Court of Queen's Bench of Alberta

Citation: Trinity Christian School Association v Schienbein, 2021 ABQB 218

Date: 20210323
Docket: 2014 00197
Registry: Edmonton

Between:

Trinity Christian School Association

Applicant

- and -

Grace Schienbein, Lynn Gullackson, Bernice Toews, Robert Toews and Helen Lewis

Respondents

Ruling on Costs
of the
Honourable Mr. Justice W.N. Renke

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[1] In an oral decision delivered on August 7, 2020, I found that Trinity Christian School Association (TCSA) had succeeded in its application against the Respondents. The parties made written costs submissions.

[2] TCSA is unquestionably entitled to costs. The basis for calculating costs and the amount of costs are in dispute.

[3] TCSA seeks costs on a solicitor-client or indemnity (in that sense) basis.

[4] The Respondents contend that costs should be calculated as 1.5 times Column 1 or should be set at a lump sum of $25,000.

[5] For the reasons that follow, I order that the Respondents shall pay costs of $62,700 to TCSA.

[6] I will provide a very brief overview of the factual background and the history of the litigation, set out some issues raised that have no bearing on my determinations, address the factors bearing on costs on a solicitor-client indemnity basis, then consider the quantum of costs.

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I. Background

[7] TCSA was incorporated under the *Societies Act* in 1994. It has provided educational services, both in-person schooling in a Cold Lake school house and on-line assistance for home schooling. By the 2019-2020 school year, it had about 13 in-person students and 3,800 home schooling students.

[8] TCSA is governed by a Board of Directors.

[9] Two family-based groups came together in TCSA, one that had focused on in-person schooling, the other on home schooling. By way of a very general observation, it appears that TCSA did not integrate the two family businesses properly. That, and doubtless other reasons, led to a series of what I'll refer to as governance, organizational, and regulatory difficulties that surfaced in around 2016. There have been ongoing tensions between the two family-based groups.

[10] By around June 2020, the home schooling personnel, affiliated with one family group, had resigned or had signalled their intention to resign. Loss of the home schooling division would have a grave impact on the viability of TCSA. The Directors sought to deal with this crisis.

[11] On July 2, 2020 a meeting was held, attended by about 21 individuals, including parents of in-person students, a small number of home-schooling parents, a former Board member whose membership was terminated on June 28, 2019, and 4 individuals who unsuccessfully stood for Board membership in a June 22, 2019 meeting. At this meeting, a new Board of Directors was purportedly elected (the New Board). The New Board members were the terminated Board member and the unsuccessful Board candidates. These are the Respondents. At 16.2-7 of the transcript of my August 7 decision (August Decision) I stated as follows:

> In my opinion, what occurred is not that these July 2 directors were innocently drawn into events that were operating beyond their control. Rather, they pounced. What we had was a coup. On the record, I infer that the Respondents instigated the meeting of the in-school parents. And even if they did not, they capitalized on the meeting to impose their own rule on Trinity. They had no authority under the bylaws to do what they did, and they went ahead anyway.

Among other things, the Respondents padlocked the door of the school, attempted to take over TCSA's online accounts, including Facebook and e-mail, and attempted to take over TCSA's ATB account.

[12] The pre-July 2 Board of Directors (the Original Board) retained counsel. Following some unsuccessful efforts by the Original Board's counsel to resolve matters, counsel filed an Originating Application on July 13, 2020, returnable on July 16, 2020. This was treated as an

emergency application. The start of the 2020-2021 school year was fast approaching and the crisis swirling around home schooling, which had government funding implications, had to be dealt with quickly.

[13] The application came before me. I granted an adjournment so the Respondents could respond to the application coupled with an order permitting one of the Original Board members to deal with ongoing TCSA matters until the hearing date (the July Decision).

[14] The Respondents filed a Counter-Application supported by an Affidavit of about 300 pages. TCSA filed an affidavit in response and Grace Schienbein, the affiant of the Respondents' affidavit, was Questioned on her affidavit.

[15] The application was heard on August 5, 2020. I gave my decision on August 7, 2020. I found that the July 2 "election" was entirely illegitimate. It had no legal effect on TCSA. I rejected an argument that a June 22, 2020 appointment of three directors to the Original Board was invalid. I rejected claims by the Respondents sounding in oppression and breach of fiduciary duty on the main grounds that they lacked standing to bring these claims and they were not entitled to any equitable remedies because of a lack of "clean hands."

[16] Respondents' counsel for this costs matter was not Respondents' counsel for earlier stages of this litigation.

II. Costs Framework

[17] I attempted to work through a variety of costs issues in ***GO Community Centre v Clark Builders and Stantec Consulting Ltd***, 2020 ABQB 203, referred to in submissions by both parties. I will not repeat that material here, except as necessary for the purposes of this case.

A. The Foundational Rules

[18] The costs rules must be applied in accordance with the foundational rules, including rules 1.2(1), (2)(b), (c) and (e), (3), and (4):

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used …
>
> > (b) to facilitate the quickest means of resolving a claim at the least expense,
> >
> > (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable, …
> >
> > (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.
>
> (3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

> (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
>
> (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
>
> (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and
>
> (d) when using publicly funded Court resources, use them effectively.
>
> (4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

See ***EAD Property Holdings (103) Corp v Greyhound Canada Transportation ULC***, 2015 ABQB 425, Topolniski J at paras 13-15.

[19] With respect to proportionality, the Court of Appeal wrote in ***Goldstick Estates (Re)***, 2019 ABCA 508 at para 31 that "[c]osts awards should always be proportional to the interests involved." I'll return to the proportionality issue below.

B. Rule 10.31

[20] Rule 10.31 provides that

> 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;
>
> (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 …;

> (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.

The Schedule C tariff was recently amended by s. 31 of Alta Reg 36/2020 and, were the tariff to be relied on in this case, the amended tariff would apply.

[21] Rule 10.31 confirms four important points. First, an award of costs is discretionary (the Court "may" order). Second, that discretion extends to awarding costs with or without reference to Schedule C. Third, the discretion is to be exercised based on consideration of "the matters described in rule 10.33:" ***Stewart Estate v TAQA North Ltd***, 2016 ABCA 144 at para 26; ***Weatherford Canada Partnership v Addie***, 2018 ABQB 571, Shelley J, affd 2019 ABCA 92 at para 11(CA); ***Strategic Acquisition Corp v Multus Investment Corporation***, 2017 ABQB 297, varied 2018 ABCA 63, Mahoney J at para 34(QB); ***Styles v Caravan Trailer Lodges of Alberta Limited***, 2019 ABQB 558, Jones J at para 47. Fourth, the costs awarded may fall into one or a combination of four types:

- party-party costs (r. 10.31(1)(a), (3)), whether as set by Schedule C or (e.g.) as enhanced by a multiplier or calculated by a percentage of costs under a column
- a lump sum (r. 10.31(1)(b)(ii))
- indemnity costs, meaning reasonable legal fees and disbursements, which may not amount to complete indemnification (r. 10.31(1)(b)(i))
- full indemnity costs or complete indemnification for legal fees even if not essential to the litigation in question (r. 10.31(1)(b)(i)).

See ***R&R Consilium Inc v Talbot***, 2019 ABQB 275 at para 41; ***Secure 2013 Group Inc v Tiger Calcium Services Inc***, 2018 ABCA 110 at para 12.

C. Rule 10.33 and "Enhanced Costs"

1. Rule 10.33

[22] Rule 10.33 sets out the "matters to be considered" in making a costs award. 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.

[23] I have taken into account Justice Topolniski's comment at para 16 of ***EAD Property Holdings***:

> [16] Costs are not intended to only indemnify a successful litigant: *BC v Okanagan Indian Band*, para 22-26. They are also designed to promote settlement, deter frivolous actions and defences, discourage unreasonable behavior, deter parties from taking unnecessary steps, and to sanction those who refuse a reasonable settlement offer: *Okanagan Indian Band* at para 25 and Rule 10.33(2).

2. Solicitor and Client Costs

[24] "Solicitor and own client costs" are "justified in the most exceptional circumstances:" ***Tiger Calcium*** at para 12. One circumstance would be when the losing party is contractually obligated to pay such costs. This form of costs was not claimed by TCSA.

[25] TCSA has claimed solicitor-client costs (only). TCSA's claim must be fitted into rules 10.31 and 10.33 and the jurisprudence. ***Tiger Calcium*** confirmed the appropriate approach to solicitor-client costs.

[26] First, these costs are "only awarded in rare and exceptional circumstances:" at para 15. In the usual case, a form of partial notional indemnity based on Schedule C is the rule: ***RVB Managements Ltd v Rocky Mountain House (Town)***, 2015 ABCA 304 at para 14; ***EAD Property Holdings*** at para 20; ***Trizec Equities Limited v Ellis-Don Management Services Ltd***, 1999 ABQB 801, Mason J at paras 21, 22.

[27] Second, these costs are appropriate if the losing party engaged in some form of "misconduct." See rules 10.33(2)(g) and (1)(g). The Court of Appeal stated in ***Tiger Calcium*** that "solicitor-client costs are generally awarded only when there has been reprehensible, scandalous or outrageous conduct by a party:" at para 15.

[28] Misconduct takes a variety of forms. The list is derived from Justice Huchinson's decision in ***Jackson v Trimac Industries Ltd***, 1993 CanLII 7031, 138 AR 161 (QB), endorsed by the Court of Appeal in ***Sidorsky v CFCN Communications Ltd***, 1997 ABCA 280 at para 28; ***FIC Real Estate Fund Ltd v Phoenix Land Ventures Ltd***., 2016 ABCA 303 at para 4; and ***Tiger Calcium*** at para 15:

> a. blameworthiness in the conduct of the litigation;
>
> b. when justice can only be done by a complete indemnification for costs;
>
> c. when there was evidence that the plaintiff hindered, delayed or confused the litigation, there was no serious issue of fact or law which required lengthy, expensive proceedings, when the misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
>
> d. when there has been an attempt to delay, deceive and defeat justice, imposed the requirement to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents and failing 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 the ordinary order of costs;
>
> f. litigants found to be acting fraudulently and in breach of trust;
>
> g. fraudulent conduct including inducing a breach of contract and presenting a deceptive statement of accounts to the court at trial; and
>
> h. an attempt to delay or hinder proceedings, deceive or defeat justice, fraud or untrue or scandalous charges.

TCSA did not allege that the Respondents concealed material documents or failed to produce material documents in a timely fashion, were acting fraudulently and in breach of trust, engaged in fraudulent conduct or presented a deceptive statement of accounts to the court.

[29] Before addressing the factors that TCSA relied on as attracting solicitor-client costs, I will identify some matters raised that do not properly bear on my determination of whether TCSA should receive solicitor-client costs.

III. Immaterial Matters

A. Impecuniosity

[30] The Respondents claimed they were not "people of means." A party's financial circumstances neither immunize from a costs award nor even, necessarily, dictate a reduction of a costs award. The Court of Appeal determined in ***Anderson v Canada Safeway Ltd***, 2005 ABCA 6 at para 3 that "[i]mpecuniosity … is not a basis on which to refuse costs ….:" see also ***Chouinard v Skippen***, 2013 ABQB 465, Ross J at para 18.

[31] The Respondents' lack of resources, unchallenged on the record, should have inclined them toward a legal response to TCSA that focused on essential issues, not on collateral issues that offered no reasonable prospect of success within the proceedings as constituted. It should also have inclined the Respondents towards out-of-court resolution of the issues.

[32] I will return to the Respondents' financial circumstances below.

B. Lack of Knowledge

[33] The Respondents claimed that they did not know that they could be liable for costs. The Respondents had consulted counsel, at least by July 4, 2020. Regardless, ignorance of the law is no excuse in civil matters. See, e.g., ***Theralase Technologies Inc v Lanter***, 2021 ONSC 943, Myers J at para 23; ***663073 Alberta Ltd v Alberta (Treasury Board)***, 2020 ABQB 550, Friesen J at para 60. And in any event, the Respondents had actual notice that solicitor-client costs were being sought. TCSA claimed solicitor-client costs in its Originating Application. TCSA personally served the Originating Application on four of the Respondents. I referred to solicitor-client costs and enhanced costs in my July 16 adjournment decision. Respondents' counsel claimed solicitor-client costs from TCSA in its Counter-Application.

[34] A connected claim was that the Respondents were not sophisticated. The evidence did not disclose that the Original Directors were "more sophisticated" than the Respondents. The Respondents, like other citizens, were sophisticated enough to know that disputes are governed by legal rules and their conduct would be judged under the law.

[35] The Respondents referred to the "disparity in power" issue I addressed in ***GO Community Centre***. There is no analogy in the present circumstances. This case did not involve community group members pitted against national and international level firms.

[36] I will return to the "disparity in power" issue below.

C. Insolvency of TCSA

[37] TCSA is now insolvent. It did not survive the departure of its home schooling personnel. According to TCSA's reply brief at para 17, TCSA "has ceased to operate a school," but it "continues to have obligations and its assets available to satisfy those obligations have been seriously impacted by the conduct of the Respondents."

[38] As regards TCSA's costs claim, I do not consider TCSA's insolvency to be relevant. On the record, I cannot conclude that the Respondents' conduct was the cause – the "but for cause" – of the insolvency. The home school personnel were leaving before the Respondents' "election" occurred. The election and the consequent litigation drained time and resources from TCSA but I cannot say that TCSA would not have ended up where it did without the wrongdoing of the Respondents.

[39] As regards the Respondents' reply to TCSA's costs claim, I do not regard TCSA's insolvency to be a factor showing that a form of elevated costs should not be awarded because the award would serve no purpose. Costs concern litigation conduct, and solicitor-client costs concern litigation misconduct. That misconduct is not ameliorated because, by the end of the litigation, the successful party has gone out of business.

D. No Money Claim

[40] The Originating Application made no monetary claim, no claim for damages or restitution. In my opinion, that does not preclude an elevated costs award, including a claim for solicitor-client costs. The relief sought by TCSA was not somehow unimportant. The purpose of the application was to stop the Respondents from interfering with the governance and operations of TCSA during a time critical to its survival. The remedy sought was the corporate equivalent of

an ejectment or eviction. The return of unhindered control of TCSA to the Original Board was as compelling an objective as a monetary claim might be for other claimants in other circumstances.

[41] I note the following comment of Justice Topolniski in ***EAD Property Holdings*** at para 27:

> [27] Costs above Column 1 are available where non-monetary relief is sought where the outcome is of particular importance to the parties: *Vulcan (County) v Morozoff*; *Blaze Energy Ltd v Imperial Oil Resources*; *Freyberg v Fletcher Challenge Oil and Gas Inc* at para 29; *RIC New Brunswick Inc v Telecommunications Research Laboratories* at para 8.

E. Uses for the Cost Award

[42] There was a suggestion in Ms. Bekolay's September 14 affidavit that TCSA, despite its insolvency, could put the costs to good use through preserving school premises in the Cold Lake area. I do not consider the uses to which a successful party might put costs to be relevant to a costs award.

F. Loss

[43] TCSA was wholly successful and the Respondents lost the application. Costs should not be enhanced "on account of a finding the litigation was merely without merit or misconceived:" ***Louw v Hamelin-Chandler***, 2012 ABQB 52, Michalyshyn J at para 28; ***Cogent Group Inc v EnCana Leasehold Limited Partnership***, 2014 ABQB 593, Jones J at para 37; ***Appleby v Smallwood***, 2019 ABQB 114, Burns J at para 9; ***Geophysical Service Incorporated v Falkland Oil and Gas Ltd***, 2019 ABQB 314, Woolley J at para 11. Losing does not demonstrate misconduct, even if a claim is summarily dismissed: ***GO Community Centre*** at para 166. That is to say, loss *by itself* or loss *without more* is not evidence of misconduct. There are, however, degrees of error. Some arguments may fail to reach even the limits of reasonable error. See ***EAD Property Holdings*** at para 28.

G. Prior Conduct vs. Litigation Conduct

[44] Some authority permits consideration of a party's pre-litigation conduct in making a costs award. See, e.g., ***Toronto Dominion Bank v Lienaux***, 1997 CarswellNS 206, 1997 CanLII 14986 (*sub nom. Campbell v Linaux*), 1997 NSCA 80 at paras 34, 36, 38 (CarswellNS), a case cited with approval in ***Goldstick*** at para 24, although not on this particular point:

> 34 A party's conduct both before and during the litigation process as well as the degree of success achieved are relevant to the exercise of the court's discretion as to costs (*The Law of Costs*, Orkin, 2nd edition 2-4, November 1996)

[45] However, in my opinion, under Alberta authority, costs are based on litigation conduct or misconduct not on misconduct preceding litigation. I agree with Justice Veit's observation in ***Max Sonnenberg Inc v Stewart, Smith (Canada) Ltd***, 1986 CanLII 1771, [1987] 2 WWR 75 (AB QB) at para 21 (CanLII): "Costs and damages should not be confused. I subscribe to the [view] … that costs deals with the conduct of the litigation and that damages deals with the conduct of the parties giving rise to the cause of action." I accept the view of Justice Graesser in ***College of Physicians and Surgeons of the Province of Alberta v JH***, 2009 ABQB 48 at paras 12 and 14:

> [12] ***Polar Ice Express Inc. v. Arctic Glacier Inc.***, 2009 ABCA 20, appears to put to rest any argument that before-suit conduct might give rise to solicitor and client costs (at para. 21) ....
>
> [14] Following ***Polar Ice***, it would appear that the focus will now be on finding conduct that can be characterized as conduct during the suit.

[46] Hence, in this case, costs consequences should not attach to the "election," just because it occurred and was not legally effective.

[47] The election, though, must be distinguished from the Respondents' conduct after the election was challenged.

IV. Grounds for Solicitor-Client Costs

[48] Solicitor-client costs are justified in the present case on three interconnected grounds – first, the unreasonableness of the Respondents' litigation conduct, second, the short time-line the Respondents' conduct imposed on the application, and third, the legal complexities engendered by the Respondents' response to the application.

A. Unreasonableness of the Respondents' Litigation Conduct

[49] The Respondents' litigation conduct was unreasonable, because there was no serious issue of fact or law that required the proceedings and TSCA was forced to take proceedings to reacquire control that had obviously been wrongly grasped by the Respondents, and because the Respondents introduced issues in the application that had no foundation and that did not belong in the application.

1. Nature of the Respondents' Litigation Misconduct

[50] I found that the "election" for which the Respondents were responsible had no legal support whatsoever. The Respondents had no right to deal with TCSA's assets as they did. In both my adjournment decision and my decision on the merits, I offered an analogy (July Decision, 3.6-13):

> you can imagine student demonstrators occupying the University of Alberta administration buildings, purporting to fire the president and fire the board of governors and appoint a new board and a new president ... these actions by the student protestors would have no legal effect. And the argument of the Applicant would be that the rival board and the rival directors are in no better position than persons appointed by the student protestors.

But as indicated, costs do not attach to the illegitimate election itself.

[51] I find that costs consequences do attach to the failed attempt to defend the indefensible.

[52] The Respondents engaged in litigation misconduct of the third type identified in ***Tiger Calcium***: "there was no serious issue of fact or law which required lengthy, expensive proceedings, [and] ... the misconducting party was 'contemptuous' of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously [the aggrieved party's]." See also ***Max Sonnenberg*** at paras 26 ("findings of such positive misconduct are then taken into account one more time on the costs issue in determining whether the positively misconducting party was 'contemptuous', to use the *Vorvis* expression, of the

aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his") and para 29; ***Jackson v Trimac*** at para 32 ("the very fact that the action must be brought by the injured party to gain what was rightfully his in the face of an unreasonable denial is in itself positive misconduct deserving of indemnification"); ***College of Physicians and Surgeons*** at para 33 ("Misconduct during the litigation can surely be found if there is no reasonable basis on which to commence, or continue, litigation"); ***Toronto Dominion Bank v Lienaux*** at para 36.

[53] The Respondents were warned. In the adjournment decision, I acknowledged that I had heard only one side of the dispute, but that on the record before me, TCSA's claims "seem to be insurmountable:" July Decision, 3.16-17. I went through some arguments relating to the strength of TCSA's claims. I found, on the record at that point, that

> there is a strong argument that the parents and guardians of the students of Trinity Christian had no legal authority to elect directors, no authority to remove directors. Their meeting was not a meeting affecting Trinity Christian. From the standpoint of Trinity Christian it was an irrelevant gathering. The rival board does not legally exist, as least as regards the governance of Trinity Christian: July Decision 5.21-26.

I repeated that there was a strong case on the merits and a strong case for prejudice to TCSA at July Decision 6.17-18; see also 6.40, 7.32-33.

[54] I granted the adjournment not on merits but process grounds. I recognized that the application was "a breath away from being an *ex parte* application and that the Respondents have not had an opportunity to respond. They have not had an ability to show that their case is not hopeless:" July Decision 6.21-23; see 7.32-36. The adjournment sought was not long. The Respondents also wished to question on an affidavit in support of the application.

[55] The adjournment, coupled with my comments, gave the Respondents an opportunity to re-think their position.

[56] In the hearing on the merits, I confirmed, in greater detail, the description of the lack of legality of the Respondents' actions that the Respondents had heard twice before – once from TCSA's counsel, and once from me.

[57] The Respondents should not have required TCSA to make an application. That application having been made, the Respondents should not have sought an adjournment and should not have Questioned on Ms. Bekolay's affidavit. The Respondents failed to admit what should have been admitted. And having been granted the adjournment, the Respondents should not have brought the counter-application, supported by a 300-plus page affidavit.

2. Standard and Typical Response

[58] Respondents' counsel stated that the Respondents responded to the Applicant's application in a "standard and typical manner" by cross-examining on affidavit and pursuing a counter-application. I agree that the steps taken by the Respondents were "standard and typical," and would have been appropriate had the circumstances been standard and typical. It is not that, in the abstract, the steps taken were wrong. The circumstances, though, were not typical. The Respondents' conduct after engaging in the illegal activity necessitated an urgent application. Further, because of the manifest lack of foundation for the litigation steps taken by the Respondents, the steps should not have been taken at all.

3. Good Faith

[59] Respondents' counsel's suggestion that the Respondents acted in "good faith" requires unpacking.

(a) August Decision

[60] The suggestion that the Respondents had acted in "good faith" is inconsistent with my August Decision. I found that the Respondents would be disentitled to any equitable remedies because they did not come with "clean hands:" August Decision 15.4-41. Two of the Respondents were former Directors. They knew TCSA had bylaws. Even if the other Respondents were unaware of the bylaws of the organization they wanted to serve as Directors, they had no reasonable justification for going along with an obviously unauthorized scheme to oust the Original Board, and not coincidentally, to give them the Director positions they had been denied. Further, as contended by TCSA, these other Respondents had sought appointment as Directors at the June 22 Board meeting. They knew then of the Board's role in the appointment of Directors. None of the Respondents acted on actual interpretations of the bylaws that turned out to be incorrect. They acted without regard to any bylaws.

(b) Reliance on Legal Advice

[61] Respondents' counsel asserted that the Respondents were operating under advice from legal counsel that their position was legally tenable.

[62] The evidence to support this proposition was an e-mail from Grace Schienbein to former counsel, that asked, specifically, "do we have the legal standing as a board now to communicate as such?" The response from former counsel was the single word "Yes." This e-mail was sent July 4, 2020. The advice was provided after the July 2 election and before TCSA's counsel contacted former counsel, and before the Originating Application was served.

[63] I do not have evidence of the communications between former counsel and the Respondents, and properly so. I am not in a position to assess what was said between them and I expressly refrain forming any opinion on this matter. The Respondents were - or one or more of them could have been - the client(s). They provided the instructions. The Respondents have provided no foundation for evading their responsibility by shifting responsibility to former counsel.

(c) Widely Held Beliefs

[64] Respondents' counsel asserted that the Respondents' beliefs "had some basis in reality" and were "widely shared." Setting aside that the breadth of sharing was, on the evidence, restricted to those who participated in the "election," the criteria of having "some basis in reality" and being "widely shared" do not distinguish true belief from false belief or reasonable belief from unreasonable belief. The Respondents were entitled to their view of the facts. Their view of the facts did not entitle them to ignore legal processes.

(d) Motivation

[65] In their affidavits filed in support of costs submissions, the Respondents indicated that they acted for a good or higher motive, to save the school.

[66] Motive is no shield for illegal conduct. There is not one law for those with "good" motives and another law for those without. Individuals are not entitled to decide the laws that they will and will not obey based on their ambitions.

4. Counter-Application

[67] The Respondents filed a cross-application, supported by an affidavit of over 300 pages containing numerous and wide-ranging allegations respecting a variety of Directors, officers, and employees of TCSA. The allegations are listed at para 21 of TCSA's written submissions.

[68] The allegations did not belong within the four corners of the application brought by Originating Application, although conceivably the Respondents might have argued that trials of issues were required and the litigation of contested allegations should be authorized. The Respondents did not make such an argument.

[69] Because of the serious nature of the allegations of wrongdoing, TCSA was compelled to respond and examination on the lengthy affidavit was held.

[70] I rejected the counter-application arguments. I interpreted the arguments to sound in breach of fiduciary duty and oppression. The Respondents lacked standing to bring such complaints.

[71] Because I considered the Respondents to lack standing to assert the grievances they did and because the allegations and responses were made by way of affidavit (with some addition of Questioning on Affidavit), I did not wade into the merits or demerits of the Respondents' allegations. I stated the following in the August Decision at 17.12-14, 19-28:

> Given my findings, it is not necessary for me to decide what the merits were, and I'm not going to embarrass any later fact finder by making any factual findings ....
>
> The difficulties though – and this is offered only by way of observation or comment, not by way of any sort of fact finding – the difficulty though is that the links between the Noster group and the pre-July 2 Board aren't supported in the evidence. I can't find on a balance of probabilities or to any other standard of proof that the pre-July 2 Board either was supportive of the Noster group's efforts or engaged in negligence relating to the Noster group's efforts.
>
> The allegations against the pre-July 2 Board are at best circumstantial requiring multiple layers of inference. On the record that we have, the claims are speculative. And more than speculative, the claims are contested on the record.

[72] My concern is not that I found that the Respondents' allegations were baseless. I made no such finding. My concern is that the Respondents lacked standing to bring those allegations against TCSA and these allegations, contestable and contested as they were, did not belong in the Originating Application proceedings.

[73] Respondents' counsel stated that Grace Schienbein's allegations were at most willful or careless but not malicious. I recognize that "[a]n unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs:" ***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 at para 26. These observations would have purchase if I'd found that Ms. Schienbein's allegations were false. My finding, though, is that the allegations should not have been made in these proceedings at all. An application relating to the status of a

gathering under a society's bylaws does not open the door to pursuit of wide-ranging grievances concerning conduct stretching back over years.

[74] This finding was confirmed, in effect, by Respondents' counsel's concession that the allegations supporting the counter-application were "ultimately irrelevant to the central issues of the litigation." I agree. That does not mean that the effects of the Respondents relying on the allegations is somehow mitigated. The allegations were not merely collateral comments mentioned in passing. The allegations were the foundation for the counter-application. The allegations figured in the Respondents' submissions on the counter-application. The irrelevant allegations should not have been made. The Respondent improperly relies on para 46 of ***Evans v The Sports Corporation***, 2011 ABQB 616, Graesser J. In that case, "[t]he allegations created noise, but were irrelevant. They added to the bitterness evident in this litigation (both ways). The truth any of the irrelevant allegations was not an issue at trial, and at the end of the day, it was not necessary for me to make findings in that regard. At trial, the parties mainly stuck to the relevant matters:" at para 47. In this case, it was not necessary for me to make findings about the Respondents' allegations, but the Respondents did not "stick mainly" to the relevant matters. Their entire counter-application, dealt with in the hearing, was founded on irrelevant matters.

[75] The Respondents thereby "confused" the application and certainly lengthened it, although, in fairness, the application was lengthened only by about 3 weeks.

B. Urgency of the Application

[76] The Respondents purported to take over TCSA on July 2. Following an unsuccessful attempt by TCSA's counsel to work out a solution, the application was filed on July 13, with a return date of July 16 (along with an application to reduce the normal 10-day notice period). The merits were heard on August 5. The time-line for the application was short, about a month from start to finish.

[77] Respondents' counsel emphasized the short duration of the proceedings. The length of proceeding (particularly in light of the rules factor concerning unnecessarily prolonging proceedings) is relevant, but not itself dispositive. It is true that "[h]istorically, the percentage indemnity approach has been associated with lengthy, complicated litigation" (***GO Community Centre*** at para 148) and so *a fortiori*, a solicitor-client approach should be associated with "lengthy, complicated litigation." The current litigation was not lengthy. But it was complicated, because of the issues raised by the Respondents.

[78] Further, the brevity of the time-line enhanced and did not undermine the claim for solicitor-client costs. Time was of the essence for two reasons. First, the school year was starting in September. Second, the crisis caused by the departure of the home schooling personnel had to be addressed.

[79] The time-line was compressed and intense. TCSA counsel had to work quickly to get the application heard and to deal with the examinations on affidavit. Counsel had to address the new types of arguments raised in the counter-application. A lot of work had to be done in a short period of time.

[80] As was TCSA's right, it engaged senior counsel. In submissions counsel indicated – and I accept – that the short time-line left little opportunity to brief junior counsel and delegate tasks.

[81] The time-constraints of the application supported a form of elevated costs, including solicitor-client costs.

C. Complexities

[82] Had the litigation focused only on the essential matter of the TCSA bylaws, the litigation would not have been unusually complex.

[83] However, the Respondents' arguments turned not only on the TCSA bylaws, but Robert's Rules of Order, the breach of fiduciary duties owed to a non-profit corporation, and equitable (non-legislative) oppression in a non-profit setting. The issues beyond the bylaws were all raised by the Respondents.

[84] I found that the Respondents' arguments were ultimately groundless, but some significant digging had to be done to show that the arguments had no legal support.

[85] Moreover, the large number of serious factual allegations made by the Respondents, embedded in the 300-plus-page affidavit, required responses, even though I ultimately did not make findings of fact respecting the Respondents' allegations.

[86] The application involved, in my view, some unusual complexities that demanded attention in the short time-frame.

D. Conclusion

[87] Respondent's counsel suggested that the application was a standard Chambers application. It was not. It was an urgent application in response to manifestly illegal activity by the Respondents compounded by inappropriate legal arguments and factual allegations, all requiring prompt response.

[88] The Respondents' compounded the wrongdoing of their initial conduct with their intransigence and their litigation conduct. They and others should be deterred from engaging in similar activity.

[89] In my view, the Respondents' suggestion of costs at 1.5 times Column 1 would be, in my view, far below the quantum of costs demanded by the Respondents' litigation conduct. The Respondents' suggestion of $25,000 steps closer toward what is reasonable. This amount appears to be, by an inexact calculation, about 2 times Column 5.

[90] In my opinion, in all the circumstances, TCSA's claim for costs representing a form of indemnity on a solicitor-client basis is justified.

[91] The question then becomes, in all the circumstances, should the costs award be 100% of TCSA's legal costs or some lesser amount?

V. Amount of Costs

A. Considerations Bearing on the Amount of Costs

[92] TCSA's Bill of Costs was not provided to me. I understand from Ms. Bekolay's affidavit and TCSA's counsel's submissions that TCSA's legal fees were approximately $180,000. I do not doubt that this was the total of the account properly rendered on TCSA.

[93] Ms. Schienbein deposed in her October 23, 2020 affidavit that the Respondents' legal fees totalled about $40,700. No Bill of Costs was provided to me, but again, I do not doubt that this was the total of the account properly rendered on the Respondents.

[94] Respondents' counsel was concerned that the total amount of costs incurred by TCSA was excessive.

[95] I agree with Respondents' counsel that, as confirmed by the foundational rules, costs must be proportional - in this case, both to the identified features of the Respondents' conduct and to the overall nature of the litigation. See rule 1.2(4) and ***Goldstick Estates*** at para 31 and ***Hryniak v Mauldin***, 2014 SCC 7, Karakatsanis J at paras 29 and 31-33.

[96] Further, in my view, access to justice considerations play a role in the assessment of costs. (These considerations are expressly mentioned in rule 10.32, which does not apply in the present circumstances.) Costs should not be so small that they have no deterrent or incentive effect or provide no real support to a successful litigant, but costs should not be so large that their threat deters legitimate litigation. Thus Justice Fruman, as she then was, wrote in ***LSI Logic Corporation of Canada, Inc v Logani***, 2001 ABQB 968 at para 5 that "[o]n the one hand it is unfair to require a successful party whose conduct is not blameworthy to bear any costs incurred in prosecuting or defending the action; on the other hand, citizens will be hesitant to assert valid legal rights or even defend an action if an unsuccessful party is required to bear all the costs." See also ***Weatherford*** at para 12(CA). The costs system should not run counter to "timely and affordable access to the civil justice system:" ***Hryniak v Mauldin*** at para 2.

[97] These considerations apply respecting party-party costs awards. The Court of Appeal concluded in ***Weatherford*** at para 12 that "[t]he result of this balance is the concept of partial indemnification through party and party costs to the successful party." Generally, costs should not provide full indemnity of fees to the winner, but partial or incomplete reimbursement. "[T]he philosophy behind the costs rules is that litigants will only be partly indemnified by an award of costs:" ***RVB Managements*** at para 14.

[98] This approach has been operationalized by consistent confirmation that costs should, generally, fall within the range of 30 or 40 to 50% of the successful litigant's billed costs. The Costs Committee wrote in Alberta Law Reform Institute, *Costs and Sanctions, Consultation Memorandum* 12.17 (February 2005), https://www.alri.ualberta.ca/docs/cm01217.pdf, at paras 8 and 15 that

> [8] Alberta presently uses a partial indemnity system for the legal costs component of party and party costs. It is premised on the assumption that a winning party is deserving of some compensation for legal costs incurred in establishing or defending its position, but recognizes that full indemnity of legal fees can significantly hamper access to justice in many cases. Accordingly, Schedule C of The Rules is intended to award approximately 30-50% of a winning party's actual legal fees, subject always to the discretion of the court to vary a costs award.
>
> [15] The Committee is of the view that the most desirable balance of these interests is achieved through a default partial indemnity regime for the recovery of the legal fees component of costs. The Committee also believes that partial indemnity of such costs also provides an appropriate incentive to reach settlements early in the action.

[99] These considerations, in my opinion, should also apply when the foundation for the costs award is not party-party costs but indemnification for solicitor-client costs. Even if litigation

conduct attracts an indemnity-based costs award, that does not require that the award amount match the total solicitor-client costs of the successful party. The total amount may but not must be awarded. Factors such as proportionality and access to justice continue to inform the discretion to award costs. These factors are not nullified just because the tariff is disregarded for inadequacy. Even if costs are determined on a solicitor-client basis, judicial discretion is not limited only to the determination of the foundation for the costs award and the successful party's bill or counsel's view of costs does not replace judicial discretion. Rule 10.31(1)(b) allows for a costs award "in any amount that the Court considers to be appropriate in the circumstances." Rule 10.31(3)(a) empowers the Court to order one party to pay to another "all or part of the reasonable and proper costs with or without reference to Schedule C."

B. Partial vs. Full Indemnity

[100] I return to three features of the Respondents' claims. First, the Respondents are not "people of means." The Respondents are in economic circumstances doubtless similar to those of many who participate in societies or community organizations. Members of such organizations should be deterred from frivolous litigation with their organizations. A costs award founded on solicitor-client costs serves that deterrent purpose. But members of such organizations should not be deterred from reasonably-based litigation against their organizations for fear of crushing costs awards. An indemnity-based costs award may be high enough to deter without elevation to a level that would ruin unsuccessful litigants.

[101] Second, Respondents' counsel referred to the "disparity of power" point in ***GO Community Centre***. What I do infer is true is that TCSA's resources for paying counsel were larger than the Respondents' combined resources. That, by itself, may not shield a litigant who deserves to pay solicitor-client costs from the full force of the successful party's bill of costs. When, however, the successful party's costs are about 4.5 times the size of the unsuccessful party's costs, Justice Woolley's warning in ***Geophysical Services*** at para 23 is heard – fairness may not be promoted by "having the indemnity vary based on how expensive a lawyer the successful party could afford to hire, or how much work they can afford to ask that lawyer to do." See also ***Monco Holdings Ltd v BAT Development Ltd***, 2005 ABQB 851, Veit J at para 31 ("parties with deep pockets would gain an enormous advantage over litigants of modest or ordinary means"); ***Blaze Energy Ltd v Imperial Oil Resources***, 2014 ABQB 509, Schutz J, as she then was, at para 75.

[102] Third, as Respondents' counsel emphasized, this litigation was an affidavit-based application that took a little over a month to conclude from filing to decision. The litigation did not involve many litigation steps.

[103] I therefore find that this is not an appropriate case in which to award a full indemnity to TCSA. A partial indemnity is appropriate.

[104] Respondents' counsel suggested that this case is unlike those attracting percentage indemnity awards discussed in ***GO Community Centre*** at paras 141-163. I did say at para 163 that

> [163] In my opinion, the percentage indemnity approach, despite the concerns raised, remains a viable approach to costs assessment outside of its traditional application in lengthy, complex proceedings. The availability of this approach, however, is best confined to narrow circumstances such as litigation with

> substantial sums at stake, involving significant legal or factual complexities, between sophisticated parties on an equal economic footing.

This litigation, it is true, did not have "substantial sums at stake … between sophisticated parties on an equal economic footing." That observation is to no avail. Percentage indemnity may be a just response in other circumstances, such as circumstances warranting costs on a solicitor-client basis.

[105] I did not consider a solicitor-client costs award in ***GO Community Centre*** because, as noted at para 80, the successful parties did not claim that type of costs. I did say at para 163 that the percentage indemnity approach was "best confined to narrow circumstances." Awards of solicitor-client-based costs are justified in even more narrow circumstances than the types of circumstances that have typically attracted percentage indemnity awards.

[106] Generally, judicial decisions should not be read like statutes and judicial decisions should not be approached like law reform institute-style surveys of an entire area of law. I must again refer to ***Quinn v Leathem***, [1901] AC 495 (HL), [1901] UKHL 2 (BAILII) at 506: "every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

C. Quantifying the Amount of Indemnity

[107] In the context of a discussion of TCSA's alternative claim to costs on a percentage indemnity basis, Respondents' counsel discouraged recourse to "an undesirable and unnecessary accounting." Foundational rule 1.2(2)(3)(e) does encourage "efficient" remedies. I also acknowledge, though, that Judges are not necessarily well-placed to determine whether particular accounts are reasonable: ***Geophysical Services*** at para 18; see ***GO Community Centre*** at para 158.

[108] In this case, we know what the Respondents paid in legal fees – about $40,700. They did not claim that this was not a fair amount. Hence, they could not claim that is not a fair amount to compensate TCSA for having to bring litigation that it should not have been forced to bring.

[109] The litigation required concentrated work over a short period of time.

[110] Moreover, the Respondents were responsible for introducing collateral complexities through their counter-application.

[111] TCSA is entitled to an elevation of its partial indemnity to account for its need to respond quickly to the Respondents' claims, claims that imposed both quantitative (Ms. Schienbein's affidavit) and qualitative (application of common law corporate principles to a society) complexities.

[112] In my view, the appropriate elevation of TCSA's costs is an additional 50% (approximately) or $20,000, plus an additional $2,000 for this costs application (involving two written submissions by TCSA's counsel).

[113] This takes the appropriate costs award to $62,700.

[114] This award is about 30% of TCSA's actual billed costs, which, in my view, falls within the range of costs supported by Alberta authority, and is an amount proportional not only to the

time and effort required by TCSA's counsel to bring the application and respond to the counter-application, but to the short duration of the litigation and the limited number of litigation steps that TCSA's counsel had to take.

[115] The Respondents shall therefore pay costs of $62,700 to TCSA.

Written submissions received on the 11th day of September 2020, the 23rd day of October, 2020, and the 13th day of November, 2020.
Dated at the City of Edmonton, Alberta this 23rd day of March, 2021.

W.N. Renke
J.C.Q.B.A.

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