

# Court of King's Bench of Alberta

**Citation: BFL Canada Risk and Insurance Services Inc v Le, 2024 ABKB 338**

**Date:** 20240610  
**Docket:** 2301 15145  
**Registry:** Calgary

Between:

**BFL Canada Risk and Insurance Services Inc.**

Applicants

- and -

**David Le and Hub International Canada West ULC**

Respondents

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**Endorsement  
of the  
Honourable Justice T.G. Rothwell**

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## **A. Introduction**

[1] On November 22, 2023, I was scheduled to hear an application in Urgent Chambers from the Applicant (BFL) for an interim injunction. BFL sought, *inter alia*, an order enjoining the Respondents (HUB) from soliciting its customers. Counsel for BFL and HUB attended before me, advised they were close to resolving the matter, and requested a short adjournment. I ultimately granted a Consent Injunction Order (the “Consent Order”) in favor of BFL.

## B. Position of the Parties

### BFL

[2] BFL submits that it put significant time and effort into obtaining an injunction against HUB, that HUB only consented on the “courthouse steps”, and that BFL is entitled to costs in light of the expenses it incurred. BFL notes that it sent HUB cease and desist letters and that HUB vehemently opposed its requests, indicating that they would oppose any injunction and seek solicitor/client costs. BFL seeks modified *McAllister* costs (*McAllister v Calgary (City)*, 2021 ABCA 25) or, in the alternative, 1.5 times column 5 of Schedule C of the *Alberta Rules of Court*, AR 124/2010 (*Rules of Court*).

### HUB

[3] HUB maintains that Mr. Le has not breached the Unanimous Shareholders Agreement (the “USA”) and that no breaches have been proven. HUB submits that it should be entitled to costs as a result of having to defend against the application, and also notes that BFL did not receive all of the remedies they sought in their Originating Application. HUB is content to have each party bear its own costs or have costs dealt with at the conclusion of the matter.

## C. Law

[4] Rule 10.31 of the *Rules of Court* contemplates a cost award being made at the conclusion of a matter and r. 10.33 sets out factors that the Court may consider, namely:

- (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.

[5] Factors (b) and (e) have limited applicability in the present case.

[6] It is well established that:

- The successful party is generally entitled to costs: r. 10.29;
- Costs are discretionary and subject to specific requirements in the *Rules of Court*;
- Discretion over costs must be exercised judicially and in accordance with established principles;
- In appropriate circumstances costs may be increased beyond that provided for in Schedule C; and
- Costs ought not to be oppressive.

*B & R Development Corporation Ltd v Trail South Developments Inc*, 2011 ABQB 706 at paras 4-8; *Mikkelsen v Truman Development Corporation*, 2016 ABQB 255 at paras 21, 23; *Pharand Ski Corp v Alberta* (1991), 81 Alta LR (2d) 304 at 398; *Elder Advocates of Alberta Society v Alberta Health Services*, 2021 ABCA 67 at para 14.

[7] BFL referred me to several decisions, and I note the following two decisions.

- *Orbis Engineering Field Services v Taiifa Engineering Ltd*, 2019 ABQB 592 [*Orbis*] – Justice Mah awarded costs of 1.5 times Column 5 of Schedule C in relation to a request for an injunction that he denied.
- *North v Davison*, 2024 ABKB 52 [*North*] – This costs decision arose out of an interim receivership application. Justice Mah awarded costs of 3 times Column 5 of Schedule C.

[8] HUB referred me to several decisions, and I note the following two decisions:

- *Stonewater Group of Restaurants Inc v Mikes Restaurants Inc*, 2005 ABQB 964 [*Stonewater*] - Justice Ross declined to grant costs in favor of the Stonewater Group after it successfully obtained an interlocutory injunction against Mikes Restaurants. Justice Ross held that costs should be determined by the trial judge because the injunction could be set aside at trial. Justice Ross noted that that costs should likely be in the cause, but she saw no need to fetter the trial judge’s discretion.
- *Rock River Developments Ltd v Village of Nampa*, 2023 ABKB 529 [*Nampa*] – Rock River Developments unsuccessfully sought a permanent injunction against the Village of Nampa to prevent it from selling lands to satisfy outstanding tax arrears. Justice Hollins considered Justice Ross’ decision in *Stonewater* and agreed with it in principle but distinguished it. Justice Hollins held that in this case: (1) the refusal to grant the permanent injunction did dispose of the essential issue; (2) the subsidiary issues that remained were extant in a separate lawsuit; and (3) it would be unfair to require the Village of Nampa to wait for that lawsuit to be concluded.

## D. Analysis

### Is BFL Entitled to Costs?

[9] It is well established that the successful party to an action is generally entitled to costs of some measure. In the present case, HUB and Mr. Le argue that they only agreed to abide by the terms of the USA and that it has not been established that Mr. Le breached the terms of the USA. Mr. Le has clearly maintained that he has not breached the terms of the USA. HUB and Mr. Le, in essence, argue that BFL was not successful as they did not receive anything more than what Mr. Le had agreed to in the USA.

[10] I agree with HUB and Mr. Le that the Consent Order did not confirm any breaches. I also note that paragraph 4 of the Consent Order reserves the right to both parties to make claims and states that the Consent Order is without prejudice to such claims.

[11] However, I do not accept HUB and Mr. Le's position that BFL did not gain anything from the Consent Order. BFL gained an order requiring Mr. Le to comply with the USA and defining both the term "Customer" and the relevant timeline. Similarly, paragraph 2 of the Consent Order imposed a confidentiality obligation on Mr. Le. HUB and Mr. Le's position that the Consent Order is of limited value does not accord with their determined opposition to the Consent Order up until the eve of the application.

[12] Resolution should be encouraged, and parties should not be penalized for resolving matters; however, the background and timing surrounding the resolution of a matter is a relevant consideration. The parties are also free to negotiate costs when they resolve a matter. In this case, the parties were unable to resolve costs and the Consent Order reserved that decision to me. I received brief written submissions from the parties in April of 2024.

[13] While I agree with the principles enunciated in *Stonewater*, I find that in this case it is appropriate to award costs to BFL because it obtained an order seeking largely what it sought in its Originating Application. Unlike *Stonewater*, the relief was not contested but agreed to on the eve of the application and was not time limited. I did not make any findings regarding a breach that could be overturned like the situation in *Stonewater*. This was a consent order. HUB and Mr. Le note that BFL has commenced a separate action which implies some type of final relief and/or damages will be sought. That action is not before me and the cost consequences, if any, arising from that action will be dealt with within that action. The cost consequences arising out of the Originating Application should be dealt with by me.

[14] For the foregoing reasons, I find that BFL was successful and is entitled to costs.

### Quantum

[15] Having regard to the factors enumerated under r. 10.33, I note that an injunction in an employment/commercial context involves the application of the well-known test (i.e., *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311) for an injunction; however, there are nuances relative to each application. An application for an injunction is not an overly complex application, but I would not describe it as simple or routine either. The issue was clearly important to the parties as evidenced by the resources that were expended in bringing and defending the application.

[16] As I have already noted, I find that BFL was largely successful in obtaining what they sought in their Originating Application. However, BFL was not successful in obtaining the return of property or a preservation order. Having regard to "conduct of a party that tended to shorten the action" (r. 10.33(1)(f)), a consent order was reached which would have involved negotiation between the parties and did save some court resources.

[17] I am aware of *McAllister* and the solicitor/client costs that BFL incurred; however, *McAllister* arose out of a lengthy trial involving a difficult and novel claim against a public entity. In the present case we have a well-established test being applied in a commercial/employment context. I adopt and rely upon Justice Mah's finding at paragraph 18 of *North*, wherein he stated:

I have regard to the extensive and scholarly review of the caselaw conducted by Graesser J in *Grimes* and agree that *McAllister* does not necessarily create a “new normal” or presumption of 40-50% indemnity for successful litigants. The costs assessment exercise remains inherently discretionary and contextual.

[18] I have touched upon the factors listed in r 10.33 and, noting that Courts do not want to discourage resolution, even resolution late in the day, I find it appropriate to award BFL costs on Column 4 of Schedule C. I decline to increase it by a multiple primarily because BFL was not entirely successful and there was a resolution. On the other hand, BFL was largely successful and is entitled to some indemnification greater than column 1, given the complexity of the matter and the HUB’s last-minute capitulation.

### **E. Conclusion**

[19] BFL is entitled to costs on Column 4 of Schedule C for the steps taken plus their taxable disbursements. I thank counsel for their helpful submissions.

Heard on the 22<sup>nd</sup> day of November, 2023.

**Dated** at the City of Edmonton, Alberta this 10<sup>th</sup> day of June, 2024.

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**T.G. Rothwell**  
**J.C.K.B.A.**

### **Appearances:**

Pat Robinson and Austin Ward  
for the Applicants

Shane B. King  
for the Respondents