ABCA clarifies approach to determining a successful party's entitlement to costs

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In *Barkwell v McDonald* ("*Barkwell*"),[1] the Alberta Court of Appeal (the "ABCA") recently clarified the considerations and procedure for determining reasonable and proper costs – particularly, where a party seeks a lump sum or percentage-based costs award.

What you need to know

- A trial judge has broad discretion to make a "reasonable and proper" costs award, which may be awarded based on Schedule C, as a lump sum, or as a percentage of the costs that were *reasonably* incurred by a successful party.
- A party must demonstrate that their claimed costs are reasonable, proper, and proportionate in the circumstances, including with reference to, among other factors, the importance of the issues, the complexity of the action, the services provided, the conduct of the parties, the rates charged, and the manner in which the file was staffed.
- Where a party seeks a lump sum or percentage-based costs award, they should always provide the Court with an assessment of the fees payable under Schedule C, which the Court may use as a benchmark to determine whether the claimed costs are "reasonable and proper" in the circumstances.

Background

Following a trial related to the division of matrimonial property, the Trial Judge awarded the Respondent $387,653.22 in costs, which consisted of: (1) 50% of their *actual* legal fees plus disbursements; and (2) $160,754.38 for expert reports.

The issues on appeal related to: (1) the division of matrimonial property, including tracing exempt assets and accounting; and (2) the Trial Judge's decision to award the Respondent 50% of their *claimed* legal fees without further analysis as to whether those fees were reasonable and proper in the circumstances.

Summary of the ABCA's decision on costs

The ABCA held that the Trial Judge erred in distributing the parties' property according to the factors set out in the *Matrimonial Property Act*.[2] Although the Court noted that further submissions would be required regarding costs in this case, it took the opportunity to provide general guidance and clarification with respect to costs awards.

The Court began by affirming its recent decision in *McAllister v Calgary (City)* ("*McAllister*"),[3] where the ABCA held that trial judges have broad discretion to determine what constitute "reasonable and proper costs" in a particular case, which may be awarded based on Schedule C, as a lump sum, or as a percentage of legal fees that were *reasonably* incurred by the successful party.

Although the Court observed that the "rough rule of thumb" is that a costs award should reflect 40-50% of the legal fees incurred by a successful party, it noted that this range of indemnification is not necessarily a reference to the costs *actually* incurred and paid by the client, but rather the costs that "should *reasonably* have been incurred"[4] in the circumstances of the case.[5]

The Court emphasized that the "overriding issue" in any costs award is proportionality, and that a party seeking a lump sum or percentage-based costs award must demonstrate that their claimed costs are reasonable and proportionate in the circumstances,[6] including with reference to the factors outlined in Rules 10.2 and 10.33. These factors include, among others, the importance of the issues, the complexity of the action, the services provided, the conduct of the parties, the rates charged by counsel, and the manner in which the file was staffed.[7] In other words, 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".[8]

Notably, the Court stressed that "regardless of the costs claimed, [a party] should always provide as a benchmark a draft Bill of Costs based on Schedule C"[9] which the Court may use to assess whether the claimed fees are reasonable and proportionate.

Ultimately, the Court held that the Trial Judge erred by awarding the Respondent 50% of their *claimed* legal fees without further inquiry or reference to costs payable under Schedule C. In doing so, the Court expressly noted that the approach taken by the Trial Judge "is not […] sanctioned by *McAllister*",[10] which signals that going forward, parties seeking a lump sum or percentage-based costs award should expect greater scrutiny as to whether their claimed costs are reasonable and proper in the circumstances.

[1] *Barkwell v McDonald*, 2023 ABCA 87 [*Barkwell*].

[2] *Matrimonial Property Act*, RSA 2000, c M-8.

[3] *McAllister v Calgary (City)*, 2021 ABCA 25.

[4] *Barkwell* at para 58 [emphasis added].

[5] *Barkwell* at para 57

[6] *Barkwell* at para 57.

[7] *Barkwell* at para 60

[8] *Barkwell* at para 57

[9] *Barkwell* at para 58

[10] *Barkwell* at para 61.

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