Court of King's Bench of Alberta

Citation: 420 Investments Ltd v Tilray Inc, 2024 ABKB 480

Date: 20240807
Docket: 2001 02873
Registry: Calgary

Between:

420 Investments Ltd

Plaintiff

- and -

Tilray Inc and High Park Shops Inc

Defendants

- and -

High Park Shops Inc

Respondent / Plaintiff by Counterclaim

- and -

420 Investments Ltd

Appellant / Defendant by Counterclaim

Reasons for Decision on Costs
of the
Honourable Justice E.J. Sidnell

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[1] On April 11, 2024, I issued my reasons for dismissing the appeal brought by 420 Investments Ltd (Four20) of an Applications Judge's dismissal of a monetary judgment stay application: ***420 Investments Ltd v Tilray Inc,*** 2024 ABKB 210 (the Stay Appeal). The parties to

the Stay Appeal were Four20 and High Park. High Park was successful. The parties have not been able to agree to costs of the Stay Appeal and made written submissions on costs.

[2] Because the costs award made by the Applications Judge was not appealed, I declined to reconsider that costs award. This Costs Endorsement relates solely to the Stay Appeal.

High Park's position

[3] High Park seeks partial indemnity costs in the amount of $19,920.60 being 50% of what it submits are its legal fees relating to the Stay Appeal, plus disbursements.

[4] High Park relies on: (1) its success; (2) the Stay Appeal being brought on an emergency basis; (3) the magnitude of the damages at issue; and (4) the difference between High Park's actual legal costs and the Schedule C tariff under the *Alberta Rules of Court* AR 124/2010.

[5] Regarding High Park's first point, it was entirely successful on the Stay Appeal.

[6] Regarding the second point, High Park submits higher costs are appropriate because the Stay Appeal was sought on an emergency basis and relies on ***Trinity Christian School Association v Schienbein***, 2021 ABQB 218 paras 76 to 81. However, the Stay Appeal is not analogous to the ***Trinty Christian School Association*** facts and none of the factors considered in that case on the urgency issue exist in the Stay Appeal, for example:

(a) the initial ***Trinty Christian School Association*** application was heard a month after being filed; whereas the Stay Appeal was an appeal of an application already heard;

(b) the ***Trinty Christian School Association*** was complex; whereas on the Stay Appeal High Park submitted that there was little in dispute in relation to the applicable law and what was in dispute was the application of the law to the factual record;

(c) the brevity of the ***Trinty Christian School Association*** application timeline enhanced a claim for significant costs; whereas there was no evidence that the brevity of time for the Stay Appeal affected High Park costs;

(d) the ***Trinty Christian School Association*** application timeline was compressed and intense, and counsel had to address the new types of arguments raised in the cross-application; whereas the Stay Appeal was an appeal of an Application Judge's decision, there was no new evidence on appeal, and Four20's 239-page affidavit (including exhibits) would have been reviewed and considered in relation to the initial stay application before the Applications Judge; and

(e) the ***Trinty Christian School Association*** timeline was so short that it left little opportunity for senior counsel to brief junior counsel and delegate tasks; whereas the Stay Appeal was a reiteration of the submissions before the Applications Judge.

[7] Regarding the third point, High Park points out that a stay of a $9,810,364.12 judgment was at issue, though at the hearing of the Stay Appeal I was only made aware that it was a $7,000,000 judgment, plus interest. In any event, the amount of the judgment is significantly more than Column 5 of Schedule C, which is the tariff for claims over $2,000,000. However, I

note that the test applied on the Stay Appeal was that for an injunction and the commentary on Schedule C in Division 2 The Tariff states that:

> Unless the Court orders otherwise, matters that have no monetary amounts, for example, injunctions, will be dealt with under Column 1.

[8] Regarding the fourth point, High Park did not follow the direction of the Court of Appeal and provide the Court, and Four20, with a draft Bill of Costs based on Schedule C as a benchmark: see ***Barkwell v McDonald***, 2023 ABCA 87, para 58.

[9] In ***McAllister v Calgary (City)***, 2021 ABCA 25 at para 46, the Court of Appeal explained that, where a percentage of assessed costs are claimed under Rule 10.31(3)(d), an assessment must be undertaken:

> … 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. …

[10] High Park submits that awarding 50% partial indemnity would provide for reasonable and proper costs and would be consistent with the direction in ***McAllister***. In ***Kantor v Kantor***, 2023 ABCA 329 at para 12, the Court of Appeal explained ***McAllister***:

> … this Court has clarified that *McAllister* does not mean that "the winning party can simply assert the quantum of the fees that was charged by counsel, and paid by the winning party": *Barkwell* ... at paras 53-59. If a party claims costs as a proportion of the amounts billed by their lawyer, a more detailed analysis is needed to determine whether the sums claimed are "reasonable and proper costs" under R 10.31.

Four20's position

[11] Four20 submits that High Park is entitled to costs in the amount of $2,700 based on item 8(1)(a) of Schedule C under column 5. However, Item 8(1)(a) is for an application and not an appeal.

[12] Four20 also asserts that High Park's brief for the Stay Appeal was "largely similar to the brief prepared for the underlying Stay Application and contained fewer case authorities". Four20 also asserts that the Stay Appeal "with its limited record and abridged proceedings" is the type of matter to which Schedule C applies.

[13] In addition, Four20 takes issue with High Park's statement that its legal fees are $37,943 without any explanation of the work performed. This can be an issue in interlocutory matters because production of legal statements could disclose confidential information. Four20 relies on ***VLM v Dominey Estate***, 2023 ABCA 382 at para 13, and submits that some justification is required for components of the costs, including the hourly rate, the number of hours worked, the number of counsel involved, and the proportionality of the litigation.

Rules 10.31 and 10.33

[14] Rule 10.31(1) directs the Court to first consider the factors set out in Rule 10.33.

[15] Rule 10.33(1) sets out factors that may be considered in making a costs award. The following factors are relevant for the Stay Appeal:

> (a) the result of the action and the degree of success of each party;
>
> (b) the amount claimed and the amount recovered;
>
> …

[16] I have already noted that High Park was the successful party. Further, the amount of the judgment underlying the Stay Appeal was in the millions of dollars; however, the Stay Appeal was essentially an appeal of a denial of an injunction in relation to a monetary judgment.

[17] Having considered the relevant Rule 10.33(1) factors, the options under Rule 10.31(1) may be considered. In this case, both High Park and Four20 focussed on the reasonable and proper costs approach under Rule 10.31(1)(a), but their proposed outcomes are radically different.

[18] Where a party proposes that all or a portion of their legal costs should be awarded, some substantiation of the costs claimed must be provided to determine whether the costs claimed are reasonable and proper. Substantiation is typically made by producing copies of legal invoices. Substantiation of the costs claimed must be disclosed so that the opposing party can make submissions on whether those costs are reasonable and proper and the Court, or a Review Officer, can decide whether the costs are reasonable and proper.

[19] High Park did not provide any substantiation about the legal costs it has claimed.

[20] It would be possible to direct High Park to provide redacted copies of its legal invoices that disclose details only about those steps taken in relation to the Stay Appeal. However, such a direction might not be practical because: (1) the amount of time it could take to redact the invoices may be excessive compared to the amount of costs claimed; (2) the appeal relating to the underlying monetary judgment has not been heard and it may not be possible to disclose all steps in relation to the Stay Appeal without disclosure of some confidential information or information governed by litigation privilege; and (3) the parties' submissions on costs have been made and requiring High Park to produce legal invoices would require further submissions from both parties.

[21] Because High Park has not provided any substantiation of its legal costs, and it is not practical to direct High Park to produce legal invoices, I find that awarding costs on the basis of a percentage of legal costs incurred is not an appropriate option in this case.

[22] Under Rule 10.31(3)(a), the Court can award a party costs based on Schedule C. Further, as a costs award for an interlocutory application, I find that a costs award based on Schedule C is appropriate: see ***VLM*** at para 7.

[23] Notwithstanding the commentary on Schedule C in Division 2 The Tariff, regarding costs for injunctive relief and quoted at paragraph [7], the stakes on the Stay Appeal were high for both parties. Even though much of the preparation, submissions and argument would have been similar to those made at the initial application before the Applications Judge, the Stay Appeal

still required a written brief and detailed submissions. I find that it appropriate to award High Park costs for the appeal based on one counsel and two times Column 5 of Schedule C item 20 (2 x $4,050), plus GST.

[24] Counsel for High Park is directed to prepare an order to reflect this costs decision and circulate it to counsel for Four20. Once both counsel have affixed their respective signatures, the order can be submitted electronically for filing.

Written submissions received on the 24th day of May, 2024 and the 30th day of May, 2024.
Dated at the City of Calgary, Alberta this 7th day of August, 2024.

E.J. Sidnell
J.C.K.B.A.

Appearances:

R Hawkes KC, G Price and S Miller
for the Appellant

DV Tupper, T Wagner and C Stiemer
for the Respondent