

Court of King's Bench of Alberta

Citation: Brokop v 1378882 Alberta Ltd, 2025 ABKB 477

Date: 20250814
Docket: 1801 16539
Registry: Calgary

Between:

Erwin Brokop and 866565 Alberta Ltd.

Plaintiffs

- and -

1378882 Alberta Ltd., William Harris, Luba Harris, Samuel Harris, John Doe and ABC Corporation

Defendants

**Decision on Costs
of the
Honourable Justice B.E. Romaine**

I. Introduction

[1] A defendant in this action, William Harris, now the Estate of William Harris, seeks costs against the Plaintiffs on a solicitor-client full indemnity basis, or in the alternative, an award of 50% of all costs incurred by Mr. Harris or his Estate multiplied by two pursuant to Rule 4.29 of the Alberta Rules of Court, AR 124/ 2010.

[2] The Plaintiffs seek an order that no costs be awarded, or in the alternative, an award of Schedule C costs.

II. Analysis

[3] Rule 10.33 sets out considerations that go into determination of the amount of a costs award in Alberta: *McAllister v Calgary (City)*, 2021 ABCA 25 at para 23.

[4] The Plaintiffs conceded that they were unsuccessful in their application for summary judgment against the Estate of Mr. Harris and their application for leave to amend their proceedings to allege conspiracy. The Estate's application for summary dismissal was granted. The Plaintiff's claim against the Estate was for \$2 million and there was no recovery.

[5] Given the amount claimed and the allegations against Mr. Harris, this was an important issue to the parties, and the matter was complex.

[6] There was no apportionment of liability. Mr. Harris and his Estate made multiple offers to settle the claims against him in accordance with Rule 4.24. The first formal offer was on March 4, 2020, before Mr. Harris filed a statement of defence and was an offer to settle by payment of \$10,000 in exchange for the Plaintiffs filing a Partial Discontinuance of Claim on a without costs basis and a release of Mr. Harris from all claims.

[7] Formal offers were also made on March 2, 2023, and March 7, 2023, shortly before the applications were heard. The second offer included payment of \$15,000 to the Plaintiffs, and the third offer involved payment of \$22,500. The Plaintiffs made one offer in March 2023, offering to settle the action for a payment of \$49,666 and \$10,000 in costs.

[8] The first offer was thus made roughly three years before the application was heard and at an early stage of the proceedings. Rules 29 (2) and (3) provide that a defendant is entitled to double its costs for steps taken in the action after service of the offer if the claim that is subject to the offer to settle is dismissed. These Rules do not apply if the Court awards an indemnity to a party for the party's lawyer's charges or a lump sum instead of assessed costs: Rule 10.31 (b).

[9] Rule 10.33 (1)(g) allows the Court to consider "any other matter related to the question of reasonable and proper costs that the Court considers appropriate."

[10] The Estate submits that this Court should consider that the claims against Mr. Harris and the Estate were claims in fraud, and that the Plaintiffs further sought to assert claims of dishonesty against Mr. Harris through an amendment of their pleadings to allege conspiracy. All these claims were found to be without merit, for the reasons set out in the decision at 2023 ABKB 650.

[11] Specifically, this Court found that the proposed claim of conspiracy against Mr. Harris was hopeless and contrary to the Plaintiffs' own allegations that Mr. Harris lacked capacity. The Estate also submits that the fact that some of the evidence that allowed the Court to summarily dispose of the Plaintiffs' claims against Mr. Harris was provided by the Plaintiffs in the form of a forensic accounting report. The Estate notes that this evidence was available to the Plaintiffs before they filed their summary judgment application and before they received the March 2023 offers. It is also noteworthy that a decision of Registrar Farrington in *Harris (Re)*, 2022 ABQB 381 (June 2022) with respect to the bankruptcy of Jon Harris pointed out that the same forensic account report indicated that the funds that were the subject of the application before this Court had "flowed back to either Mr. [Jon] Harris or his business ventures." This finding was important to the application before this Court.

[12] All these factors support a substantial award of costs against the Plaintiffs. However, are Mr. Harris and the Estate entitled to solicitor-client costs?

[13] As this Court noted in *Karnalyte Resources Inc. v Phinney*, 2021 ABQB 26, the law in Alberta relating to an award of solicitor or client fees is aptly set out in *Secure 2013 Group Inc. v Tiger Calcium*, 2018 ABCA 110 at para 15:

Solicitor-client costs are generally awarded only when there has been reprehensible, scandalous or outrageous conduct by a party... They are only awarded in rare and exceptional circumstances and may be available if misconduct occurs in the course of litigation... A careful analysis of the facts is required...

[14] The Court in *Tiger Calcium* set out factors to be considered by a court at para 15, including the following:

- (a) blameworthiness in the conduct of the litigation;
- (b) when justice can only be done by a complete indemnification for costs;
- (c) where there was evidence that the appellant hindered, delayed or confused the litigation;
- (d) where there has been an attempt to conceal material documents and failure to produce material documents in a timely fashion;
- (e) positive misconduct, where others should be deterred from like conduct and the party should be penalized beyond an ordinary order for costs; or
- (f) untrue or scandalous charges: see also *Pillar Resource Service Inc v Primewest Energy Inc.*, 2017 ABCA 19 at paras 8 and 12.

[15] In *Xpress Lube & Car Wash Ltd. v Gill*, 2019 ABQB 898, Eamon, J. awarded the defendants 80% of its solicitor and client costs for the period of time after it became clear that the plaintiff had engaged in serious litigation misconduct. The plaintiff had attempted to delay justice after it realized it was likely that it could not prove its allegations of dishonesty. In addition, the Court doubled costs from the date of the first service of a formal offer.

[16] In *1490703 Alberta Ltd v Chahal*, 2021 ABQB 853, the defendants were entitled to “a doubling of their incurred costs on a 50% indemnity basis, given the factors set out in Rules 10.33 and 10.2 (1)”.

[17] The circumstances of this case do not meet the seriousness of misconduct sufficient to award solicitor-client costs according to the factors set out in *Tiger Calcium*, but they justify a lump sum award equal to a percentage of Mr. Harris’ solicitor-client costs.

[18] Counsel for Mr. Harris and the Estate states that since the Statement of Claim was served on Mr. Harris, he and his Estate have incurred legal fees and disbursements totalling \$142,672.30 as of the date the applications were argued.

[19] From the time the decision was rendered on November 17, 2023 up to the time written submissions with respect to costs were finalized, the Estate incurred additional legal fees and disbursements totaling \$24,125.75 with respect to the settlement of a form of order regarding the decision, unsuccessful attempts to resolve the issues of costs with the Plaintiffs amicably, and in the preparation of written submissions on costs.

[20] In *Barkwell v McDonald*, 2023 ABCA 87, the Court advised that:

- (a) parties seeking entitlement to a percentage of solicitor and client costs are required to justify the entitlement “by a consideration of the factors in Rule 10.2”: paragraphs 59-60; and

- (b) parties seeking entitlement to a lump sum “should provide the Court, as a benchmark, an assessment of the fees that would be ordered under Schedule C”: paragraphs 54.

[21] The Plaintiffs have supplied a draft bill of costs under column 5 of Schedule C. This indicates an entitlement to costs of \$17,520. Solicitor-client costs and disbursements claimed by Mr. Harris and the Estate total \$164,798.05.

[22] The Plaintiffs do not allege that these costs are unreasonable, other than to point out the disparity of the amount compared to their Schedule C calculation which fails to consider the doubling, and perhaps more, of these costs due to unaccepted offers.

[23] The Plaintiffs’ submission that no costs are appropriate, or that they should be limited to Schedule C costs relies on the argument that imposing costs on the Plaintiffs “compounds an already staggering loss of \$2,242,750”. They cite *B & R Development Corporation Ltd. v Trail South Development Inc.*, 2011 ABQB 706 at para 8, where the Court noted that costs ought not to be oppressive.

[24] In that case, the Court noted that, while the plaintiff lost its action on all accounts, the action was nevertheless worthy of litigation. She also notes that the quantum of the claim, after mitigation, did not justify a multiple in the circumstances, and that there was no basis on which to depart from the usual party-party costs, including second counsel fees and doubling after a formal offer was made, with an increase for written final argument.

[25] While the Plaintiffs have suffered a significant loss that they have not been able to recover due to the bankruptcy of the alleged fraudster, Mr. Harris’ son, their attempt to recover their loss from the elderly, incapacitated father of the alleged fraudster does not entitle them to relief from costs.

III. Conclusion

[26] I find that a reasonable and appropriate award of costs in this case given the factors set out in Rule 10.33 is 50% of legal fees plus disbursements and GST.

[27] Counsel for the Estate must provide a breakdown of the solicitor-client costs, maintaining privilege over details, as well as a list of disbursements. If the parties disagree over any of the particulars, their dispute is to be referred to an assessment officer for review, limited to whether the services were in fact rendered and the disbursements incurred, and not with respect to reasonableness.

Dated at the City of Calgary, Alberta this 14th day of August, 2025.

B.E. Romaine
J.C.K.B.A.

Appearances:

Richard E. Harrison
for the Plaintiffs

Dean A. Hutchison
for the Estate of William Harris