

# Court of King's Bench of Alberta

**Citation: Nova Oculus Canada Manufacturing ULC v Sather, 2024 ABKB 700**

**Date:** 20241127  
**Docket:** 2301 02211  
**Registry:** Calgary

Between:

**Nova Oculus Canada Manufacturing ULC**

Applicant

- and -

**Justin Sather, MacuMira Medical Devices Inc., Walter O'Rourke,  
and Karmastar Consulting Inc.**

Respondents

---

**Ruling on Costs  
of the  
Honourable Justice R.A. Neufeld**

---

[1] On August 27, 2024 I issued Reasons for Decision dismissing an application by Nova Oculus Canada Manufacturing ULC (“Nova”) to disqualify the law firm acting for MacuMira Medical Devices Inc (“MMD”) in a dispute regarding the transfer of intellectual property and patents. In that action, Nova seeks to set aside the transfer of such property and patents on the basis that it was done without shareholder approval under an allegedly secret deal reached between Nova and MMD as required under the British Columbia *Business Corporations Act*.

[2] Counsel for MMD in the second of the two part transfer was BDP-specifically one of its then senior partners, Mr. Darrell Fridhandler. Nova was not represented by Canadian counsel. Its Chief Executive Officer, Walter O'Rourke undertook the negotiation of the transfer agreement with his counterpart at MMD, Justin Sather. Mr. Fridhandler was present during certain negotiations and meetings.

[3] The disqualification application was supported by extensive documentation and legal briefs. So too was the response. There was also lengthy questioning on affidavits.

[4] The basic position advanced by Nova was that MMD should not be allowed to use BDP as its counsel because Nova was a near client of BDP, was likely in possession of confidential information, and Mr. Fridhandler acted as counsel to the conspiracy between Mr. O'Rourke and Mr. Sather under which Nova's intellectual property and patents were stolen from it. He was therefore likely to be a witness at trial. I did not accept those arguments, holding that Nova was not a near client of BDP, that all the information provided by Nova to BDP was also provided to Mr. Sather, and that the misconduct implicitly attributed to Mr. Fridhandler was not supported on the evidence.

[5] I also found that MMD is entitled to its costs in respect of the hotly contested application. I directed that if the parties could not agree on costs within 30 days, the issue could be remitted to me for a decision, with written submissions. The parties were not able to agree, and have now made those submissions.

[6] MMD seeks solicitor client costs of \$70,515 plus disbursements and GST for a total of \$75,952.01. It attached to its submissions a solicitor client bill of costs with a detailed breakdown of hours, services and billing rates. Also attached was a bill of costs based on column 5. The latter displays the amount of costs that would be payable at single costs, double costs and with an inflationary adjustment of 1.25%, totaling (including disbursements) \$13,461, \$25,011, and \$25,300 respectively.

[7] Nova opposes award of solicitor client costs. It also argues that MMD has failed to provide sufficient materials to award costs based on a percentage of actual costs incurred. It says that schedule C must be used in the circumstances and presented a bill of costs prepared by Nova showing what it considers to be the applicable schedule C fee items amounting to \$5062.50. It submits that an adjustment to a lump sum costs award of \$8000 would be sufficient to account for inflation.

### **Disposition – General Principles**

[8] The award of costs is fundamentally a matter of discretion for the court. Nonetheless, the discretion must be exercised judicially, with due regard for case precedent and the Alberta *Rules of Court*: *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144 at para 26.

[9] In this case entitlement to costs is quite clear. As found in my decision on the disqualification application, MMD is entitled to its costs after having been successful in defending against the application. The question is how those costs should be quantified.

[10] Successful litigants will often seek solicitor client costs, but they are rarely awarded. The case law is clear that in general the purpose of costs is to partially indemnify the successful party. Partial indemnity provides the successful party with some contribution towards its legal fees and disbursements while ensuring that cost liability does not create unacceptable barriers to justice for litigants generally: *Kantor v Kantor*, 2023 ABCA329. In keeping with this principle, solicitor client costs are the exception, rather than the rule.

[11] While entitlement to such costs can arise under various circumstances, in general solicitor client costs are awarded where the conduct of the unsuccessful litigant is so blameworthy that they should be required to pay the legal fees and disbursements of both sides: *Lay v Lay*, 2024

ABCA26 at para 17. Examples of such conduct include litigation misconduct, and fraudulent pretrial conduct by the unsuccessful party: *AGS v RNS*, 2024 ABKB 280 at para 47.

[12] Short of full indemnity solicitor client costs, it is open to the court to award partial indemnity costs comprised of a portion of reasonable legal fees and disbursement (typically 40-50%). Recent case law directs that when cost recovery is set at a proportion of legal fees, an evaluation of reasonableness having regard to the factors articulated in Rule 10.2 is necessary. The trial judge or an assessment officer must conduct a detailed analysis of reasonableness: *Barkwell* at para 60 . In addition, costs applicants are expected to provide a bill of costs calculated under schedule C as a benchmark for reasonableness.

### **Position of the Parties**

[13] MMD argues that the disqualification application and the allegations contained within Nova's application materials constituted litigation misconduct analogous to that which resulted in solicitor client costs in two Alberta Court of Appeal decisions: *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2018 ABCA and *Pillar Resource Services Inc v Prime West Energy Inc*, 2017ABCA 18. It also says that the baseless allegation of conflict in this case was similar to that which led this Court to award solicitor client costs in *Nordstrom v Stenco Inc*, 2016 ABQB 45. It urges me to deliver a clear message that the "broken-bottle-fighter" model of advocacy will attract severe cost consequences: *Pillar* at para 125.

[14] Nova denies that it engaged in reprehensible, scandalous or outrageous conduct. It says that the Nova brief did not contain any meritless accusations against BDP and stayed clear of accusing Mr. Fridhandler or of being a conspirator himself or being a part of or complicit in the theft of Nova's assets.

### **Disposition – Entitlement to Solicitor Client Costs**

[15] Nova's disqualification application was aggressively framed and argued. It started from the proposition that Nova's intellectual property and patents had been stolen- which is the essence of its claim in the main action. From there, it expressly or implicitly alleged that BDP was counsel to a conspiracy, had something to improperly hide, and that Mr. Fridhandler was sure to be a witness at trial. As I found in my reasons for decision, these were serious accusations, made with considerable rhetorical flourish.

[16] While aggressive, and at times overstated, Nova's allegations were not reprehensible or outrageous. They were supported by at least some evidence but were at minimum prematurely made and presumptive of success at trial. Either Nova or MMD may want to call Mr. Fridhandler as a witness at trial, in which case the involvement of BDP as trial counsel may once again be placed into issue. Moreover, the allegation of withholding of documents is supported by the slow pace at which disclosure took place, and the need for Nova to seek an order compelling production of records held by BDP.

[17] Accordingly, I am not prepared to award solicitor client costs for the disqualification application.

[18] I am however prepared to award partial indemnity costs at the high end of the range commonly used when awarding costs as a percentage of solicitor client costs. In my view this is an appropriate approach to take in dealing with a moderately complex application between two

similarly situated commercial entities, as is the case here. Both Nova and MMD chose to retain large and renowned law firms, and both will no doubt have been aware of the magnitude of legal costs associated with an application that was fought with such thoroughness and vigour.

[19] I therefore award MMD costs of 50% of its reasonable legal fees and disbursements.

[20] The determination of reasonableness will be made by the Assessment Officer if the parties are unable to agree on that issue within thirty days of this decision. The Assessment Officer is no doubt more conversant than me as to matters such as current hourly rates in the Calgary market.

[21] My only comment for the Assessment Officer's consideration concerns the division of time on the BDP accounts as between lawyers in the firm. I am aware of case law that holds that the principle of proportionality means that costs should be reduced where a party has not taken steps to delegate work to lower-billing timekeepers on a file: *Pytka v Pytka Estate*, 2010 ONSC 6406 at paras 21-22 as cited in *Re Estate of Garbera*, 2024 ABKB 641 at para 13. In my view the Court and Assessment Officers must be very cautious in making such generalizations.

[22] In practice, there are many situations in which a file may require attention by senior counsel, without delegation to junior lawyers. This includes cases in which the integrity of the law firm is questioned. Moreover it is not always the case that delegation to lawyers with lower hourly rates will be more economic. Junior lawyers may spend far more time on tasks than one who is more experienced, and "teams" of junior lawyers can be highly inefficient from a cost control perspective. Each file will be different.

Heard by written submissions received on September 26 and October 15, 2024.

**Dated** at the City of Calgary, Alberta this 27 day of November, 2024.

---

**R.A. Neufeld**  
**J.C.K.B.A.**

**Appearances:**

Peter Roberts K.C. and Codie Chisholm, Lawson Lundell LLP  
for the Applicant

Trevor R. McDonald, Burnet, Duckworth & Palmer LLP  
for the Respondents, Justin Sather and MacuMira Medical Devices Inc.