More Alberta Pushback On McAllister Costs

VLM v Dominey, 2024 ABKB 295 (Henderson, J) is an Alberta Court of King's Bench decision where the Court declined to award costs tied to the notional legal fees of the successful applicants in a class certification proceeding, instead opting to award costs under Schedule C to the Alberta *Rules of Court*.

This decision is important because it discusses and considers the application important Alberta costs decision *McAllister v Calgary (City), 2021 ABCA 25*, amongst others.

This case summary is a bit on the technical side, and mostly intended for practicing lawyers who are already familiar with how "costs" work in Alberta.

Facts

The following were the facts summarized by the ABKB:

- The applicant had successfully applied to court to become certified to proceed with a class action
- Legal counsel for the applicant was under a "contingency" retainer agreement, whereby they were to be paid a percentage of recovery if they were successful in the case itself
- Applicant legal counsel argued they should get as costs, 75% of their recorded legal fees on the application plus disbursements, which totaled $136,472.84

Analysis / Conclusion

The applicant's argument for costs was based on the *McAllister* decision. The applicant argued that *McAllister* supported the proposition that 40-50% of the winning party's legal costs as a baseline, and argued that in this case the relevant considerations supported a costs award of 75% of their recorded fees.

The respondent argued the costs should be based on Schedule C of the *Rules of Court*.

The Court disagreed with the argument of the applicant about the meaning of *McAllister* as follows:

[6] While *McAllister* does permit a Court to order costs to reflect 40 – 50% of the fees paid by the client, this does not mean that 40 – 50% is the baseline to be used in assessing a costs award. Instead, *McAllister* provides a rule of thumb that, in

appropriate circumstances, can be used as part of the exercise of discretion in a costs award. The Alberta Court of Appeal has addressed this issue several times recently. In *Barkwell v McDonald*, 2023 ABCA 87 the Court, referring to *McAllister,* confirmed trial judges have considerable discretion in setting "reasonable and proper costs" under Rule 10.31(1). Specifically with respect to awarding costs based on a percentage of fees charged by a lawyer, the Court of Appeal in *Barkwell* at para 55 explained:

McAllister confirms that the discretion of a trial judge over costs extends to awarding a percentage of the solicitor and client costs incurred by the successful party. That does not, however, mean that the winning party can simply assert the quantum of the fees that was charged by counsel, and paid by the winning party. As *McAllister* recognized by sending the costs award in that case back to the trial judge, a detailed analysis is required to determine "reasonable and proper costs".

[7] At paragraph 57 – 58 the Court in ***Barkwell*** further explained:

The overriding issue is proportionality. The rules on costs aim to balance indemnity of the winner without unreasonably discouraging access to the court, or unduly penalizing the losing party: *McAllister* at para 45. The winning party cannot simply claim a percentage of the fees paid if they are disproportionate to the issues and the amounts involved. Success is not a justification for disproportionate litigation. One important feature of the tariff in Schedule C is that it does not measure how much in fees was paid by the winning party, but rather, gives a rough measure of how much should have been incurred in the ordinary case having regard to the amounts in dispute. Obviously, the amount involved is not always determinative, but the principle of proportionality applies to non-monetary issues as well.

The long-established principle is that costs awards are designed to partially, but not fully indemnify the winning party: *McAllister* at para 37. It is frequently said that a rough rule of thumb is that the costs award should reflect 40 to 50% of the solicitor and client costs: *McAllister* at paras 41-42. That again is not necessarily a reference to the costs incurred and paid by the client, but rather to the costs that should reasonably have been incurred given the issues. This was also the benchmark that was used to set the tariff in Schedule C (*McAllister* at para 43), and why we stress that a party, regardless of the costs claimed, should always provide as a benchmark a draft Bill of Costs based on Schedule C.

[8] These principles were again emphasised in ***Sutherland v Sutherland*** 2023 ABCA 185 at para 4:

As indicated in *Barkwell v McDonald*, 2023 ABCA 87 at paras. 52-61, an award of party and party costs based on solicitor and client costs must be justified. Importantly, the costs claimed must be proportionate to the amounts in issue: *Sunridge Nissan Inc v McRuer*, 2023 ABCA 128 at para. 58. The issue is not simply how much the successful party spent, but how much that party can reasonably expect the other party to pay. The rates and amount of time invested must be justified. The amount actually charged to the client is not definitive, and not of dominant importance. Indeed, it is not something specifically listed in R. 10.33. There is no rule or presumption that party and party costs should equal 40 to 50% of solicitor and client costs in every case. In addition to the issue of proportionality, the appropriate award of costs depends on a consideration of all the factors in R. 10.33.

The Court noted that it was very challenging to assess the proportionality of hourly fees on a preliminary application because ultimate liability and damages are not yet known, and "time recorded is not the same as legal fees that have been paid".

The Court ultimately decided to award costs on the basis of Schedule C and not on the basis of recorded legal time. Its analysis of proper costs under Rule 10.33(1) was as follows:

[11] When considering the amount of costs to be awarded it is important to consider the factors identified in R. 10.33(1):

- The Applicant was successful on the certification application and thus is presumptively entitled to costs.
- The issues in the litigation are important and may have a significant impact on the Applicant and other class members, although that is generally true of many class proceedings and would not, on its own, justify elevated costs: ***Skands v Allergan***Inc 2021, ABQB 870 at para 21.
- All certification applications have a level of complexity, however this application was not overly complex and the application was heard in one day and would not, on its own, justify elevated costs: ***Andrik v Merrill Lynch Canada Inc.*** 2014 ABQB 28at para 4 and 6.
- The Respondents forcefully opposed the certification application and challenged the Applicant on many points. However, the positions taken by the Respondents gave rise to no impropriety and would not justify elevated costs.
- Many of the class members are vulnerable persons who have, for all practical purposes, no ability to finance this litigation. This is a factor that can be taken into consideration in relation to an award of costs. However, that factor is mitigated to some extent due to the contingency arrangements that have been entered into with Counsel.

My Take

I think the development of the law after *McAllister* has been interesting to say the least. On the one hand, its understandable that a successful party will want to recover as much of their legal fees as possible from the unsuccessful party. It also has an inherent feeling of fairness to it, because when a party is successful we are tacitly acknowledging that they were in the right and should not have had to go through the litigation process.

However, I have been concerned since *McAllister* released that if it is not reconsidered or at least applied with very significant care, it will exacerbate existing economic unfairness in access to justice and will cause *more costly* and *more complicated* litigation, not less.

Here is a scenario that illustrates what I mean:

An employee proceeds with litigation in Court of King's Bench for wrongful dismissal. The employer alleges it has just cause for dismissal. The employee's legal counsel advises the odds of success are around 50/50 and the potential recovery between $175,000 and $250,000. Many just cause cases are too complicated for summary judgment or even streamlined trial, so the employee needs to pursue a full trial. Employee counsel tries to get a 2 day trial to keep costs from escalating too much. The employer itself has this cost concern as well, but in discussion with its legal counsel comes to understand that there is a good argument that 50% of its legals will be covered if they win, so the most important thing is they put everything they can into winning the case at all costs. The employer can afford this investment risk, so it instructs the lawyer to go ahead. Employer counsel ends up getting instructions to push for a 6 day trial and the Court orders 5 days. The employee's legal counsel gets instructions to continue with the case and run the trial, but to make a best effort

to keep it within a restricted budget, because the employee literally does not have more than a certain amount of money to throw at it.

Every party always has an incentive to put their best foot forward in litigation to increase their chances of winning. However in this above scenario – which would not be unusual – the employer has a business case to ensure they win that goes beyond the ordinary business case related to the liability at stake. That business case definitely results in lawyers encouraging excessively expensive litigation practices *sometimes*, if not *often*. This is especially concerning where there is a major disparity in the relative economic resources of the parties, which is the case in almost all employment law litigation.

There are a number of decisions considering *McAllister* at this point, but *VLM v Dominey* reaffirms that costs are always in the discretion of the Court, and there is no automatic baseline tied to legal fees.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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