In the Court of Appeal of Alberta

Citation: McAllister v Calgary (City), 2021 ABCA 25

Date: 20210127
Docket: 1901-0003-AC
Registry: Calgary

2021 ABCA 25 (CanLII)

Between:

Kyle Lyndon McAllister

Appellant
(Plaintiff)

- and -

The City of Calgary

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Elizabeth Hughes
The Honourable Madam Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice J.C. Kubik
Dated the 10th day of December, 2018
Filed on the 23rd day of January, 2019
(2018 ABQB 999, Docket: 0701-07017)

Memorandum of Judgment

The Court:

I. Introduction

[1] This is an appeal of a costs award by the party to whom the costs were awarded. The appellant argues that the costs award is not reasonable because it does not provide him with a sufficient level of indemnification for the costs he actually incurred.

[2] At the outset, we wish to note that the costs award being appealed is what we will refer to as Rule 10.31(1)(a) costs. That is, they were awarded on the basis that they represented the "reasonable and proper costs" incurred by a party who was successful in litigating his claim to near completion (that is, to a determination of liability). The costs award was not an exceptional, discretionary costs award permitted by Rule 10.31(b).[1] This is not a case where it was necessary to employ the costs award as an instrument of policy or to accomplish any purpose other than that of partially indemnifying the successful party. The trial judge was wholly satisfied that counsel acted reasonably in their pursuit of the claim. There was no need to discourage unnecessary steps taken in the litigation or to sanction obstructive behaviour or to encourage settlement.

[3] The final point to be made by way of introduction is that the costs being awarded in this case were the costs of prosecuting a claim from Statement of Claim to judgment in a protracted piece of litigation involving arguably novel liability.

II. Overview

[4] This appeal involves a consideration of the level of indemnification a successful party to protracted litigation should receive in costs from the losing party, and in so doing it addresses the role of Schedule C in making such costs awards, as well as other types of costs awards.

[1] 10.31(1) After considering the matters described in rule 10.33 [Court considerations in making a costs award], the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

> (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
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> (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
>
> > (i) an indemnity to a party for that party's lawyer's charges, or
> >
> > (ii) a lump sum instead of or in addition to assessed costs.

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[5] The trial judge's costs decision (*McAllister v Calgary (City)*, 2018 ABQB 999 [*Reasons*]) followed a trial in which the appellant plaintiff was successful in establishing liability against the City of Calgary for injuries he sustained from an assault on a Plus-15 outside a C-Train station.

[6] In her costs decision, the trial judge suggested that absent out-of-the-ordinary circumstances, costs should normally be awarded pursuant to the Tariff of Recoverable Fees or Schedule C of the Rules of Court without regard to the actual legal costs incurred by the plaintiff in the litigation. She simply awarded the plaintiff Schedule C costs, adjusted for inflation. The appellant says the costs awarded represented only 17% of total legal fees incurred by him.

[7] The appellant argues that the costs award failed to properly indemnify him for the costs he incurred. In making this argument, the appellant concedes that he was only entitled to be partially indemnified for his actual out-of-pocket costs. The appellant incurred legal fees in the amount of $389,711.78. He was awarded $70,294.70 in legal costs. He seeks to be indemnified in the amount of $175,711.78, or 45% of the legal costs he incurred.

[8] For the reasons that follow, we conclude that the trial judge did not adequately consider indemnification in her costs award. She applied the Tariff of Recoverable Fees in Schedule C in a manner which may not have adequately indemnified the appellant who was the successful plaintiff in a protracted lawsuit involving the determination of a municipality's liability for the safety of its citizens on public transit platforms. We remit the matter of costs back to the trial judge to reconsider her costs award in accordance with these reasons.

III. Decision Below

[9] As a preliminary issue, the trial judge considered whether it was premature to determine the plaintiff's costs entitlement given that damages had yet to be determined (only the defendant's liability had been decided at trial). This was a bifurcated trial and the trial judge was of the view that there is no hard and fast rule with respect to the timing of costs awards. The trial judge observed that some courts award costs following liability trials while others defer costs decisions until damages have been determined. While the trial judge was of the view that quantification of damages should not be a determinative factor in addressing reasonable costs, costs awards should be proportional to the interests involved. Rule 10.33(1)(b) provides that "the amount claimed and the amount recovered" are to be considered in awarding costs. However, the trial judge's decision on the timing of her determination, though questioned by the respondent, has not been appealed and we decline to say anything further about it.

[10] Turning to the issue of quantum of costs, the trial judge was of the view that the proper approach to awarding costs was pursuant to the Tariff of Recoverable Fees or Schedule C of the Rules of Court. Schedule C itemizes steps in a litigation action and assigns a fee value for each step taken depending upon the amount in issue in the litigation (Consultation Memorandum No. 12.17 "Costs and Sanctions" from Alberta Rules of Court Project (February 2005) at 7, online (pdf): www.alri.ualberta.ca [Rules Project 2005]). The trial judge's view was that Schedule C was

preferable to basing costs awards on a percentage of the legal fees actually incurred by a successful party. She stated at paragraph 15:

> [W]hen measuring appropriate costs, a principled approach which considers the purpose of costs, in terms of Court process, should be applied. The use of Schedule C imports certainty in cases where the parties have conducted themselves reasonably and advanced meritorious claims and defences

[11] The trial judge stated that Schedule C of the Rules serves many useful purposes in litigation: it compensates the successful plaintiff for significant steps taken in litigation, it allows parties to measure the risk of incurring and not recovering costs associated with litigation, and it encourages resolution of disputes in a practical and efficient manner in line with the foundational Rules (for example, see Rule 1.2).

[12] However, the trial judge was of the view that these purposes are not promoted by what she characterized as a "rule of thumb" practice of awarding costs in the lump sum amount of 40-50% of the legal fees actually incurred by the successful party. The trial judge stated at paragraph 15:

> Relying on a rule of thumb practice that a proper costs award should approximate between 40%-50% of the incurred solicitor client fees does not, in my view, achieve these purposes. First, it compensates not for the significant steps in the court process, but for all legal expenses incurred without a safeguard for reasonableness. Second, it does not allow the parties to effectively analyze the risk of costs in litigation as it is impossible to know hourly rates charged or the amount of time spent on various steps until the conclusion of the litigation. Finally, an award of partial indemnity costs measured on the basis of solicitor client fees charged, could undermine the spirit of the foundational rules.

[13] Referring to *Weatherford Canada Partnership v Addie*, 2018 ABQB 571 [*Weatherford QB*], the trial judge suggested that costs based on an indemnity percentage are better suited to cases where there is misconduct, significant complexity, or damages claimed in excess of Column 5 of the Rules (*Reasons* at paras 16-17).

[14] Here, the trial judge was "wholly satisfied" that counsel for the plaintiff had acted reasonably in pursuing the plaintiff's claim. She also was of the view that, although novel, this case was not one in which misconduct, complexity, or some other factor might justify departing from the basic application of Schedule C. The trial judge also commended the parties for providing an Agreed Statement of Facts and an Agreed Exhibit Book, which she said significantly reduced the necessary trial time.

[15] In the result, the trial judge ordered costs pursuant to Column 3 of Schedule C (claims over $150,000 up to and including $500,000), which she increased for inflation to approximate reasonable costs in 2018 for the steps taken to bring the matter to trial. (The last time Schedule C

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had been updated was in 1998.) Apart from a modest inflationary gross-up, no other adjustment or multiplier was applied. The total costs award to the plaintiff of $70,294.70 was said to represent 17% of the legal fees the plaintiff actually incurred.

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IV. Ground of Appeal

[16] The plaintiff argues that he was not properly indemnified by the trial judge's costs award. He seeks indemnification for 45% of the amount of legal fees he incurred.

V. Standard of Review

[17] It is well established that costs awards are awarded on a discretionary basis (*Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 at para 52; *Goldstick Estates (Re)*, 2019 ABCA 508 at para 22); and we agree with the respondent that trial courts have wide discretion to award costs under Rules 10.29(1), 10.30(1), 10.31, and 10.33.

[18] Having said that, a trial judge's discretion is subject both to the Rules and to the need to act judicially on the facts of the case (*British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 42). Costs awards, though discretionary, are not completely insulated from appellate review. An appellate court "may and should intervene where it finds a misdirection as to the applicable law, a palpable error in the assessment of the facts, or an unreasonable exercise of the discretion" (*Goldstick Estates* at para 22, citing *Okanagan Indian Band* at para 43; *Jodoin* at para 52; and *Nazarewycz v Dool*, 2009 ABCA 70 at para 53).

VI. Discussion

[19] In order to address whether the appellant was properly indemnified by the trial judge's costs award, we first consider the costs provisions of the Rules, after which we look to established levels of indemnification. Finally, we consider the role of Schedule C in the awarding of costs.

A. Costs: Rules of Court

[20] Apart from her assessment of the merits of applying Schedule C, the trial judge's reasons did not expressly refer to all of the costs provisions of the Rules relating to the quantification of costs.

[21] The Rules confer a qualified "entitlement" to costs to the successful party. Rule 10.29(1) states that a successful party is "entitled to a costs award against the unsuccessful party" and that the "unsuccessful party must pay the costs forthwith". An award of costs is therefore the *prima facie* entitlement of the successful party, but that entitlement may not always obtain.

[22] The Supreme Court of Canada, in *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 articulated a rationale for awarding costs to the successful party to be paid by the unsuccessful party at 404-405:

> The long-standing rule regarding costs is that they are generally awarded to a successful party, absent misconduct on his or her part. A successful litigant has a reasonable expectation that his or her costs will be paid by the unsuccessful party. The rationale for this rule is based on the fact that, had the unsuccessful party initially agreed to the position of the successful one, no costs would have been incurred by the successful party. Accordingly, it is only logical that the party who has been found to be wrong must be ready to support the costs of a litigation that could have been avoided. [emphasis in original]

[23] In Alberta, the considerations which go into the determination of the amount of a costs award are set forth in Rule 10.33:

> 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;

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> (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 [Managing Litigation], Division 5 [Settlement Using Court Process].

[24] After the court has considered the factors described in Rule 10.33 with respect to quantum, the court is directed by the Rules to go to Rule 10.31 which provides options for making costs awards:

> 10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:
>
> > (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
> >
> > (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
> >
> > > (i) an indemnity to a party for that party's lawyer's charges, or
> > >
> > > (ii) a lump sum instead of or in addition to assessed costs.
>
> ...
>
> (3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:
>
> > (a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

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> (b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;
>
> (c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;
>
> (d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

[25] Thus, in making a costs award under 10.31(1)(a), as in this case, the court is provided with a menu of orders it may make with respect to costs. Rule 10.31(3)(a) expressly provides that "all or part of reasonable and proper costs" may be ordered, "with or without reference to Schedule C." This suggests significant discretion on the part of a trial judge in implementing a reasonable and proper costs award and would appear to clearly permit an order for a lump sum percentage of legal costs. Rule 10.31(3)(d) expressly permits such a costs award. Rule 10.31(3)(b) permits the court to make an order directing the unsuccessful party to pay the successful party an amount equal to a multiple, a proportion or a fraction of an amount set out in any column of the Tariff of Recoverable Fees in Schedule C.

[26] It is important to note that the options set forth in Rule 10.31(3) are expressly linked to Rule 10.31(1)(a), which permits the court to award "the reasonable and proper costs that a party incurred".

[27] What comes out of this analysis of the Rules is that a costs award made with reference to Schedule C is only one of several options open to a court in awarding costs to a successful party and that awarding a percentage of assessed costs is expressly authorized.

[28] The trial judge attempted to apply "a principled approach which considers the purpose of costs", but she appeared to perceive Schedule C to be the default rule, absent misconduct or complexity, for making cost awards. The Rules of Court do not support that characterization. Costs awards may or may not be based on Schedule C. A variety of means are countenanced by the Rules to arrive at a reasonable costs award (see Renke, J. in *GO Community Centre v Clark Builders and Stantec Consulting Ltd*, 2020 ABQB 203 at para 82).

[29] To summarize, Schedule C is merely one of a number of options or tools that may be used to achieve the outcome of reasonable and proper costs under Rule 10.31(1)(a). Other options include *not* making any reference to Schedule C (Rule 10.31(3)(a)); or awarding costs pursuant to "a multiple, proportion or fraction of an amount set out in … Schedule C" (Rule 10.31(3)(b); or awarding a percentage of assessed costs (Rule 10.31(3)(d)).

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[30] A successful party is entitled either to reasonable and proper costs, as set out in Rule 10.31(1)(a), or to any other amount the court considers appropriate in the circumstances, as set out in Rule 10.31(1)(b). However, if the costs award is to be "the reasonable and proper costs that a party incurred" as provided for in Rule 10.31(1)(a), then the options with respect to making such costs award are set forth in Rule 10.31(3).

B. A Standard Level of Costs Indemnification?

[31] While Rules 10.31(1) and 10.33 lay out a framework for assessing costs and making cost awards, they provide little guidance as to what quantum of costs indemnification constitutes "reasonable and proper costs". For example, the Rules do not specify a level of indemnification required to constitute reasonable and proper costs.

[32] In the court below, the trial judge was not persuaded that a rule of thumb approach of awarding 40-50% of the successful party's incurred legal fees was desirable. She rejected this approach in part because of her view that it would lack a safeguard for reasonableness, it would not sufficiently promote efficiency, and it would not allow parties to effectively assess risk. We must respectfully disagree that such an approach necessarily suffers from any of these assumed deficiencies.

[33] A "reasonable and proper costs" award involves a payment by the unsuccessful party to the successful party to indemnify the successful party for expenses incurred as a result of the conduct of the unsuccessful party. The primary purpose of a costs award is to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed) (*Okanagan Indian Band* at para 21). The indemnification is not intended to be complete. Nevertheless, a reasonable level of indemnification of costs incurred is the primary purpose of costs awards. Other considerations may come into play, but only when appropriate. For example, encouraging efficiency only comes into play where there is a specific opportunity to encourage it or where there has been a demonstrated inefficiency in the conduct of the litigation.

[34] The Supreme Court in *Okanagan Indian Band* indicated that the traditional principles supporting costs awards continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them (para 22). See also MM Orkin, *The Law of Costs*, 2nd ed (Aurora, ON: Canada Law Book, 2019) (loose-leaf updated 2020, release 89), ch 2 at 2-8, where the author indicates that indemnification is the "essence" of an award of party-and-party costs. Orkin cites *Bell Canada v Consumers' Assoc of Canada*, [1986] 1 SCR 190 at 207 for this proposition, where LeDain J stated: "I am of the opinion that the word 'costs' must carry the general connotation of being for the purpose of indemnification or compensation."

[35] However, the Supreme Court in *Okanagan Indian Band* also said that "courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose of a costs award" (para 22). When costs awards are employed as

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instruments of policy, as was the case in *Okanagan Indian Band*, other considerations may apply. As an instrument of policy, the so-called "modern" approach to costs awards "accomplish[es] various purposes in addition to the traditional objective of indemnification" (para 25). For instance, it may be designed to discourage unnecessary steps in litigation, to sanction bad or frivolous behavior, and to encourage settlement (see paras 22-25). See too *1465778 Ontario Inc v 1122077 Ontario Ltd* (2006), 82 OR (3d) 757 at para 26 (CA); and *Catalyst Paper Corp v Companhia de Navegação Norsul*, 2009 BCCA 16 at para 16. *Okanagan Indian Band* also discusses the importance of promoting access to justice through costs awards (see paras 23, 26, 27-30).

[36] However, where, as in this case, the plaintiff advanced what was found to be a meritorious claim which the defendant defended vigorously, *Okanagan Indian Band* suggests that indemnification should be the principal consideration.

[37] It is accepted that indemnification of the successful party should not normally provide full indemnity for all legal fees and disbursements. Instead, a typical costs award (i.e. party and party costs) is intended to be "a partial indemnity for the expenses to which the recipient has been put as a result of the litigation" (Orkin at 1-3). Cost awards in all Canadian jurisdictions typically constitute only partial indemnification of the litigant's legal costs (*Okanagan* at para 53).

[38] This Court in *Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH*, 2019 ABCA 92 [*Weatherford CA*] noted that the intention of costs awards is to balance the unfairness of requiring a successful party whose conduct is not blameworthy to bear any costs and the chilling effect on parties bringing or defending claims if the unsuccessful party is required to bear all the costs (para 12). An apt description of this balancing act was provided by the late Justice D.C. McDonald in *Reese et al v Alberta (Minister of Forestry, Lands and Wildlife) et al* (1992), 133 AR 127, [1993] 1 WWR 450 (which was quoted by this Court in *Sidorsky v CFCN Communications Ltd*, 1997 ABCA 280 at para 31):

> The Canadian practice [of awarding party and party costs] reflects an attempt to balance two conflicting interests. On the one hand, it is argued that if a party is successful and there are no circumstances constituting blameworthiness in the conduct of the litigation by that party, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.

[39] If costs awards are only to partially indemnify the successful party, what then is the appropriate level of such partial indemnification? Orkin speaks to this question at 2-10.1-2-11:

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> Canadian Courts have not tried to define with any precision the degree of indemnification intended by an award of party-and-party costs on the tariff scale. … Traditionally, the degree of indemnification represented by partial indemnity costs has varied between 50% and 75% of solicitor-client or substantial indemnity costs.

[40] This level of indemnification represents a balance between what has traditionally been a high degree of indemnification in England versus no indemnification (i.e. no costs are payable to the successful party) in many jurisdictions of the United States.

[41] In Alberta, the weight of authority is that party and party costs should normally represent partial indemnification of the successful party at a level approximating 40-50% of actual costs (see *Weatherford CA* at para 11; *Hill v Hill*, 2013 ABCA 313 at para 11; *Young v Alberta (Assessors' Association Practice Review Committee/Executive Committee)*, 2020 ABQB 493 at para 17; *Styles v Caravan Trailer Lodges of Alberta Ltd*, 2019 ABQB 558 at para 47; *Remington v Crystal Creek Homes Inc*, 2018 ABQB 644 at para 36; *Weatherford QB* at para 54; *Athabasca Minerals Inc v Syncrude Canada Ltd*, 2018 ABQB 551 at para 59; *Strategic Acquisition Corp v Multus Investment Corp*, 2017 ABQB 297 at para 18; rev'd in part on other grounds 2018 ABCA 63; *Blaze Energy Ltd v Imperial Oil Resources*, 2014 ABQB 509 at para 68; *Calgary (City) v Alberta (Minister of Municipal Affairs)*, 2008 ABQB 433 at para 42; *Marathon Canada Ltd v Enron Canada Corp*, 2008 ABQB 770 at para 30; *LSI Logic Corp of Canada, Inc v Logani*, 2001 ABQB 968 at para 8; *Trizec Equities Ltd v Ellis-Don Management Services Ltd*, 1999 ABQB 801 at para 20-21, aff'd as to liability only in 1999 ABCA 306).

[42] In *Weatherford CA*, this Court expressly endorsed this 40-50% level of indemnification at paragraph 11:

> The general rule is that costs are awarded on a party and party basis, and that this should represent partial indemnification of the successful party – approximately 40-50% of actual costs [citations omitted].

And before that, in *Hill v Hill* at paragraph 11:

> But party-party costs are not plucked out of the ether; they are designed to be somewhere around half a reasonable legal bill, or a little under. And Schedule C does not bind a judge in any respect, and is not even presumed correct

[43] The 40-50% level of partial indemnity was also the objective of the Schedule C Committee formed in the late 1990s to develop amendments to Schedule C of then Rules (implemented in 1998). The Committee's Report to the Benchers (2 September 1997) [Report] stated the following at pages 2-3:

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> Solicitor and client costs are the benchmark against which party and party costs are measured because the objective of any schedule is to provide a consistent level of indemnity measured as a proportion of the actual cost of conducting the action in a reasonable manner (the definition of solicitor and client costs).
>
> In formulating the revised schedule, the Committee aimed at providing 40% to 50% indemnity in a typical case. In circumstances where the revised schedule meets that target there will generally be no need for the Court to exercise its discretion. When the Court does exercise its discretion, reference to a proportion of solicitor and client costs can provide valuable guidance for the Court and other litigants.

[44] The Schedule C Committee indicated that the "target" level of indemnity of 40% to 50% provided a clear reference point for other cases and thus guidance to litigants at least with respect to an appropriate level of indemnification (Report at 3).[2]

[45] There was then (in 1997), and perhaps there may always be, debate about what the proper level of indemnification in costs to a successful party should be. Suffice it to say that the 40-50% partial indemnification guideline, which has been utilized for a number of years as providing a reasonable level of indemnification, is intended to accomplish the balance discussed in the case law between fully compensating successful parties who through no fault of their own had to engage in legal proceedings (on the one hand) and the chilling effect on parties bringing or defending claims if the unsuccessful party has to bear too heavy a costs burden (on the other). This level of indemnification assumes no misconduct by either party in the conduct of the litigation.

[46] If the option of awarding costs as a percentage of assessed costs is chosen, the assessment of the costs may require a consideration of what is a reasonable amount which ought to have been charged for the services the successful party's lawyer rendered and that may require reference to the considerations set forth in Rule 10.2(1) which go into the determination of what constitutes a reasonable charge (the Rule is reproduced at paragraph 47 herein). If a trial judge chooses to award a percentage of the assessed costs pursuant to Rule 10.31(3)(d) to the successful party, then what is being considered are the "reasonable and proper costs that a party incurred" under Rule 10.31(1)(a). In order to determine whether the costs incurred are reasonable and proper, they must be assessed, either by the party opposite, or by the judge or by an assessment officer. If it is the trial judge, then he or she should consider the reasonableness of both the legal services performed

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[2] Despite the intentions of the Schedule C Committee in this respect (or the Legislature's intention for that matter), it is unclear whether Schedule C has ever provided indemnification of 40-50% of actual solicitor-client fees. Even the recent, May 2020, updates to Schedule C (enabled in *Alberta Rules of Court Amendment Regulation*, AR 36/2020), which have increased the tariff amounts in Schedule C by approximately 35% over those in the 1998 version of the Schedule, still appear to fall well short of that range. For instance, applying the current Schedule C fees in place of what the trial judge awarded the appellant in this case would have resulted in less than the 17% indemnification he was actually awarded.

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and the amounts charged for those services. Reasonable costs reasonably incurred is what the percentage must be based on. The incurring of the cost must be reasonable and the amount of the cost incurred must also be reasonable. As indicated above, the assessment may also be undertaken by the party opposite or, if the parties cannot reach an agreement on costs, the trial judge may direct an assessment of the legal costs by an assessment officer, pursuant to Rule 10.34. Rule 10.31(3)(d) contemplates such an assessment when it speaks of one party being ordered to pay the other "a percentage of assessed costs" (emphasis added).

[47] Among other considerations, an assessment of the reasonableness of the legal costs incurred must take into account the factors set forth in Rule 10.2(1) regarding whether or not a lawyer's fees are reasonable as between the lawyer and his or her client:

> 10.2(1) Except to the extent that a retainer agreement otherwise provides, a lawyer is entitled to be paid a reasonable amount for the services the lawyer performs for a client considering
>
> (a) the nature, importance and urgency of the matter,
>
> (b) the client's circumstances,
>
> (c) the trust, estate or fund, if any, out of which the lawyer's charges are to be paid,
>
> (d) the manner in which the services are performed,
>
> (e) the skill, work and responsibility involved, and
>
> (f) any other factor that is appropriate to consider in the circumstances.

[48] That the lawyer's charges are reasonable as between solicitor and client is not the end of the assessment. Consideration must also be given in assessing the reasonableness of requiring the unsuccessful party to indemnify the successful party for a percentage of them.

[49] Resorting to Schedule C simply to avoid these assessments may not be appropriate if Schedule C does not yield an appropriate level or scale of indemnification; that is, a reasonable or meaningful level of indemnification.

[50] In our view, the trial judge may have misinterpreted Justice Shelley's conclusions in *Weatherford QB* when she suggested that overwhelmingly courts use percentage indemnity when there has been misconduct, significant complexity, or damages claimed in excess of Column 5 of Schedule C (see *Reasons* at para 16). Justice Shelley's conclusions about the common approach to costs are found in *Weatherford QB* at paragraphs 54-57, which confirm that the amount of costs awards, absent misconduct, should approximate 40-50% indemnity of the successful party's

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incurred costs. Justice Shelley made the point that Schedule C fees may be inadequate but that in any event the ultimate question was whether the final costs award was reasonable, citing *Caterpillar Tractor Co v Ed Miller Sales & Rentals Ltd*, 1998 ABCA 118 at para 4.

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[51] As a general principle, we see no reason to depart from the 40-50% level of indemnification approved by this Court in *Weatherford CA* and *Hill v Hill*. It provides a reasonable guideline upon which the level of indemnification implied by the phrase "reasonable and proper costs" may be measured under the Rules. However, we refrain from defining with any precision the level of indemnification required in any given case. All we say is that the level of indemnification must be both meaningful and reasonable. The court's discretion to move up or down from that level having regard to the factors set forth in Rule 10.33 or in Rule 10.2(1) remains intact. Also, the level of indemnification may be higher or lower than the 40-50% depending on how the litigation was conducted and other factors not necessarily having anything to do with the conduct of the litigation.

C. Schedule C

[52] The trial judge's view was that awarding costs pursuant to Schedule C was preferable to relying on a percentage of solicitor-client fees incurred because Schedule C: (1) compensates litigants for significant steps in litigation, (2) allows parties to effectively measure costs associated with litigation, and (3) encourages parties to abide by the foundational rules to promote resolution of issues in a practical and efficient manner.

[53] As discussed earlier, Schedule C provides little guidance as to what constitutes an appropriate level of indemnification. Rather, it is one of a number of tools that a trial judge may use in order to make a cost award which provides appropriate indemnification. The Rules make it clear that Schedule C may not always constitute "reasonable and proper costs" under Rule 10.31. Indeed, Rule 10.31(3)(a) expressly states that the court may order one party to pay another all or part of its reasonable and proper costs (i.e. the Rule 10.31(1)(a) costs) without reference to Schedule C. Application of Schedule C may yield reasonable and proper costs. It may not. As the majority in *Boyd v JBS Foods Canada Inc*, 2015 ABCA 191 stated at paragraph 4: "Schedule C is not a standard or starting point. A judge or master need not use it at all"; or as was noted by this Court in *Hill*: "[w]e must keep in mind that Schedule C is a purely-optional rubber stamp for a judge, who may use it or not, or amend it as he or she sees fit" (para 38).

[54] Schedule C has been referred to as a "very crude method by which to assess costs" (*Trizec* at para 23), and it can be a poor approximator of financial consequences related to undertakings or steps in litigation (*Athabasca* at para 64). It has also been argued that the level of indemnification in Schedule C does not discourage unnecessary steps in litigation, which is one of the policy goals of awarding or refraining from awarding costs (see background paper by ET Spink, QC, "Party and Party Costs" (October 1995) [unpublished, archived at Alberta Law Reform Institute] prepared for Schedule C Committee). A similar concern was raised recently in *Intact Insurance Co v Clauson Cold & Cooler Ltd*, 2019 ABQB 225 by Dilts, J., who indicated that the further Schedule C strays from the real and reasonable costs a party pays for legal fees, the less likely the risk of

paying Schedule C costs will act as a tool to promote settlement or that it will affect the conduct of litigation (para 15).

[55] One of the reasons the trial judge gave for preferring Schedule C to the percentage of assessed costs approach was that, unlike the percentage of assessed costs approach, Schedule C compensates for steps taken in the litigation. But, as noted in *Caterpillar Tractor Co* at para 6, Schedule C arbitrarily selects certain steps in a lawsuit and compensates parties for taking them, but it omits other steps which can be just as significant to advancing the litigation, and often just as costly. For example, an agreed statement of facts may be a significant step in advancing an action, as was the case here. An agreed statement of facts can be an important tool to ensure trial time is used effectively. However, it is not included as a compensable step in Schedule C. There are many other examples of steps taken to narrow issues, expedite matters, etc. which are not compensable items described in Schedule C such as taking views, conducting inspections and examinations, document organization, etc.

[56] The trial judge in this case was of the view that awarding a percentage of assessed costs would not achieve the purpose of allowing parties to measure the risk of costs, thereby encouraging the parties to resolve disputes in a practical and efficient manner. We disagree. Measuring the cost risk is similar whether the costs are awarded on the basis of Schedule C or on the basis of a percentage of assessed costs. In both cases, they must be reasonable and proper.

[57] If certainty is the goal, neither form of cost award is necessarily better than the other in achieving it. It has been said that parties should know in advance what costs they may be entitled to if successful, or liable to pay if unsuccessful. The reality is that the parties rarely know in advance what costs they may be entitled to receive or liable to pay. That is not necessarily a bad thing. Costs uncertainty is one of the risks of litigation and those risks tend to discipline parties to be reasonable, both procedurally and in the substantive positions they adopt. Also, ordering a percentage of assessed costs may result in increased scrutiny of legal costs.

[58] That said, we should not be taken as questioning the utility of Schedule C, which is provided for in the Rules of Court and which is used day in and day out by judges in a great variety of situations.

[59] Schedule C is expressly available under Rules 10.31(3)(a) and (b) as a mechanism or method by which a reasonable and proper costs award may be arrived at (i.e. a costs award pursuant to Schedule C or "a multiple, proportion or fraction of an amount set out in any column…of Schedule C). The Schedule provides a convenient and transparent foundation for judicial determination of costs (*GO Community Centre* at para 89) and may be appropriate in the "common stream of litigation" (*Trizec Equities* at para 27) and particularly useful and efficient in high-volume interlocutory matters such as chambers applications (see *GO Community Centre* at para 89). Schedule C assists judges in making expeditious costs decisions (Rules Project 2005) and may, with or without the use of multipliers, provide a reasonable level of indemnity when such indemnity is called for.

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[60] Schedule C can also be a useful default to which parties may defer, or which trial judges may adopt in a variety of circumstances. For example, in cases in which there is a significant imbalance in the power and means of the parties, Schedule C, notwithstanding its limitations vis-à-vis indemnity, may be preferable (*Styles* at para 59). See too *Blaze Energy* at para 75, *Monco Holdings Ltd v BAT Development Ltd*, 2005 ABQB 851 at para 31, and *Geophysical Service Incorporated v Falkland Oil and Gas Limited*, 2019 ABQB 314 at para 23, which express concerns over a percentage-based indemnity approach to costs awards because such an approach may impede access to justice. These concerns may and should be addressed by trial judges on a case-by-case basis, where a Schedule C approach to costs may provide a more equitable result.

[61] Finally, we note that Schedule C may be useful simply as a tool of reference for trial judges to make a "reality check" when fashioning an appropriate costs award (see *Athabasca* at para 61).

[62] At the end of the day, the real question faced by trial judges is how to achieve a reasonable and proper costs award, not the steps taken to achieve that result (see *Caterpillar Tractor Co* at para 4 and *Bell Mobility Inc v Anderson*, 2015 NWTCA 3 at para 99). Schedule C, while not properly considered a guideline or standard when assessing what constitutes an appropriate level of indemnification, is nevertheless a valuable tool that may effectively be used by trial judges in a variety of situations to make a reasonable and proper costs award.

[63] The problem with the use of Schedule C in this case was that it appeared to be used as a proxy for reasonable and proper costs without considering whether or not Schedule C yielded an appropriate level of indemnification in a case where the trial judge was "wholly satisfied" that counsel had acted reasonably in pursuing the plaintiff's claim. The trial judge focused on factors such as efficiency and certainty in circumstances where neither efficiency or the need for certainty were engaged.

[64] However, we emphasize, once again, that this was a case involving an almost completed piece of protracted litigation, which included a trial and the many steps required to bring the matter to trial. The issue of indemnification becomes a more important consideration in assessing costs at the end of a lawsuit than it does at each and every step of the way. At the interlocutory stage, it is often not clear who will ultimately be entitled to some level of indemnification.

VII. Conclusion

[65] To summarize, we conclude that the trial judge misdirected herself as to the applicable law in failing to consider whether costs determined in accordance with Schedule C provided an appropriate level of indemnification to the successful plaintiff. In short, she did not consider whether, and we cannot be satisfied that, the costs awarded represent the reasonable and proper costs that the plaintiff incurred in prosecuting his claim to a successful conclusion.

[66] The trial judge identified no special factors which would warrant not considering what might constitute a reasonable level of indemnification. The trial judge was satisfied that counsel

had acted reasonably in pursuing the appellant's claim and that this was not a case in which other factors would justify a departure from an appropriate level of indemnification. We would therefore allow the appeal and direct the trial judge to determine a reasonable level of indemnification. That determination may involve an assessment of whether the costs the appellant incurred were reasonable costs, reasonably incurred. The assessment of the reasonableness of the appellant's costs may be undertaken by the trial judge or it may be delegated to an assessment officer pursuant to Rule 10.34. The parties, of course, remain free to craft their own solution.

Appeal heard on May 8, 2020

Memorandum filed at Calgary, Alberta
this 27th day of January, 2021

O'Ferrall J.A.

Authorized to sign for: Hughes J.A.

Authorized to sign for: Antonio J.A.

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