13) provides that costs are presumptively only payable at the conclusion of the proceeding, unless the court otherwise orders.

[31] Pursuant to Rule 14-1(1), party and party costs are the default option with respect to costs. The respondent also agrees that party and party costs are also the default option with respect to a costs thrown away order. An award of party and party costs is designed to partially indemnify successful litigants: *Nazmdeh v. Spraggs*, 2010 BCCA 131 at para. 41.

[32] There are alternatives for costs orders that fall between an order for special costs on the one hand and party and party costs on the other, although many would not be appropriate in these circumstances. For example, costs at an increased scale may be awarded, but an award at Scale C as opposed to at Scale B is only appropriate when the matter was of more than ordinary difficulty, which this was not.

[33] The court may make an award of increased costs where the usual tariff amount is increased by one-half under s. 4(2) of Appendix B – Party and Party Costs, but only in circumstances where the time spent for that day exceeds 5 hours. Again, this was not the case here.

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[34] The question is whether the associate judge was clearly wrong in making an order for full indemnity costs when granting the appellant's application for an adjournment of the trial.

Positions of the parties

[35] The appellant points out that costs in British Columbia are generally either party and party costs or special costs. The appellant argues that the *Rules* do not contemplate an order for 'full indemnity costs' and to the extent that the order made is essentially one of special costs, there was no reprehensible conduct and such an order was therefore not appropriate.

[36] The appellant was critical of counsel for the respondent because in his application response, he included the following:

> 15. In the alternative, should this Court allow the Defendant's application for an adjournment, the Plaintiff seeks a term of the adjournment that the Defendant pay to the Plaintiff costs thrown away on a full indemnity for the preparation of the trial, in accordance with the reasons of the Court in *Bolin v. Lylick*, 2018 BCCA 127. In that case, Justice Saunders stated at paragraph 19:
>
> > there is no apparent reason to depart from the Usual approach to costs in circumstances of a late adjournment; in other words, there is no apparent reason not to relieve the defendants from the prejudice of the late adjournment by an award of costs thrown away. It is to be remembered that even though the judge did not attribute fault to the plaintiff in the adjournment application, in asking for an adjournment the plaintiff was asking for an indulgence from the court that had adverse consequences for the defendants. I would add to the order made for the adjournment a term that the defendants are entitled to their costs of trial preparation thrown away.
>
> 16. In *Oz Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2016 ONSC 4272, Justice Hackland stated:
>
> > The term 'costs thrown away' normally connotes complete indemnification although, the court has a residual discretion To order otherwise. The complete indemnification does not flow from any misconduct on the defendants' part as both parties seem to; suggest in their written submission, rather it simply means cost unnecessarily and uselessly incurred by the defendants' actions ie. costs that were thrown away. The plaintiffs are entitled to be reimbursed for such expenditures on a full indemnity basis.

[37] She argues these references led the associate judge into error.

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[38] The respondent argues that although this is not a case where the appellant's conduct rose to the level of warranting sanction or rebuke, which is generally a requirement for a special costs order, the order made was nonetheless within the court's discretion, and that this Court on appeal should not interfere with that exercise of discretion.

Discussion

Circumstances of the full indemnity costs award

[39] I note that the associate judge received no help from counsel on the appropriate scale of costs.

[40] The focus of counsel for the appellant was seemingly more on the issue of whether costs should be ordered thrown away, as opposed to the scale of costs. During her submissions, counsel was asked by the associate judge about costs, and in particular, the associate judge reminded her that costs are often ordered thrown away when a party is impacted by a last-minute adjournment application. Counsel for the appellant argued that costs should be in the cause because the adjournment did not fall at the feet of either party and that both parties had suffered the same prejudice, but without touching on the issue of the appropriate scale of costs.

[41] Counsel for the respondent opposed the adjournment on the basis that counsel was essentially looking for a review of the scheduling decision made by the judge in the Unrelated Matter, but argued in the alternative that costs should be ordered on a full indemnity basis, referring to *Bolin v. Lylick,* 2018 BCCA 127, and *Oz Merchandising Inc. v. Canadian Professional Soccer League Inc.,* 2016 ONSC 4272, as authority for such an order.

[42] I accept that *Bolin* stands for the proposition that costs thrown away is often the remedy for an adjournment even where there is no fault to the party seeking the adjournment, but it does not touch on the question of the scale of costs. I also accept that the Ontario authorities stand on a different footing because Ontario has a different costs regime.

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[43] However, in her reply submissions, counsel for the appellant reiterated her denials of wrongdoing, but made no submissions on the question of how the respondent's costs might be assessed, including the appropriate scale, despite having heard the respondent ask for full indemnity costs.

[44] With respect to counsel for the appellant, the question on the application, if the adjournment were granted, was never whether or not the respondent was entitled to her costs of trial preparation thrown away, but rather the scale of those costs.

[45] The appellant applied for the adjournment less than 24 hours before the trial was to start in circumstances where it clearly should have been brought earlier, and in circumstances where the only reason for the adjournment was that counsel was prioritizing the Unrelated Matter.

[46] First and foremost, I note that counsel for the appellant was not actually unavailable on November 28 and 29, 2024; rather, the adjournment was sought because she intended to prioritize the Unrelated Matter.

[47] The dates for the hearing of the Unrelated Matter were scheduled on October 30, 2024. At that point, it was apparent that counsel would be appearing at the Unrelated Matter the week following the trial. Indeed, she had brought her concern to the assigned judge in the Unrelated Matter, who scheduled the Unrelated Matter notwithstanding her express concerns.

[48] The associate judge would have been aware that counsel for the appellant would not have known when the Unrelated Matter was going to be scheduled when she filed her trial brief. However, in her trial certificate, counsel for the appellant certified that she estimated the trial would take 10 days and she was ready to proceed. Counsel already knew of the dates in the Unrelated Matter when she filed the appellant's trial certificate.

[49] Counsel for the appellant argues that eight days was not going to be sufficient for trial in any event, although I note that the trial was scheduled for eight days and

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counsel had indicated availability for the two days following the end of the trial, and by the time of the adjournment application, the time estimate was only slightly more than the eight days the parties had agreed to when the trial was scheduled. Regardless, this was not the basis of the application to adjourn.

[50] It appears that counsel were unfamiliar with, or for some reason did not understand, the assize system, because it was always a possibility that the trial, even if it could be completed in eight days, would continue on to the Thursday and Friday of the second week of the two-week assize.

[51] Counsel who conduct trials under an assize system are expected be available throughout the assize. An eight-day trial that is scheduled during a two-week assize is not scheduled to commence on the first Monday of that assize. Rather, the practice is that the trial will, if a judge is available, start on one day during the assize on the basis that there are sufficient days to have the matter completed.

[52] In the case of an eight-day trial, this means that it could commence as late as the Wednesday of the first week of the assize. Counsel with an eight-day trial scheduled to be heard on a ten-day assize therefore cannot assume that the trial will not continue on to the Thursday and Friday of the second week. Indeed, in many registries, including those in the interior of the province of British Columbia, it is common for a judge to be scheduled to hear chambers on the Monday and then start a trial the next day. This has been the system in the majority of the registries in British Columbia for a great many years.

[53] On the facts here, nothing changed between the date of the trial certificate when counsel said she was ready to proceed, and the date of the adjournment, other than Supreme Court Scheduling confirming there was a judge available. There is no doubt that an application to adjourn should have been at least contemplated as soon as counsel for the appellant was aware that the Unrelated Matter was to proceed immediately following the ten-day assize. To this end, counsel for the appellant ought to have at least put counsel for the respondent on notice that the possibility of an application to adjourn might be forthcoming.

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[54] During submissions before the associate judge, counsel for the respondent pointed out that the appellant could have brought the application sooner, such as when Justice Loo scheduled the hearing in the other matter. During submissions, counsel for the appellant stated:

> . . . I would have to do it on the basis that I was speculating we would get a judge, and I was speculating that we would get a judge on the Thursday and the Friday.

[55] I do not accept that it is only necessary to bring an application to adjourn a trial once counsel have been advised that there is a judge available. For the reasons I indicated earlier, it was always possible that the trial would have continued on the Thursday and Friday of the second week of the assize. Supreme Court Scheduling has the logistically challenging task of trying to coordinate over 90 judges to hear trials in the approximately 30 registries across the province. If a scheduled trial does not proceed at the last minute, the judge may need to be moved to another registry to hear another case, which is inconvenient for all concerned. Other litigants who did not get assigned a trial judge and were ‘bumped’ may have been able to use that court time, had Supreme Court Scheduling been aware that the parties did not intend to use their scheduled trial dates. Last, but certainly not least, as a matter of courtesy, the opposing party is entitled to know that the trial might not proceed.

[56] In all of the circumstances, it is apparent that if the adjournment were to be granted at all, the only issue was the scale of costs and not whether the appellant would pay costs thrown away.

Test for appeal of discretionary costs award

[57] An award of costs is an exercise of judicial discretion, and therefore an appeal of an exercise of discretion will only be disturbed on appeal if the decision was clearly wrong.

[58] In reviewing discretionary costs awards, the appellate court must show great deference and must only intervene where it is established that the discretion was

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exercised in an abusive, unreasonable or non-judicial manner: *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin,* 2017 SCC 26 at para. 52.

[59] In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, Justice LeBel addressed the question of when an interim costs award might be the subject of appellate review at para. 43, finding that the appellate court should intervene if the presider made a palpable or overriding error with regard to the underlying facts, or misdirected themselves on the appropriate law:

> [43] As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, 1987 CanLII 57 (SCC), [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

[60] This deferential standard of review is equally applicable to an award of special costs: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at paras. 26-27.

[61] I turn now to the question of whether the associate judge misapprehended the law as it relates to the appropriate costs award.

Full indemnity costs

[62] The term ‘full indemnity’ is not one that appears in the *Supreme Court Civil Rules* as it pertains to costs. Although the Court of Appeal in *Northwest Waste Solutions Inc. v. Super Save Disposal Inc.*, 2017 BCCA 312, ordered that the defendant was entitled to ‘full indemnity costs’, more recent caselaw from the Court of Appeal suggests that the Court was wrong in principle to do so: see *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 at para. 95:

> I would at the outset note that in the British Columbia cases the judges in *Paterson*, *Williams* and *Blue Mountain* awarded special costs. The judges in the case at bar, *Tanious* and *Kane* awarded either a full indemnity or costs on a solicitor-and-own-client basis. As noted in para. 64 above, a judge cannot impose costs sanctions that are not authorized by the *Rules.* Full

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> indemnity or solicitor-and-own-client costs awards are not authorized by the *Rules* and accordingly the costs awards in this case, *Kane* and *Tanious* are, at least to that extent, wrong in principle, as is West Van's submission that it is entitled to receive a full indemnity. The matter for determination is whether the insureds are entitled to an award of special costs.

[63] To similar effect, in *De Cotiis v. Hothi*, 2021 BCCA 60, the Court of Appeal discussed a lower court's inclusion of the words "full indemnity" in a special costs award and noted that the Court of Appeal has held more than once that the *Rules* do not allow for a full indemnity costs award: at para. 27-34. The Court continued by finding that the lower court judge's references to costs payable on a full indemnity basis added nothing to her special costs order.

[64] An example of a court awarding costs thrown away assessed on a special costs basis as a result of a late application to adjourn a trial may be found in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2023 BCSC 1554.

[65] I accept that the only possible interpretation of the term 'full indemnity costs' in the associate judge's order is something akin to 'special costs' as contemplated in the *Supreme Court Civil Rules* under SCCR 14-1(1)(b)(i).

Special costs and reprehensible Conduct

[66] It is well established that special costs are generally only awarded if there is reprehensible conduct deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.).

[67] In *Kyle Estate v. Kyle*, 2017 BCCA 329, Saunders J.A. for the British Columbia Court of Appeal explained the rationale behind special costs, while also noting that special costs are not always ordered due to reprehensible conduct:

> [45] Special costs are in the nature of indemnification and their level may be established by the judge to provide complete or partial indemnity. While I appreciate the term special costs may carry with it a sense of sanction because special costs are most frequently awarded to express disapproval of reprehensible conduct, that is not always the case, as explained in *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2017 BCCA 177, para. 56, citing *Gichuru* at para. 90 [emphasis added].

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[68] In *Gichuru v. Smith*, 2014 BCCA 414 at para. 90, the Court of Appeal discussed certain categories of litigation where special costs might be ordered in the absence of reprehensible conduct: pursuant to a statutory provision, express contractual terms, parties to estate litigation, committee proceedings, a successful public interest litigant. None of these special categories apply here.

[69] Consequently, there remains a threshold of reprehensible conduct for a court to make an award of special costs in most cases, although reprehensible does encompass a wide range of misconduct, including “milder forms”: see *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 56.

[70] However, counsel for the respondent acknowledges that the circumstances here do not rise to the level of reprehensible conduct. I therefore conclude that it was not open to the associate judge to award either full indemnity costs or special costs here.

[71] An example of the standard of reprehensible conduct being applied to an adjournment application may be found in *Soltani v. Fadaee,* 2022 BCSC 2162. In *Soltani*, the judge declined to award specials costs against a party because she did not find reprehensible behaviour, despite the fact that the party brought the adjournment application on the first day of trial, and also despite multiple opportunities to have applied sooner, resulting in a waste of significant time and resources in preparing for the trial. While the facts in *Soltani* are not identical, they are similar and I consider the principles to be applicable.

Disposition

[72] In all of the circumstances, I conclude that it was not open to the associate judge to make a costs order that was akin to an order for special costs absent a finding of reprehensible conduct on the part of the appellant.

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[73] The appeal is allowed, and an order for party and party costs will be substituted in the place of full indemnity costs.

"Wilson J."

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