

Court of King's Bench of Alberta

Citation: 9344-7167 Quebec Inc v True North Mortgage Inc, 2024 ABKB 443

Date: 20240718
Docket: 2201 13284
Registry: Calgary

Between:

9344-7167 Quebec Inc

Applicant

- and -

True North Mortgage Inc

Respondent

Reasons for Decision
of the
Honourable Justice C.M. Jones

I. Introduction

[1] In my earlier decision in this matter, I dismissed an application by 9344-7167 Quebec Inc. (“9344”) for injunctive and declaratory relief against True North Mortgage Inc. (“True North”): *9344-7167 Quebec Inc v True North Mortgage Inc*, 2024 ABKB 278 (the “Decision”).

[2] The parties have been unable to agree on costs. Each seeks a costs award in its favour. True North asserts that it is entitled to costs as the successful party. It also argues that 9344’s conduct both prior to and in the course of the litigation entitles it to costs or some other “compensation”. True North also makes reference to offers of settlement it contends were made and were not accepted by 9344. For its part, 9344, despite my dismissal of its application, argues that it is entitled to some of its costs by virtue of a provision of its contract with True North.

II. Background

[3] As I noted in the Decision, the parties entered into a Trademark License Agreement (the “TLA”) on July 25, 2016. For purposes of this costs decision, the salient provision of the TLA is clause 14B, which reads:

14. JURISDICTION AND DISPUTES

B. In consideration of the jurisdiction being Alberta, Canada, [True North] agrees to cover 50% of the legal bill incurred by [9344] in the event a legal dispute arises between the parties regardless of who initiates or wins the legal dispute.

[4] Given True North's assertion that 9344 unduly lengthened and complicated this application, the procedural history is relevant. I set out that procedural history in the Decision, but for ease of reference, I will reiterate parts of it here.

[5] In its Statement of Claim filed November 16, 2022, 9344 sought certain remedies including, *inter alia*:

1. An injunction restraining True North from conducting business in the Province of Quebec, in violation of the TLA, under the trademark of Think Financial ("THINK"), or otherwise.
2. An order requiring True North to provide 9344 with the right, privilege and license to use the trademark THINK on the same terms as the Trademarks set forth in the TLA, including but not limited to providing 9344 with the exclusive right to use THINK in the Province of Quebec on the royalty terms set forth in the TLA.
3. An order requiring True North to forward and refer to 9344 100% of all leads received by True North for the Province of Quebec, including under the trademark of THINK.
4. An order directing True North to disclose full details of:
 - (i) All leads for the Province of Quebec that it has retained for itself, under the trademark of THINK or otherwise;
 - (ii) All leads for the Province of Quebec that True North has referred to other financial institutions since the inception of the TLA.
5. An order directing True North to reinstate 9344's access to its marketing manager for pay per click campaigns on Google, or otherwise restore the level of online marking distribution required by the TLA.

[6] 9344 also sought damages, interest and costs.

[7] True North both defended and filed a Counterclaim asserting that 9344 had failed to deliver services in Quebec to the same quality it had prior to the TLA. True North also alleged that 9344 had failed to advertise or otherwise promote the licensed website and brand name to clients or potential clients and was not tracking leads as required under the TLA.

[8] The application evolved somewhat over time. It was originally set down for a hearing on March 1, 2023. Due to a dispute over affidavits, it was adjourned to March 30, 2023. Further dispute over affidavits lead to another adjournment, this time to June 15, 2023.

[9] At the hearing on June 15, 2023, 9344 acknowledged that its focus had shifted. Instead of seeking primarily a mandatory injunction relating to access to THINK, it was now seeking primarily an order declaring that it is entitled to that access. 9344 asserted that this change in focus arose from certain evidence acquired at questioning. I noted that, in its written materials to that point, 9344 had provided virtually no law or argument regarding the tests for declaratory relief or their application to the facts of this case.

[10] Subsequent to the June 15, 2023 hearing, I wrote to the parties telling them that I would entertain an application by 9344 to amend its application to allow for proper articulation and application of the law relating to declaratory relief. I also directed the parties to make submissions regarding the issue of thrown away costs in connection with the June 15, 2023 application.

[11] 9344 made its application to amend in December 2023. True North did not oppose that application. I granted the request to amend, the result being that 9344 primarily sought a declaration that it was entitled to exclusive mortgage broker access to THINK in the Province of Quebec for the remainder of the term of the TLA on the terms set forth therein and at the rates prescribed by the standard THINK term sheet.

[12] The application for declaratory relief was argued before me on March 26, 2024.

III. 9344's Costs

[13] As noted above, I dismissed 9344's application in the Decision. That notwithstanding, 9344 argues that it is entitled to have 50% of its legal bill paid by True North pursuant to clause 14.B of the TLA. It argues that this provision of the TLA "clearly and unambiguously" requires True North to pay 9344's costs in this amount regardless of the outcome of the proceedings.

[14] 9344 acknowledges that the courts retain a limited discretion to override express covenants for the payment of costs, but asserts that such covenants are generally enforceable unless there has been abusive litigation or other misconduct. It cites the Court of Appeal's statement in *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc*, 2018 ABCA 305 at para 107 that "The discretion to override a solicitor and client cost clause, however, should only be exercised when there have been abusive forms of litigation or other misconduct."

[15] In its submissions on costs, True North referred to earlier submissions it had made in respect of 9344's leave application. While it acknowledged that the starting point for dealing with legal fees is what is set out in the parties' contract, True North argued that the courts can deviate from the parties' agreement in exceptional cases. It asserts that this is such a case, given 9344's change in the focus of its application. It cites this Court's comment in *Alberta Treasury Branches v 1401057 Alberta Ltd (Katch 22)*, 2015 ABQB 548 at para 21:

If A and B enter into an agreement whereby A promises to indemnify B for legal fees B pays to law firm C for the performance of stipulated legal services, a court determining A's costs obligations will enforce the fee indemnification agreement between A and B unless there is a compelling reason not to. A compelling reason may exist if B has acted in an unreasonable manner.

[16] True North argued that it “cannot be equitably held responsible for the payment of 50% of these costs to 9344, notwithstanding the language at Section 14.B of the [TLA].”

[17] In its more recent written submission, True North contends as follows:

Should the Court intend to consider Clause 14.B to award 9344 with *any* percentage indemnity, 9344 must establish the reasonableness and proportionality of costs incurred. The Court must be satisfied that the incurring of costs and the amount incurred are themselves reasonable. Overly zealous, inefficient, or disproportionate litigation must be disincentivized. [Emphasis in original; citations omitted.]

[18] While it cannot be seriously disputed that excessive litigation is to be discouraged, I do not consider this an appropriate case to override the parties’ agreement about legal fees as expressed in clause 14.B of the TLA. This matter has taken a somewhat convoluted path, but I am not prepared to find that 9344’s conduct was overly zealous or abusive. Its change in focus may have made the process somewhat inefficient, but not, in my view, to an extent sufficient to disentitle it to the agreed indemnification.

[19] I also do not agree with True North that 9344 is obliged to establish the reasonableness of its legal costs. There is nothing in clause 14.B of the TLA that imposes such a restriction. Similarly, while the *Alberta Treasury Branches* case cited by True North speaks to the reasonableness of a party’s conduct in determining whether the court will enforce a costs agreement, it does not indicate that the court should consider the party’s conduct in determining the extent of the costs indemnity under such an agreement. In my view, for the court to import such a criterion into the parties’ agreement would be to create an agreement that the parties did not make for themselves. That would be an unacceptable incursion on the parties’ freedom to make their own contract.

[20] True North may now feel that clause 14.B of the TLA was improvident, but it is not for this Court to impose a more favourable arrangement.

[21] Accordingly, I find that 9344 is entitled to payment from True North of 50% of its legal bills as issued by its counsel.

IV. True North’s Costs

[22] As the successful party on this application, True North is presumptively entitled to costs. It also, however, makes several arguments in support of its position that it is entitled to some enhancement of the costs award.

[23] First, as noted above, True North argues that 9344 unduly lengthened and complicated these proceedings, including by changing the focus of this application from injunctive to declaratory relief. True North also asserts in its costs submissions that “In seeking a declaration for exclusive access to THINK in Quebec, 9344 effectively sought to determine the central trial issue through an interlocutory application and used an interim application to obtain final relief. This was inappropriate.”

[24] Notwithstanding its arguments about lengthening and complicating the proceedings, True North does not seek solicitor-client costs. Given my finding above that 9344’s litigation conduct,

if perhaps inefficient, was not abusive, I would not have awarded such costs if True North had sought them.

[25] Taking all of the foregoing into account, I see no reason to depart from the ordinary costs rules and principles. True North cites *McAllister v Calgary (City)*, 2021 ABCA 25 in support of the proposition that “absent extraneous factors, a 40-50% indemnity of reasonable legal costs” is appropriate. However, the Court of Appeal made clear in *McAllister* that this percentage indemnity approach is not mandatory and that Schedule C to the Rules of Court is still a useful tool for assessing costs in appropriate cases. In my view, this is such a case.

[26] While this matter proceeded somewhat circuitously, it was, in the end, an interlocutory application, not a trial. That being the case, I consider Schedule C the better method for assessing costs in this matter.

[27] True North filed a Counterclaim against 9344 seeking disgorgement of profits, general damages and damages in the form of loss of profits and deprivation of benefits. The Counterclaim, however, does not specify the amounts of any of these damages, stating only that they are to be proven at the trial of this action. Further, no specific monetary amount was at issue on this application. Therefore, I find that True North is entitled to costs calculated using Column 1 of Schedule C. The question then becomes whether there should be some enhancement of that amount.

[28] In its costs submissions, True North made this argument:

This Court rejected 9344’s argument that True North had an obligation to provide 9344 with access to THINK once it was operational in Quebec, and was satisfied that the [TLA] only granted 9344 with access to the three particularized Trademarks. Owing to 9344’s objections, True North had kept THINK’s Quebec launch in abeyance. Therefore, the effect of 9344’s protracted litigation and failure to abandon injunctive relief was True North being unable to launch THINK in Quebec for the entirety of the proceedings, despite 9344 not being entitled to the relief sought. This was prejudicial for True North, for which it ought to be compensated.

[29] This argument led to both parties providing me with further correspondence. 9344 objected to the argument, contending that it was contrary to the facts previously asserted by True North. True North argued that there was no inconsistency in its factual position.

[30] I need not resolve that dispute as, in my view, this is not an argument that goes to costs on this interlocutory application. Rather, it is a matter of damages that can and should be resolved at trial.

[31] Finally, True North argues that it is entitled to an enhanced costs award by virtue of two *Calderbank* offers it made to 9344.

[32] On January 24, 2023, True North says that it offered 9344 exclusive access to THINK, which was the relief 9344 sought in this application. 9344 asserts that this was not a genuine offer of settlement for two reasons. First, it was made before True North had filed any evidence in support of its position. Second, the terms of access to THINK were such that 9344 could not have complied with them and would have been “set up” to fail.

[33] The second offer was made on June 4, 2024. True North proposed that 9344 pay 70% of its legal costs and that none of 9344's costs would be paid by True North. Again, 9344 argues that this was not a genuine offer of settlement.

[34] In *Innes v Kleiman*, 2023 ABCA 307 at para 11, the Court of Appeal held that "...to attract costs consequences, an offer must be a 'genuine offer' of a sufficient compromise at the time it was served and remained open for acceptance...". The Court of Appeal also noted in that same paragraph that "Courts view with scepticism offers to merely abandon appeals...".

[35] Even if a *Calderbank* offer is genuine, the Court of Appeal has made clear that it does not carry mandatory costs consequences. In *Ting v Ting*, 2023 ABCA 9 at para 6, the Court stated as follows:

Costs, including those in respect of *Calderbank* offers, are discretionary. Further, where informal offers are made there is no "one size fits all" response, and doubling costs based on a *Calderbank* offer is neither automatic nor presumed: *Bruen v University of Calgary*, 2019 ABCA 275 at para 7; *Carroll v ATCO Electric Ltd*, 2018 ABCA 186 at para 3, 68 Alta LR (6th) 302.

[36] In this case, I do not consider it appropriate to award True North double costs on the basis of either of the *Calderbank* offers. Clearly, the second offer was not more favourable to 9344 than what I have decided here. Further, given 9344's assertion that it would have been unable to meet the terms of the first offer, I decline to award double costs on the basis of that offer.

V. Conclusion

[37] In the result, 9344 is entitled to be reimbursed by True North for 50% of its legal bills incurred in respect of this matter. True North is entitled to costs of this application on Column 1 of Schedule C to the *Rules*.

Written submissions filed June 28 and July 2, 2024.

Dated at the City of Calgary, Alberta this 18th day of July, 2024.

C.M. Jones
J.C.K.B.A.

Appearances:

Eugene J. Bodnar
Scott Venturo Rudakoff LLP
for the Applicant

Navdeep Kaur
Bennett Jones LLP
for the Respondent