

Court of King's Bench of Alberta

Citation: Hultink v Trafigura Canada Limited, 2026 ABKB 149

Date: 20260302
Docket: 2201 11010
Registry: Calgary

Between:

Jessica Hultink

Plaintiff

- and -

**Trafigura Canada Limited and Trafigura Canada General Partnership
and Trafigura Trading LLC**

Defendants

**Decision of the Honourable Mr. Justice O.P. Malik
Regarding an Appeal from an Applications Judge
for Security for Costs**

Appeal from the Decision by
J.T. Prowse, The Honourable Applications Judge
Dated the 27th day of June, 2024

I. Introduction

[1] The issue before me is whether to grant the Defendants' appeal of the Applications Judge's ("AJ") decision, dated June 27, 2024, denying their application for security for costs under r 4.22 of the *Alberta Rules of Court*.

[2] The Defendants' application stems from the Plaintiff's Statement of Claim, filed in 2022, which seeks damages for wrongful dismissal, negligence, and the intentional infliction of mental suffering, in addition to aggravated and punitive damages of over \$1.5 million. The Defendants responded by filing a Statement of Defence. In 2023, the parties exchanged their Affidavits of Records. Part 5 questioning has not yet commenced.

II. Evidence Pertaining to the Defendants' Application for Security for Costs

[3] The Defendants sought an order that the Plaintiff provide security in the amount of approximately \$100,000.00, or such other sum as the court may order. They filed an Affidavit of Iain Singer. Mr. Singer deposed that the Plaintiff was employed in the United States, owned property there, and did not possess any exigible assets in Alberta. Mr. Singer deposed that the Defendants had a strong defence on the merits, that he was not aware of any reason why the Plaintiff would be prejudiced were she required to provide a reasonable amount of security, that there was a low probability the Plaintiff would obtain judgment, and that absent such an order, the Plaintiff could avoid paying a potential costs award, estimated to exceed \$100,000.00 (as per column 5 of Schedule C of the *Rules of Court*) in the event she was unsuccessful.

[4] In her responding Affidavit filed in November 2023 (the "2023 Affidavit"), the Plaintiff deposed that it was premature for the Defendants to assert the relative strength of their defence, that she possessed sufficient financial resources to satisfy a costs award, including an annual base salary (exclusive of other compensation and benefits) of \$175,000.00 USD, a Canadian RRSP account valued at approximately \$160,000.00, a Canadian chequing account with a balance fluctuating between \$5,000.00 and \$15,000.00, and assets which her husband owns in Alberta, including an apartment in Calgary.

[5] While the Plaintiff's evidence was that she had sufficient assets such that there was "no substantial risk, or any risk" that the Defendants may not be able to recover an eventual costs award, she deposed that it would be prejudicial for her to provide security for costs. She claimed that to do so, she would have to withdraw funds from her RRSP, which would cause her to incur tax penalties and would reduce her retirement savings. She maintained that the amount of security sought by the Defendants was excessive, particularly given the early stage of proceedings and their inclusion of costs for steps already completed. She deposed that her lawsuit, which alleges the Defendants' systemic harassment and misconduct, is of public importance and should be allowed to proceed. She noted that she has no history of failing to pay costs awards and that there were no special or egregious circumstances that would justify an order for security.

[6] The Plaintiff was cross-examined on her Affidavit. She confirmed that she has been employed in the United States since 2022, that her income is paid into a US bank account, that she pays taxes in the US, and that she does not earn any income from Canadian sources. She acknowledged that the funds in her Canadian bank account are hers and that there are no restrictions on her transferring funds in and out of that account. She conceded that she does not possess any other assets in Canada. She believed her husband's apartment, which is fully paid, could potentially be used to satisfy a costs award. She agreed that her RRSP assets are her only available source of Canadian funds to pay a security for costs award.

III. The AJ's Decision

[7] During the hearing, the parties agreed that the merits of their respective legal positions, a factor to consider pursuant to r 4.22 (c), were neutral because questioning had not yet taken place and it was too early to assess the relative strength of each other's legal positions. They also agreed that the Plaintiff had not demonstrated an entitlement to her husband's apartment, such that it could

be considered an Alberta asset against which a costs award could be enforced, a factor to be considered under r 4.22 (a).

[8] The Defendants argued that the Plaintiff's only Canadian assets were the funds in her RRSP account which are not "readily exigible" for enforcement purposes and a "small" bank account with a variable balance that can quickly change, akin to the situation in *Esfahani v Samimi*, 2024 ABCA 142 at paras 12-13. They expressed skepticism regarding the Plaintiff's ability to pay an eventual costs award but pointed out that if the Plaintiff is to be believed (that she can pay a costs award), then she should also be able to provide security.

[9] The Plaintiff argued that she had sufficient assets to pay a reasonable costs award, noting that there were no restrictions on her depositing additional funds into her Canadian bank account and that receiving her salary in the United States does not limit her capacity to pay a costs award in Canada. The Plaintiff pointed out that the \$100,000.00 in security sought by the Defendants represented roughly six months of her base salary and would substantially reduce her litigation resources and significantly impede her ability to continue with the action. She noted that the prejudicial effect of requiring security for costs on a plaintiff's ability to continue with the action, a factor to be considered under r 4.22(d), has a "greater role to play when the plaintiff is an individual rather than a corporation" and that "[a]n individual with a meritorious claim should not be deprived of pursuing his claim because he cannot afford to put up security for costs": *Xpress Lube & Car Wash Ltd v Gill*, 2011 ABQB 457 at para 12. She argued that the amount requested by the Defendants was excessive and unreasonable and included costs for previous steps. Alternatively, she argued that if security for costs was ordered, that it should be for a lesser sum than \$100,000.00 and that it should not include costs arising from previous steps.

[10] The AJ examined the factors enumerated in r 4.22. In assessing the factor set out in r 4.22(a), namely whether the Plaintiff had assets in Alberta against which a costs award could be enforced, he concluded that the Plaintiff had not proven an entitlement to her husband's Calgary apartment, and that it was not likely the Defendant could enforce a costs award against her remaining assets in Alberta. He noted that the funds in her Canadian bank account were small and could be depleted at any time, and that her RRSP assets were exempt from enforcement. The AJ determined that in accordance with r 4.22(b), the Plaintiff has a "very good paying job" and that she can pay the costs award notwithstanding that it arises from foreign-sourced income. He found that the merits of the action, a factor to be considered under r 4.22(c) was neutral. In considering whether granting an order for security for costs would unduly prejudice the Plaintiff's ability to continue her action in accordance with r 4.22(d), the AJ concluded:

Whether the order would unduly prejudice the responsibility. I don't think, in the amount sought, and it may be, I don't have the evidence, I can't say that the plaintiff is being reckless. \$1.5 million is a huge amount to claim. It may be warranted when the evidence comes out. And so that then triggers column 5 in schedule C, which then results in large party and party schedule C costs. But the reason for all that introduction to that remark is, in an award, if I had decided to grant security for costs, I would have awarded it in the range of \$20,000 to \$25,000.00 for the steps leading up to trial and would have done just that award, not including the trial. I wouldn't have included trial costs. And so that type of a more modest award, I don't think would be a prejudice. If I had decided to grant the award, again, I wouldn't

have granted the 90,000 award because I think the difference between the two, you are getting into territory with a \$90,000 award and it would prejudice, even with her good salary, that would prejudice the ability of the plaintiff to continue with the action.

... And to me the weightiest factor or the factor I choose to give the most weight is to the ability of the respondent to pay the costs awards and on that basis I am declining to grant security for costs. [Emphasis added]

[11] As is evident, the AJ's primary reason for dismissing the security for costs application was grounded in his belief that the Plaintiff has the ability to pay an eventual costs award. He noted that had he decided the Plaintiff should provide security, he would have ordered a more modest sum in the \$20,000.00 - \$25,000.00 range.

IV. Further Evidence

[12] The Plaintiff filed a further Affidavit in December 2024 (the "2024 Affidavit") confirming that she began a new employment position in the US in March 2024 with a base salary of \$175,000.00 USD plus an initial signing bonus of \$30,000.00, profit sharing, benefits, employer-matched 401K contributions, and a bonus plan. At paragraph 4 of her Affidavit, she deposes:

Based on my income and earning ability, I verily believe that I have the ability to pay for costs award should any be made against me in this action.

[13] While I appreciate that strictly speaking, this is new evidence that was not before the AJ, I do not consider it to be materially new evidence as it essentially confirms her salary situation at the time the AJ heard the application.

V. The Parties' Arguments

[14] The parties agree that the appeal from an AJ takes the form of a *de novo* hearing and that the standard of review of an AJ's decision is whether the AJ was correct based on the record that was before him: *Bahcheli v Yorkton Securities Inc* 2012 ABCA 166 at para 3.

[15] For the most part, the parties reiterated arguments like those made before the AJ. They agree that it is too early in the proceedings to assess the relative merits of the parties' respective legal positions, that the Plaintiff's only assets in Alberta are the cash balance in her bank account and her RRSP account, that her husband's apartment is not an asset against which a costs order may be enforced, and that her only recurring source of income derives from her US-based employment.

[16] The Defendant argues that the AJ erred in three respects: (1) accepting the Plaintiff's evidence that she could pay a costs award without requiring the Plaintiff to discharge her evidentiary burden of proving she could do so; (2) determining that a costs award could be "easily enforceable" against the Plaintiff's US income; and (3) declining to order security despite the Plaintiff having no exigible assets in Alberta.

[17] The Plaintiff contends that: (1) since incurring additional expenses to fund proceedings that took place after the AJ's decision, her financial resources have been significantly diminished such that can no longer afford to pay *any* amount for security; and that (2) the Defendants have not yet satisfied the outstanding costs awards arising from other proceedings where the Plaintiff was awarded costs.

VI. Discussion

[18] The test for security for costs for r 4.22 involves a two-step process. First, the Court considers those factors set out in r 4.22(a) – (e) and second, asks itself whether it considers it just and reasonable to require the plaintiff to provide security for payment of a costs award, keeping the foundational Rules, specifically r 1.2, in mind: *Attila Dogan Construction v AMEC Americas Ltd*, 2011 ABQB 175 at paras 24-25; *Stepanik v Timmons*, 2021 ABQB 287 at para 29. Whether to order security for costs engages this Court's exercise of discretion, which involves balancing rights to economic security with access to the legal process, all the while being mindful that "[a]ccess to justice does not equate with access to civil processes without fear of cost consequences": *DataNet Information Systems Inc v Belzil*, 2011 ABCA 40 at para 4.

[19] When considering the factors listed in r 4.22, I agree with the AJ's finding that a plaintiff's ability to provide security can reasonably include assets located outside Canada. I concur with the AJ (and this does not appear to be contested) that it is unlikely the Defendants could enforce a costs award against any assets located in Alberta given that there is no obligation for the Plaintiff to maintain a minimum balance in her Canadian bank account, her RRSP assets do not appear to be accessible for enforcement purposes, and she has not established any ownership interest in her husband's apartment. I agree with both the parties and the AJ that it is too early in these proceedings to weigh the relative strengths of their legal arguments, making this factor neutral. I accept the AJ's finding that ordering the Plaintiff to provide security for costs in the amount of \$100,000.00 would unfairly prejudice her ability to continue with her action.

[20] However, I find that the AJ made an error by accepting the Plaintiff's unsubstantiated claim that she can pay a costs award, which is a consideration that is relevant under r 4.22(b).

[21] In my view, the Plaintiff's evidence which is set out in her 2023 Affidavit and 2024 Affidavit namely, that that she can afford to pay an eventual costs award, is wholly unsubstantiated. Her assertion is baldly made without any financial disclosure as to what other liabilities or obligations she has, whether she has any additional sources of income other than that which she earns from her full-time employment, and whether, upon paying her current liabilities, there is anything left over from her income that might be applied towards paying a costs award. In my view, the Plaintiff's mere statement of fact that she can pay a costs award that is not supported with evidence does not constitute the type of clear, persuasive and credible proof upon which the AJ could reasonably rely: *Liu v Tangirala*, 2005 ABQB 246 at para 46 and *Wilpetro Contracting Ltd v Woodbridge Homes Inc*, 2010 ABPC 111 at para 58.

[22] As held in *Toronto-Dominion Bank v Suitel Canada Executive Suites*, 2011 ABQB 519, once a defendant has brought itself within r 4.22, the evidentiary burden shifts to the plaintiff to show that this Court should not require security. The rationale for such an approach was explained

at paras 30-32 of its decision where the Court referred to the earlier decision of *32262 BC Ltd v Besler*, 1998 ABQB 210:

[31] Why this shift? Valerio is the only person who knows whether there is any reason why this Court should not order him to post security for costs: *Besler* at para. 15; *Steffanson v. Richardson Greenshields of Canada Ltd.*, [1992 ABCA 299 \(CanLII\)](#), [1992] A.J. No. 929, 135 A.R. 55 at 56 (C.A.).

[32] Valerio has provided this Court with no evidence that points to the value of the Condo, any of the corporations in which he has an interest or the 1/3 Interest. He is the only person who has this knowledge and he has chosen not to provide it to this Court.

[23] On the basis that there is no evidence the Plaintiff can afford to pay a costs award and given that she has no assets in Alberta against which the Defendants' costs may be enforced, I asked the Defendants to specify what amount of security for costs they considered appropriate to cover their costs through questioning and up to trial. They suggested a range between \$20,000.00 and \$25,000.00.

[24] The Plaintiff disagrees and argues that due to proceedings that have occurred in this action since the hearing before the AJ, she has incurred additional expenses and has been awarded costs that the Defendants have not yet paid. She maintains that her resources have been depleted such that she is now unable to provide security in any amount.

[25] I dismiss her argument. It does not appear to be disputed that *both* parties have succeeded in various applications and that none of these costs have yet been assessed. This is therefore not a case where the Defendant owes the Plaintiff unpaid costs. If, as the Plaintiff says, she can afford to pay an eventual costs award, then she should be able to provide security in a modest amount. Consequently, I require her to do so.

[26] I find it appropriate to order her to provide "stepped" security to cover litigation costs up to trial, like the approach taken in *Mudrick v Capital Management v Wright*, 2018 ABQB 648 at paragraphs 38-39. Had the Plaintiff's action been a simple claim in constructive dismissal, I would have ordered her to provide security in the \$7,500 - \$15,000.00 range. However, the Plaintiff's case is substantially more complex, as it involves broader allegations regarding the Defendants' permissive workplace culture that enabled harassment and bullying. Having considered the Defendants' Bill of Costs (which assesses costs based on Column 5) and the days required for questioning, I conclude that "stepped" security in the amount of \$20,000.00 up to trial is appropriate and proportional.

[27] Having considered those factors enumerated in r 4.22(a)-(e), I find it just and reasonable to grant an order requiring the Plaintiff to provide security in the sum of \$20,000.00.

[28] In accordance with r 4.23, the required security may be provided either by paying the amount into Court (r 4.23(a)) or by posting a bond: r 4.23(2). Although the default timeframe for providing security is 60 days (r 4.23(b)), I recognize that the Plaintiff may need additional time to arrange security and I therefore extend the deadline to 90 days from the date of the within Order. As per r 4.23(c), all other applications and proceedings are stayed, except for assessments of costs

relating to the parties' other proceedings. If the Plaintiff does not provide security as directed within the specified period, her action is automatically dismissed without further order, pursuant to r 4.23(d).

VII. Disposition

[29] The Defendants' appeal is granted.

[30] The Plaintiff is ordered to provide security for costs in the sum of \$20,000.00.

[31] The Defendants were successful and are entitled to their costs. These costs shall be set down for an assessment pursuant to r 10.34, along with the parties' cost assessments arising from their other proceedings.

Heard on February 17, 2026.

Dated at the City of Calgary, Alberta on March 2, 2026.

O.P. Malik
J.C.K.B.A.

Appearances:

Sophie Purnell, for the Plaintiff

Jennifer Koschinsky, for the Defendants