Court of King's Bench of Alberta

Citation: Tragger v Intact Insurance Company, 2026 ABKB 112

Date: 20260218
Docket: 2303 17808
Registry: Edmonton

Between:

David Alexander Tragger and Hypocrite Productions Inc.

Plaintiffs

- and -

Intact Insurance Company and Royal & Sun Alliance Insurance Company of Canada

Defendants

Costs Endorsement
of the
Honourable Justice Michael J. Lema

I. Introduction

[1] Are full-indemnity costs payable where judgment creditors of the insured succeeded in showing coverage of their losses by the insured's insurers in a proceeding under s 534 of the *Insurance Act* ("Execution against insured unsatisfied").

[2] Per the judgment creditors, they stand in the position of the insured, including a right to full-indemnity costs.

[3] Per the insurers, in seeking such costs the judgment creditors invoke inapplicable "duty to defend" cases. And no other grounds for such costs are present here.

[4] I find that full-indemnity costs are not warranted, that the appropriate (lump-sum all-inclusive) costs are $38,000, that further claims of judgment-enforcement costs and interest fall outside the scope of these costs proceedings (albeit the latter can be addressed, as something possibly covered by the insurance policies, via follow-up submissions).

[5] All as explained below.

II. Background

[6] The background was described in the main judgment (***Tragger v Intact Insurance Company***, 2025 ABKB 678):

> … the Plaintiffs hired a company ["the contractor"] to supply and install stone siding to two buildings. [The contractor] supplied the siding and hired a subcontractor to install it.
>
> The siding was installed in 2007.
>
> In 2014, material portions of the siding began to delaminate, forcing the plaintiffs to remove and replace all of it.
>
> The Plaintiffs sued both companies in summary judgment proceedings.
>
> AJ Summers found faulty workmanship, amounting to negligence, by the subcontractor and a breach of contract by the [contractor]. He awarded a judgment for approximately $310,000 (with prejudgment interest and costs) against the companies joint and severally.
>
> The Plaintiffs were unable to collect any amount on the judgment.
>
> They invoke s 534 of the *Insurance Act*, seeking recovery from the [contractor's] commercial general liability insurers.

[7] The contractor notified its two insurers of the plaintiffs' claim. Both advised that, in their view, the claim fell outside the scope of the insurance coverage. The contractor apparently did not dispute that view or otherwise assert a duty to defend by the insurers. As a result, the contractor (and the subcontractor) defended themselves in the summary judgment proceeding.

[8] As explained in the main judgment, I found that the plaintiffs' losses were covered under some of the policies issued by the insured's two insurers, obliging them to cover those losses.

[9] I ruled that the plaintiffs were entitled to costs, with the scale to be addressed by written submissions, now received and addressed below.

III. Analysis

A. Plaintiffs' position (solicitor-client costs warranted)

[10] The plaintiffs outlined their core position:

> This Court should uphold the … principle in *M(E) v Reed* [2003 CanLII 52150 (paras 22 and 23); leave denied [2003] SCCA No 334 (SCC)] [key excerpt reproduced below**]. Full indemnification follows from the explicit terms of the insurance contract of a duty to defend at no expense to the insured** [footnote

17: Set out at Agreed Statement of Facts PDF pages 14 (RSA Policy) and page[s] 72-73 (first Intact Policy): "Supplementary Payments."]

It also follows from the Alberta Rules of Court **discouraging duplicity of actions and efficient access to justice.** And it follows from *McAllister* [*v Calgary (City)*, 2021 ABCA 25] because, in these circumstances, **reasonable indemnity is full indemnity on the remedial principle that insured should not have to sacrifice a material portion of their recovery to establish coverage.**

The Defendants in this action enjoyed a **free pass on the first lawsuit**, incurred one of its expenses, while enjoying its potential for a result that could have been favourable to them.

Had the Defendants correctly interpreted coverage in 2015, this lawsuit would not have been necessary. This engages rules 10.33(a) ["the result of the action and the degree of success of each party"], (c) ["the importance of the issues"], and (d) [the complexity of the action"). Avoiding the cost and need for secondary lawsuits against insurers under section 534 [*Insurance Act*] engages Rule 1.2 ["The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way."]

Under section 534, the Plaintiffs are in the **shoes of the insured**. In line with *Reed*, **the claimed costs are those incurred by the assured in forcing the insurers to admit liability under the policy.**

The costs of enforcing against [the contractor] are "thrown away." They would not have been necessary if the Defendants responded to coverage during the first lawsuit. Further, the thrown-away costs of enforcement against [the contractor] are costs in this action because the failure to satisfy a judgment is an element of the test under section 534 of the *Insurance Act*. In any event, enforcement is a standard first step following judgment and the steps taken were reasonable. Even if [the Court] deem[s] not to award them, the thrown-away enforcement costs nonetheless demonstrate the exceptional financial prejudice supporting full indemnification for Action #2 itself.

Accordingly, total costs claimed are $137,252.66:

a) **$93,223.83 for the within action** (see Schedule A for spreadsheets and invoices)

b) **$44,028.83 for thrown-away costs to attempt and enforce the judgment of AJ Summers** (see Schedule B for spreadsheet and invoices)

c) In the alternative, Schedule C are taxable costs under column 3 for comparison purposes and would be inadequate given *McAllister*. [This schedule reflects Schedule-C-level fees of $13,625.00, taxable disbursements of $198.72, non-taxable disbursements of $897.00, and GST of $691.19 i.e., a total of $15,411.91.]

> The reasons for judgment do not mention interest on the underlying judgment, which is explicit in the policy, and we want to ensure it is included. It is tabulated in the attached schedule to be $42,424.87. See Schedule D for calculation. [emphasis added]

B. Solicitor-client costs not warranted here

[11] As seen above, the plaintiffs rely primarily on costs principles arising from duty-to-defend cases, such as ***Reed***. However, the present case was not about the duty to defend.

[12] Such duty was a matter between the contractor, on the one hand, and its two insurers, on the other. The Agreed Statement of Facts shows that the contractor advised its insurers of the plaintiffs' claim against it, that both denied coverage, and that (as far as the ASF reveals) the contractor did not dispute either denial, proceeding to defend the action on its own (paras 13 and 14).

[13] The plaintiffs here are not seeking to enforce the insurers' duty to defend. We are past that stage, with (as noted) the contractor defending itself in the liability action, the plaintiffs obtaining judgment but failing to collect it from the contractor, and the plaintiffs then invoking the s 534 *Insurance Act* right to seek payment directly from the insurers. In other words, the focus here is the duty to indemnify.

[14] In *General Principles of Canadian Insurance Law* (Third Edition – September 2020 – LexisNexis), Professor Barbara Billingsley summarizes the two duties:

> Liability insurance [featured here] is designed to protect an insured against financial loss which may be incurred if the insured is sued by a third party. By their express terms, liability insurance policies ordinarily impose **two separate but related duties on the insurer**. First, the insurer is required to pay for and instruct legal counsel to defend the insured against the third-party claim. This is the **duty to defend**. Second, the insurer is required to pay any judgment awarded to the third party against the insured (or any settlement in lieu of judgment), up to the policy limits. This is the **duty to indemnify**. Both duties arise as a matter of contract, so the scope of these duties is dependent upon the wording of the relevant insurance contract. [p 230] [emphasis added]

[15] With the duty to defend not at issue here, the cases cited by the plaintiffs, turning on the "unique nature of the insurance contract which entails a duty to defend at no expense to the insured" – per ***Reed*** (para 22), are distinguishable.

[16] And the plaintiffs did not point to any duty-to-indemnify cases calling for full-indemnity costs simply on the basis of a failure (at first instance) to indemnify.

[17] Even if this had been a duty-to-defend case, or if the principles from those cases are relevant here, I would decline to award full-indemnity costs, on the basis that the better approach to duty-to-defend costs is that in ***West Van Holdings Ltd v Economical Mutual Insurance Co***, 2019 BCCA 110. As the BCCA explained there (with reasoning that I accept):

> It is difficult from the authorities to understand the principled basis upon which the full indemnity or cost awards have been made against insurers. In *Reed*, the court suggests that an award of solicitor-and-client costs is justified on a contractual basis. **What is troubling about that analysis is that the insurance**

contract in the case at bar is silent in regard to the cost of enforcing coverage. The contract is limited to the cost of defending an underlying action against an insured. The Economical policies contain the following provisions [policy wording reproduced]

The Intact policies contain similar but not identical wording. Similar language is also found in the policy considered in *Crosbie*.

The amounts that the insurer has agreed to pay are clearly set out in the policy. **The insurer agrees to pay the costs to defend until the limits of the policy are exhausted. The language in the policy cannot be extended to cover legal fees and expenses the insured may incur in attempting to enforce its contractual right to coverage.**

There is in the context of the insuring agreement **no basis to imply a term that the insurer will pay special costs if it unsuccessfully resists a claim under the policy**. In *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619, the Supreme Court of Canada set out the principles governing implied terms [reproduced paras 27 and 29 not reproduced here]

There is no custom in the insurance industry by which insurers are expected to pay the full indemnity costs of a claimant enforcing coverage. An implied term is not necessary to give business efficacy to the contract. The terms of the contract are meticulously drafted. The contract sets out in precise detail what is and what is not covered. If the parties intended that the insurer would pay the costs of enforcing the insurance contract, the contract surely would have said so.

…

The special nature of insurance contracts however does not justify the creation of a different costs regime governing all insurance claimants. This question was canvassed at some length in a recent article in the *Canadian Journal of Insurance Law*: James Steele, "*Deterrence not Damages: the Punitive Rationale for Solicitor-Client Costs*" (2018) 36 Can J Ins L 1. As detailed by Mr. Steele, **there is no principled reason why a different scale of costs should apply to insureds who successfully enforce a contractual obligation than any other litigant who is forced to bring an action in order to obtain relief. Many such plaintiffs are surely as sympathetic. Why, for example, should an insured receive a full or near indemnity while the plaintiff in a personal injury lawsuit finds the award eroded because he or she is only entitled to a partial indemnity.**

In this regard, it is also important to recall the caution in *Marchen* that costs are not a remedy for breach of contract.

Party and party costs are designed to only partially indemnify a litigant. While party and party costs offer some compensation to the successful party, they avoid unduly discouraging the bringing of legitimate proceedings out of fear of the potential costs consequences. **An insurer faced with a difficult question as to**

> **whether a duty to defend arises should be able to raise that defence without automatically incurring an exposure to special costs.**
>
> The main purpose of special costs is to deter misconduct. If special costs are to be awarded regardless of conduct, there is no way to punish those unsuccessful parties who subject a successful party to an abusive proceeding. If a losing party faces full indemnity costs irrespective of their litigation conduct, the incentive for good conduct is correspondingly diminished.
>
> There is, in my respectful opinion, **no principled reason to award costs in a duty to defend case in a manner different than other litigation. There already exist other suitable mechanisms to censure an insurer's wrongful conduct:** *Smithies Holdings* **at para. 134. If the insurer has breached its duty of good faith, or conducts itself in a manner that is worthy of rebuke, it will be sanctioned. If not, an insurer facing a duty to defend claim should be treated no differently than any other litigant who may breach a contract.**
>
> With respect, the [B.C.] Supreme Court decisions in *Paterson, Williams, Kane* and *Blue Mountain* were all wrongly decided on the cost issue and should not be followed. They are not consistent with the *Rules* and the principles that have long governed cost awards. I say nothing further about the decision in *Tanious*, which is presently on reserve in this Court. [paras 96, 98-101, and 105-110] [emphasis added]

[18] That analysis is directly applicable here i.e. it would be if we were dealing with a duty-to-defend case or if the present case should be treated as analogous to such a case.

[19] To the same effect, see also ***AXA Insurance (Canada) v Ani-Wall Concrete Forming Inc***, 2007 CanLII 56478 (ONSC) (Perell J.) (paras 29-41).

[20] The plaintiffs did not point to any other basis on which full-indemnity costs should be payable.

[21] I accept the insurers' arguments that, instead, their conduct of the "coverage or not" litigation was unobjectionable – in fact, commendable. Here I accept this overview from Royal & Sun Alliance:

> … once RSA was served with the Statement of Claim in the Coverage Lawsuit, all of the parties/counsel involved worked very collaboratively to try to find the most efficient way to resolve the outstanding coverage issue.
>
> To that end, the "plan" was to not "re-litigate" any of the issues that were already determined in the First Lawsuit (i.e. the plaintiffs' against the contractor), rather to find to find the most efficient way to deal with the coverage issue going forward.
>
> The path agreed to by all counsel was to prepare/agree on a lengthy Agreed Statemetn of Facts/documents/reports (all arising from the First Lawsuit). Once this was completed, steps were then taken to schedule a one-day trial of an issue (solely to deal with the coverage issue(s)).

> RSA submits it was brought back into this matter in 2023 [i.e. long after it had initially declined coverage, in 2015], and proceeded from that point forward (by agreement) in a very expeditious manner to try and get the matter resolved.

[22] I similarly accept Intact's position that it:

> … cooperated to have the action heard in the most efficient and timely manner. Intact agreed to proceed via an Agreed Statement of Facts and a Streamlined Trial. Intact could not have provided a more expedient manner for the trial decision to be obtained.

[23] And the plaintiffs did not argue otherwise.

[24] Accordingly, I find no basis on which to award solicitor-client-level or otherwise enhanced costs.

C. Schedule-C-level costs

[25] As noted, the Plaintiffs prepared a for-comparison's-sake draft bill of costs per Schedule C, showing fees of $13,625 and associated amounts, for a total of $15,411.91.

[26] Intact helpfully noted as follows:

> The appropriate costs guide is Schedule C, Division 2, Column 3 of the Rules. The Plaintiffs' Bill of Costs is for $15,411.91. The Plaintiffs did not claim item 12 in the amount of $4,050 (Written Argument) – which is properly included. Additionally, it is submitted that although the Agreed Statement of Facts does not neatly fit into item 4 (Expedition or better definition of the case), it is similar to a Notice to Admit Facts and costs should be awarded for that step in the amount of $1,080. Total costs (including disbursements) are then $20,541.91.
>
> Determining costs is discretionary and this Court has wide discretion. At the end of the day, the Court attempts to find fairness and award costs that are reasonable and proper [citing *McAllister*]. The action was conducted in a manner more takin to a Special Application than a Trial. Thus, it is submitted that a lump sum award [citing R. 10.31(1)(b)(ii)] of $30,000.00, which is double the Plaintiffs' Bill of Costs, is a fair and reasonable amount for Costs to prosecute this action.

[27] Royal & Sun Alliance argued for costs to be set at Schedule-C-level, albeit without offering comments on items that should be added to the plaintiffs' draft bill of costs or on the proposed-by-Intact lump-sum figure.

[28] The plaintiffs did not offer detailed submissions this aspect, other than to argue that base-level Schedule-C costs "would be inadequate given *McAllister*."

[29] Recognizing that the plaintiffs claimed solicitor-client costs of $93,233.83 for the coverage action, that RSA asserts the plaintiffs' solicitor-client costs "must be taxed as … the amount of fees billed was not reasonable", that *McAllister* suggests a benchmark of 40 to 50 per cent of reasonable solicitor-client costs, and noting Intact's suggestion of $30,000 all-inclusive (which translates to approximately $28,000 in basic fees), I find $38,000 to be the appropriate amount in lump-sum costs for the plaintiffs for the coverage action. That amount represents 40.7 per cent of their claimed solicitor-client fees (i.e. assuming the reasonableness of those fees) or

50 per cent of their fees if adjusted to $76,000 i.e. an approximately 20 per cent reduction if it were found for some reason that the plaintiffs' fees were excessive to that degree.

D. Costs of judgment enforcement against contractor

[30] The plaintiffs also claim a further $44,028.83 for "thrown-away costs to attempt [to] enforce the judgment of AJ Summers."

[31] The Agreed Statement of Facts includes a follow-up order dated March 1, 2022 from AJ Summers awarding the plaintiffs "costs of the action" against the contractor in the amount of $40,133.70 and prejudgment interest of $15,282.68. . (I recognize that the judgment itself and the follow-up order were also made against the subcontractor. For present purposes the contractor's joint liability with the subcontractor makes no difference.)

[32] The ASF also includes a copy of a writ of enforcement filed by the plaintiffs against the contractor for the "original judgment" amount of $311,718.38, which represents the base judgment amount of $256,322 plus the noted costs ($40,133.70) and prejudgment interest ($15,282,.68) plus post-judgment interest ($276.99), apparently representing such interest from the date of the main judgment (September 30, 2021) to the filing date of the writ (April 11, 2022).

[33] As noted earlier, the plaintiffs' costs materials included a schedule outlining various steps taken to enforce their judgment against the contractor, reflecting (per the schedule) the claimed associated legal costs of $44,028.83.

[34] Those steps include registering the noted writ of enforcement.

[35] I find that the costs fall outside the scope of the current costs proceedings:

1) many of the described steps were on, in, or in respect of court applications (e.g. an application to compel undertakings arising from a questioning in aid of execution, and a "set aside, removal, and sale" application), which applications would presumably have had their own costs consequences. Alternatively, the plaintiffs did not show that the costs of any of those applications were deferred to be addressed in the current proceeding; and

2) in any case, as reflected in items 13-17 of Schedule C ("Post-judgment"), post-judgment enforcement steps are properly addressed in the proceeding giving rise to the judgment e.g. in the form of a supplementary bill of costs (i.e. beyond the pre-judgment costs of $40,133.70 noted above) i.e. in the plaintiffs' action against the contractor (and subcontractor) i.e. not in this spill-over proceeding against the insurers.

E. Interest

[36] The plaintiffs finally addressed interest:

> The reasons for judgment [i.e. in the main judgment here] do not mention interest on the underlying judgment, which is explicit in the policy, and we want to ensure it is included. It is tabulated in the attached schedule to be $42,424.87. See Schedule D for calculation [showing interest calculated at the *Judgment Interest Act* post-judgment interest rates for 2021-2025 totalling the noted $42,424.87].

[37] On this point, I accept Intact's position:

> The Plaintiffs seek indemnification for … what it purports, is contractual interest. [That is] pre-litigation [damage] that [was] not pled, not argued, and thus Intact had no opportunity to address. [Interest] … should not be awarded under the guise of costs.

[38] I agree that this is not a costs-related claim and that is thus beyond the scope of the present exercise.

[39] If the plaintiffs believe that this post-judgment interest forms part of the loss covered by the insurance in question, and if the insurers do not agree, I will decide the point after receiving further letter-form submissions (maximum two pages), with the plaintiffs' letter due by 4.30 pm on February 27, 2026 and the insurers' by 4.30 pm on March 6, 2026.

F. Closing note

[40] I thank the parties for their helpful costs submissions.

Heard via written submissions received on December 5, 12 (x 2) and 16, 2025.
Dated at Edmonton, Alberta on February 18, 2026.

Michael J. Lema
J.C.K.B.A.

Appearances:

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Bruce MacLeod
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Trent Kulchar
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