

Court of King's Bench of Alberta

Citation: 1010805 Alberta Ltd v Sundial Growers Inc, 2025 ABKB 439

Date: 20250721
Docket: 2201 14923
Registry: Calgary

Between:

1010805 Alberta Ltd, 2087866 Alberta Ltd, 2083136 Alberta Ltd, 2082910 Alberta Ltd

Applicants

- and -

Sundial Growers Inc and Spirit Leaf Inc

Respondents

**Ruling on Costs
of the
Associate Chief Justice
D.B. Nixon**

I. Introduction

[1] This is a ruling on costs following my decision in *1010805 Alberta Ltd v Sundial Growers Inc*, 2024 ABKB 173 wherein I gave leave to the parties to speak to costs if they could not otherwise agree. The parties could not agree.

II. Background

[2] In my decision in *Sundial Growers*, concerning an application brought by 1010805 Alberta Ltd (“**101Co**”), 2087866 Alberta Ltd, 2083136 Alberta Ltd and 2082910 Alberta Ltd (collectively, the “Applicants”) to appeal an arbitral award pursuant to section 44 of the *Arbitration Act*, RSA 2000, c A-43, I dismissed the appeal finding no reviewable error by the arbitrator. There is no dispute that Sundial Grower Inc and Spirit Leaf Inc (collectively, the “Respondents”) were successful in defending the appeal and therefore presumptively entitled to costs. The question is what the appropriate determination of costs should be in these circumstances.

III. Issues

- [3] In this ruling I must determine the following.
- a. What is the appropriate award of costs to the Respondents?
 - b. How should those costs be awarded against the Applicants?

IV. Positions of the Parties

i. The Respondents

[4] The Respondents note that they were entirely successful in the appeal and argue that the appropriate costs would be party and party costs at 50% of reasonable legal fees. In the alternative, they argue that if Schedule C costs were assessed, those costs should be based on Column 5 with at least a 3 times multiplier due to the significant sums represented by the arbitration agreement.

[5] The Respondents assert that the appeal was extremely broad and the Applicants sought to appeal nearly every element of the arbitration award. This approach by the Applicants caused a very complex appeal, leading to significant expense of time and funds.

[6] The claimed bill of costs for the Respondents is \$232,245.95, of which they seek 50% recovery. Under Schedule C in Column 5: (i) if based on Items 1-8, the claimed amount is \$11,610.56; and (ii) if based on Items 18-21, the claimed amount is \$32,930.56.

[7] The Respondents claim these costs jointly and severally.

ii. The Applicants

[8] The Applicants argue that the costs should be awarded based on Column 1 of Schedule C because Schedule C is the presumptive starting point. The Applicants further assert that because there was no specific amount at stake to the appeal, the costs should be based on Column 1.

[9] The Applicants also argue that joint and several costs awards may cause unfairness and impose an onerous burden on the litigants. Instead, they argue that the costs should be awarded severally, and apportioned one-third to each of the Applicants.

V. Analysis

A. The Law of Costs – Overview

[10] The framework for determining costs is set out in the *Alberta Rules of Court* (the “Rules”). The default rule is that a successful party to an application is entitled to an award of costs against the unsuccessful party payable forthwith, subject to the Court’s general discretion under *Rule* 10.31: see *Rule* 10.29(1); *McAllister v Calgary (City)*, 2021 ABCA 25 at paras 21-22.

[11] There are no particular constraints or rules that apply to the application of these general rules. This decision fits within the broad discretion the Court has in making a costs award as per *Rules* 10.31 and 10.33. This discretion is, of course, subject to the need to act judicially on the facts of the case: *McAllister* at para 18.

[12] *Rule* 10.33 provides as follows:

10.33(1) In making a costs award, the Court may consider all or any of the following:

- (a) the result of the action and the degree of success of each party;
- (b) the amount claimed and the amount recovered;
- (c) the importance of the issues;
- (d) the complexity of the action;
- (e) the apportionment of liability;
- (f) the conduct of a party that tended to shorten the action;
- (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

- (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
- (b) a party’s denial of or refusal to admit anything that should have been admitted;
- (c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party’s defence from that of another party;
- (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
- (e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
- (f) a contravention of or non-compliance with these rules or an order;
- (g) whether a party has engaged in misconduct;

(h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

[13] *Rule* 10.31 provides that “after considering the matters described in *Rule* 10.33, the Court may order one party to pay to another party” a costs award, which can be one or a combination of the following:

- all or part of the reasonable and proper costs with or without reference to Schedule C,
- an amount using multipliers, proportions, or fractions of columns in Schedule C,
- all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action,
- or a percentage of assessed costs.

[14] The primary purpose of a costs award is to partially indemnify the successful party for either defending a claim that proved unfounded or in pursuing a valid legal right: *McAllister* at para 33. Under *Rule* 10.31(1), the trial judge holds considerable discretion in determining what constitutes reasonable and proper costs: *Barkwell v McDonald*, 2023 ABCA 87 at para 53.

[15] The costs award need not be based on Schedule C, and Schedule C is not a mandated default method: *McAllister* at para 54. However, Schedule C does, in certain situations, have the “advantage of providing parties with greater certainty as to their exposure to costs, it is simple, efficient, and inexpensive to apply, and in many cases avoids the need for lengthy inquiries into and assessment of the appropriate level of costs”: *Barkwell* at para 53.

[16] There is no presumptive level of indemnification in the *Rules*: *VLM v Dominey Estate*, 2023 ABCA 382 at para 6. The overriding issue is proportionality and reasonableness: *Barkwell* at paras 57 and 58.

[17] Typically, when awarding costs, outside of special circumstances, it is assumed that it will be jointly and severally: *Kent v MacDonald*, 2020 ABQB 29 at para 9; *956126 Alberta Ltd v JMS Alberta Co Ltd*, 2021 ABQB 121 at para 15.

B. Application of the Law

[18] I turn to consider the issues as I framed them above.

a. What is the appropriate award of costs to the Respondents?

[19] In my review of the law and the evidence, I find that awarding costs to the Respondents based on Column 5 of Schedule C is the appropriate award in the present case. I come to this conclusion for the following reasons.

[20] First, despite the argument by the Respondents, I am not of the view that this was a particularly complicated or complex appeal. That the Applicants decided to appeal most every part of the Arbitrator’s decision does not of itself warrant an elevated costs award against them, even though they were not successful on the issues that they had raised. As noted in the decision, the appeal was properly brought under s 44 of the *Arbitration Act*.

[21] As aptly stated by Justice Dilts in *Prather v Tower Engineering Group*, 2024 ABKB 466 at para 6 “[t]he success of one party over another is the presumptive foundation of the costs regime.”

[22] The Applicants argued that because there was no monetary amount at issue in the appeal itself, challenging solely the findings of the Arbitrator and thus the appropriate column would be

Column 1. In contrast, the Respondents argue that this dispute was really worth millions of dollars and that the upshot of the application would have opened the possibility of significant damages.

[23] I note that the relief requested from the Applicants was an order setting aside the Arbitrator's awards as well as the following:

- a) Finding that Sundial is a franchisor, and is a party to and bound by the Franchise Agreements and the *Franchises Act*;
- b) Finding that the Franchise Agreements and *Franchises Act* prohibited Sundial from acquiring a direct competitor that operates in the Applicants' exclusive territories;
- c) Finding that Sundial is in breach of the duty of fair dealing owed to the Applicants pursuant to the *Franchises Act* by acquiring a direct competitor that operates in the Applicants' exclusive territories;
- d) Finding that Sundial procured, induced, or caused Spirit Leaf to be in breach of the franchise agreements;
- e) Finding that the franchise agreements have been fundamentally breached;
- f) Terminating the franchise agreements;
- g) Directing a damages assessment, or referring the matter back to the Arbitrator to reassess damages payable to the Applicants; and
- h) Awarding damages to the Applicants in the amount of \$50,000, or such other amount or remedy as counsel may advise, for the ongoing breach of the duty of fair dealing.

[24] I do not agree that this suggests there was no monetary amount at issue. I make this comment because the Applicants were not solely seeking to appeal and have it sent back to the Arbitrator for reconsideration. Instead, they were seeking findings from this Court that would have implicated significant amounts of damages for the Arbitrator to now reassess were the appeal successful.

[25] As such, I find that the proper column to assess the costs at would be Column 5 of Schedule C in this case. Further, since this was an appeal, the costs will be calculated under Column 5 with Items 18-21 applied.

[26] The Respondents sought a multiplier. Typically, a multiplier is warranted if the matter is complex or to cover the significant expenditures in costs of the Respondents to defend the appeal. Although I acknowledge that counsel put in serious time and effort to prepare and respond to the appeal and that it was significant, I do not find that this situation meets the circumstances where the caselaw has recognised a need for a multiplier: see the reasoning outlined in *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144 at paras 24-26; *Savoie v Lambert*, 2024 ABKB 744 at paras 17-19.

[27] Based on my review of the evidence and analysis of the law, I find that Schedule C Column 5 costs with Items 18-21 applied is appropriate. I make that determination because this is an appeal, and that column represents reasonable and proper costs in this case. While I considered the application of a multiplier because of the "kitchen sink" approach taken by the Applicants, I do not find (as mentioned above) that this situation meets the circumstances where

the caselaw has recognised a need for a multiplier. Notwithstanding the “kitchen sink” approach, I am of the view that the case was not that complex.

b. How should those costs be awarded against the Applicants?

[28] Based on my review of the evidence and analysis of the law, I find the costs award should be jointly and severally applied against three of the Respondents: being 2087866 Alberta Ltd; 2083136 Alberta Ltd; and 2082910 Alberta Ltd (collectively, the “208Cos”). I excluded 101Co from that joint and several application because the 208Cos had agreed that 101Co had a very limited role in this appeal. Also, based on my review of the evidence, I inferred that the 208Cos were in accord with the focus being on them concerning the application of costs. Finally, I make this determination because when awarding costs in these types of circumstances the burden is typically applied on a joint and several basis: see *Kent* at para 9; and *956126 Alberta* at para 15.

[29] As such, I find it appropriate to award costs jointly and severally against 2087866 Alberta Ltd; 2083136 Alberta Ltd; and 2082910 Alberta Ltd.

VI. Conclusion

[30] Based on my review of the evidence and analysis of the law, I find as follows concerning the issues:

- a. What is the appropriate award of costs to the Respondents? For the reasons outlined above, I find that Column 5 of Schedule C, with Items 18-21 applied is the appropriate award of costs to, and for the benefit of, the Respondents.
- b. How should those costs be awarded against the Applicants? For the reasons outlined above, I find it appropriate to award costs jointly and severally against 2087866 Alberta Ltd; 2083136 Alberta Ltd; and 2082910 Alberta Ltd.

Dated at the City of Calgary, Alberta this 21st day of July 2025

D.B. Nixon
A.C.J.C.K.B.A.

Appearances:

Trevor McDonald and Alison Scott
for the Applicants

Adam Ship and Kyle McMillan
for the Respondents