

Court of King's Bench of Alberta

Citation: Merchant Law Group LLP v Bank of Montreal, 2023 ABKB 597

Date:
Docket: 1903 02342
Registry: Edmonton

Between:

Merchant Law Group LLP

Plaintiff

- and -

Bank of Montreal

Defendant

- and -

Merchant Law Professional Corporation and Her Majesty the Queen In Right of Alberta
Respondents

**Ruling on Costs
of the
Honourable Justice R.W. Armstrong**

Background

[1] Merchant Law Group LLP had an account with the Bank of Montreal (the “Bank”). Merchant Law Professional Corporation is one of the partners of Merchant Law Group LLP. The Government of Alberta (“Alberta”) issued a Requirement to Pay (“RTP”) to the Bank in relation to a tax debt owed by Merchant Law Professional Corporation. Merchant Law Group LLP asserted that the bank account belonged to Merchant Law LLP and that Alberta could not enforce the debt of a partner against the partnership.

[2] The Bank, not knowing who the rightful recipient of the funds in the account was, sought interpleader relief and asked to pay the disputed funds into court. On November 29, 2018, a chambers judge granted the Bank an interpleader order and the funds, totaling just over \$80,000, were paid into court.

[3] Merchant Law Group LLP appealed the order of the chambers judge. In a Memorandum of Judgment dated October 3, 2019, the Court of Appeal dismissed the appeal: *Merchant Law Group LLP v Bank of Montreal*, 2019 ABCA 360. The Court of Appeal remitted the matter back to the Court of King’s Bench for a determination of issues arising from the chambers judge’s order. The Court of Appeal also directed that the costs of the appeal be determined by the Court of King’s Bench.

[4] On February 8, 2023, I rendered a decision on 5 questions that had been remitted to this Court by the Court of Appeal: *Merchant Law Group LLP v Bank of Montreal*, 2023 ABKB 74.

[5] Merchant Law Group LLP, the Bank and Alberta now seek a determination of the costs arising from the appeal and the subsequent application.

Governing Principles in Awarding Costs

[6] Division 2 of Part 10 of the Alberta *Rules of Court* governs recoverable costs of litigation. The general rule is that a successful party in a proceeding is entitled to a costs award against the unsuccessful party or parties. When exercising its discretion in making a costs award, the court is required to take into consideration the factors set out in rule 10.33(1). Those factors are:

- (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.

[7] In addition to the factors set out in rule 10.33(1), the court is also obliged to consider the conduct of the parties, including whether any party’s conduct unnecessarily delayed or lengthened the action, whether any party took unnecessary steps or contravened the Rules or a

court order or otherwise engaged in misconduct. The Court may also consider the existence of any offers of settlement: *Rules of Court*, r 10.33(2).

[8] Once the factors set out in r 10.33 have been considered, the court has considerable discretion in fashioning a costs award. Rule 10.31 permits the court to order costs based on the reasonable and proper costs incurred by a successful party or to order any other amount that the court considers appropriate in the circumstances including indemnification for a party's lawyer's charges or a lump sum instead of or in addition to assessed costs.

[9] When considering the reasonable and proper costs that a party incurred, the court may, but is not required to, have reference to Schedule C of the Alberta *Rules of Court* which sets out a tariff of recoverable fees. It assigns a certain dollar value to each significant step taken in typical litigation; however, it does not provide any guidance on what an appropriate total costs award ought to be in any specific matter. A formulaic application of Schedule C may not result in a costs award that is reasonable and proper. Accordingly, when relying on Schedule C, the court must still satisfy itself that the total costs payable pursuant to the Schedule are reasonable and proper: *McAllister v Calgary (City)*, 2021 ABCA 25 at para 25

[10] Generally speaking, absent misconduct on the part of one or more parties or other unusual circumstances, a fair and reasonable costs award should provide a level of indemnification in the range of 40% to 50% of costs reasonably incurred to the successful party: *McAllister* at para 51.

[11] When determining what a fair and reasonable costs award is, the court must also consider the proportionality of the costs award to the issues and amounts involved in the litigation. As the court of Appeal said in *Barkwell v McDonald*, 2023 ABCA 87 at para 57: "Success is not a justification for disproportionate litigation." See also: *Sunridge Nissan Inc v McRuer*, 2023 ABCA 128 at paras 56-58.

Bank of Montreal

[12] Merchant Law Group LLP appealed the order granting the Bank interpleader relief. Alberta and the Bank were the Respondents in the appeal, although Alberta's arguments regarding interpleader were aligned with those advanced by Merchant Law Group LLP. The appellant, Merchant Law Group LLP, was unsuccessful as the Court of Appeal dismissed the appeal.

[13] Merchant Law Group LLP argues that the Bank should not be entitled to costs because it improperly responded to the RTP issued by Alberta. According to Merchant Law Group LLP, when the Bank received the RTP, it should have simply refused to honor it and that would have avoided lengthy and costly interpleader proceedings, including the appeal and the subsequent hearing.

[14] Alberta's position is that each party should bear their own costs of the appeal. According to Alberta, the issue before the Court of Appeal was novel because s 60 of the *Alberta Corporate Tax Act* had not previously been judicially considered. Furthermore, Alberta argues that the appeal was only dismissed because there were several outstanding issues that had yet to be determined. It was not a typical case of there being a clear winner and a loser.

[15] I do not accept the arguments of Merchant Law Group LLP and Alberta. The Bank was faced with competing claims to money it held in an account. It had no way of knowing, at the

time, which party's claim to the funds would be successful. The Bank's application for interpleader was a reasonable response to the situation. While Alberta was technically a respondent on appeal, it unsuccessfully argued that interpleader relief ought not be available to the Bank. Alberta and Merchant Law Group LLP could have pursued their claim for the funds without further involvement of the Bank, thereby simplifying the matter. The appeal and the arguments advanced by Alberta and Merchant Law Group LLP seeking to overturn the interpleader relief and keep the Bank in the action, did not further the purpose and intention of the *Rules of Court* as articulated in the foundational rules.

[16] Interpleader proceedings are not novel, nor were the issues in this case particularly complex, notwithstanding the application of s 60 of the *Alberta Corporate Tax Act*.

[17] There was simply no basis for either Alberta or Merchant Law Group LLP to require the Bank continue to participate in this action once it successfully applied for interpleader relief. The only issue for determination was who, as between Alberta and Merchant Law Group LLP, was entitled to certain funds that had been paid into court. That issue could have been dealt with directly between Alberta and Merchant Law Group LLP without any further involvement of the Bank. That would have dealt with the real issues in dispute and would have been the quickest means of resolving the claim at the least expense.

[18] As the successful party on appeal, the Bank is presumptively entitled to its costs: Alberta *Rules of Court*, r 10.29. I see no reason to depart from the general rule that the Bank is entitled to its costs for the appeal. Given that both Alberta and Merchant Law Group LLP were aligned against the Bank, the Bank's costs for the appeal ought to be payable by Alberta and Merchant Law Group LLP in equal proportions, jointly and severally.

[19] With respect to the subsequent application, the Bank was fully successful on the question of interpleader. That was the only question the Bank had an interest in at the application. It was also the question that would have been avoided had Merchant Law Group LLP and Alberta accepted the Bank's offer of resolution. I therefore find it fair and reasonable for both Alberta and Merchant Law Group LLP to be equally responsible, jointly and severally, for the Bank's costs relating to the application, notwithstanding that Merchant Law Group LLP was ultimately successful on the other issues as between Merchant Law Group LLP and Alberta.

[20] The Bank asserts it is entitled to an enhanced costs award because of offers of settlement made prior to the appeal and then again prior to the subsequent application. Prior to the appeal, the Bank made a formal offer to Merchant Law Group LLP offering to waive its costs in exchange for a discontinuance of the appeal. Merchant Law Group LLP declined the offer and was unsuccessful at the appeal. In November 2022, prior to the subsequent application, the Bank served a Calderbank offer on both Alberta and Merchant Law Group LLP. The Bank offered not to seek costs for both the appeal (which it had already successfully defended) and the subsequent application, if Alberta and Merchant Law Group LLP abandoned their opposition to the interpleader relief. Both Alberta and Merchant Law LLP rejected that offer.

[21] Merchant Law Group LLP argues that it could not accept the offer, putting it this way in its written reply submissions: "It was impossible for the parties to sit on their own appeal and abandon interpleader." That is not the case at all. The Bank had successfully obtained an interpleader order. Merchant Law Group LLP chose to appeal that order. Alberta aligned itself with Merchant Law Group LLP on that appeal. Alberta and Merchant Law Group could have

carried on the action without the Bank. The Bank was simply not a necessary party to these proceedings after it obtained the initial interpleader order.

[22] On two occasions the Bank made offers that would have simplified the proceedings and allowed for a more efficient and cost-effective means of resolving the true issue in dispute, that is, the entitlement to the funds subject to the RTP. As I have determined that the Bank is entitled to costs and as it has achieved a result that is more favourable to it than the offers made, I am satisfied the Bank is entitled to an enhanced cost award.

[23] The Bank has prepared a draft bill of costs based on Schedule C of the *Rules of Court* and it has provided its solicitor client bills for the relevant period, December 2018 through the end of May 2023.

[24] Having reviewed the accounts provided by the Bank and considered the complexity and importance of the issues, the quality of the materials provided by counsel for the Bank and the fact that the Bank was wholly successful, I find the fees incurred by the Bank are reasonable and proper.

[25] Based on the Field LLP Billing History by Client covering the period from December 18, 2018, through August 15, 2023, fees incurred for the period of time after the initial chambers application through to the conclusion of the appeal total \$14,397.40. The column 2 Schedule C costs for the appeal total \$6,378.75. The Bank argues that a 1.25 multiplier ought to be applied to the Schedule C costs to account for inflationary factors since the Schedule was enacted. I agree this is an appropriate factor to apply to the Schedule C figures so that they more accurately reflect a fair and reasonable costs award in 2023: see *Grimes v Governors of the University of Lethbridge*, 2023 ABKB 432 at paras 88-89; *Hearn v Kirk Montoute Dawson LLP*, 2023 ABKB 449 at para. 7. Applying a 1.25 inflationary factor results in Schedule C costs for the appeal of \$7,973.44. That amounts to approximately 55% of the actual fees incurred. That is slightly higher than the range of 40-50% that the Court of Appeal indicated was an appropriate bench mark in most cases, but it is very close to that range and provides a useful guide for the remaining analysis.

[26] Based on the Field LLP Billing History by Client, fees incurred by the Bank for the period after the appeal to May 31, 2023, total \$22,093.89. This period accounts for the fees incurred for the application. The column 2 Schedule C costs for the application are \$3,895.50. Applying a 1.25 multiplier to account for inflationary factors, the Schedule C costs for the application amount to \$4,869.38. That amounts to only 22% of the actual fees incurred. An award of schedule C costs would amount to an under indemnification for the application. Given that the fees incurred by the Bank are reasonable and proper, I am of the view that it would be fair and reasonable to provide a similar level of indemnification for the application as the Schedule C costs provided for the appeal. At 55% that amounts to approximately \$12,150.

[27] Before concluding what amounts to a fair and reasonable costs award for the Bank, I must consider whether the offers made by the Bank ought to result in an enhanced costs award. On two occasions the Bank made offers that would have allowed it to withdraw from the action without prejudicing the positions of either Alberta or Merchant Law Group LLP. These offers were rejected. Considering the offers of settlement and that had the offers been accepted, the Bank would have been out of the action and the issues would have been narrower and more properly focussed on the merits of the competing claims to the money, I am of the view that enhanced costs are warranted. Double costs would likely result in an over indemnification of the

Bank, so I decline to award double costs. However, I am going to order lump sum enhanced costs based on a 75% indemnification of the actual fees incurred.

[28] Accordingly, the Bank shall have its costs for the appeal in the amount of \$10,800 and it shall have its costs of the application in the amount of \$16,500. These amounts are exclusive of any applicable taxes and disbursements. The Bank shall have its disbursements in the amount of \$787.97.

[29] Alberta and Merchant Law Group LLP are each responsible for one half of the Bank's costs, with that responsibility being joint and several.

Merchant Law Group LLP

[30] Merchant Law Group LLP was unsuccessful on the appeal and is not entitled to costs for the appeal. Merchant Law Group LLP did, however, ultimately prevail on the issue of entitlement to the money paid into court. I see no reason to deviate from the general rule that it, as the successful party on the application, is entitled to costs for the application.

[31] As set out above, costs must be assessed based on fees and expenses reasonably incurred. There must be proportionality between the fees incurred and the matters at issue. Merchant Law Group LLP submitted its draft accounts for fees incurred in both the appeal and the application and that account includes fees of nearly \$100,000 plus disbursements and other charges of just over \$3,400.

[32] Merchant Law Group LLP argues it should be entitled to full indemnity costs in the amount of \$111,639.01 against Alberta. Merchant Law Group LLP suggests this would be a lesson to Alberta to be more careful when it issues RTPs.

[33] The fees incurred by Merchant Law Group LLP are not reasonable and proper in the circumstances. They are, in fact, wildly disproportionate to the amount at issue and the complexity of this case. The fees exceeded, by a considerable margin, the amounts at issue in this case. It is also worth noting that Merchant Law Group LLP was providing legal services to itself. There is no independent third-party client here with an interest in keeping the fees to a reasonable amount.

[34] The quality of the materials provided on behalf of Merchant Law Group LLP do not justify the fees incurred. While the materials were of some assistance to the court, there was nothing in them that demonstrated particular insight or high-level legal analysis that might be required in larger and more complex cases where fees of that magnitude may be justified. Merchant Law Group LLP's materials relied too heavily on unwarranted, hyperbolic, and inflammatory language to describe the actions of the Bank and Alberta.

[35] An enhanced costs award for Merchant Law Group LLP is not appropriate in this case. While Merchant Law Group LLP was ultimately successful in its claim to the money attached by Alberta's RTP, there was a genuine lack of clarity as to the ownership of the bank account at the outset. Contrary to the submissions of Merchant Law Group LLP, Alberta's position throughout this matter was not "ridiculous" and "untenable. Alberta brought forth reasonable arguments based on their interpretation of the state of the law. While Alberta was unsuccessful and will now have to pay costs, it did not engage in any sort of misconduct or highhanded and unreasonable behavior that might attract an enhanced costs award. As noted above, the Court of Appeal of Alberta has clearly stated "Success is not a justification for disproportionate litigation."

[36] Given that I have found the fees incurred by Merchant Law Group LLP are unreasonable and disproportionate given the matter at hand, I cannot use those fees as a reference point for establishing a fair and reasonable costs award. Furthermore, as I indicated during my analysis of the Bank's entitlement to costs, simply imposing Schedule C costs for the application, even with an inflationary multiplier, would result in an under indemnification.

[37] I found the Bank's fees of just over \$22,000 for the application to be reasonable and proper. The Bank was primarily interested in the first of the 5 questions remitted to this court by the Court of Appeal whereas Merchant Law Group LLP's interests extended to all the issues. I would therefore expect its reasonable and proper costs for the application to be somewhat higher than those of the Bank. I also note that many of the issues for determination in the application would have been live prior to the appeal hearing and some of the work in preparing for the application would have already been completed for the purposes of the appeal. Taking all these factors into account, I award costs to Merchant Law Group in the amount of \$16,500.00, exclusive of any applicable taxes and disbursements. I arrive at this number based on a finding that reasonable and proper fees for the application for Merchant Law Group LLP would have been approximately \$30,000 and then applying the same 55% level of indemnification discussed in relation to the Bank's costs.

[38] Given that the Bank had made an offer that would have removed itself from the proceedings prior to the application and would have waived its costs for the appeal in which it had been successful, I find that the costs to Merchant Law Group LLP ought to be borne solely by Alberta.

[39] As I am unable to differentiate the disbursements and other charges incurred in relation to the appeal from those incurred in relation to the application, I cannot award an amount for costs and disbursements at this time. Merchant Law Group LLP shall have its reasonable disbursements and other charges related to the application. If Alberta and Merchant Law Group LLP cannot agree on what those reasonable disbursements and other charges are, a Review Officer shall assess them.

Summary and Conclusion

[40] The Bank shall have its costs for the appeal and the application in the amount of \$27,300 plus disbursements of \$787.97. The costs award in favor of the Bank shall be borne equally by Alberta and Merchant Law Group LLP and is payable jointly and severally by them.

[41] Merchant Law Group shall have its costs of the application in the amount of \$16,500.00 plus reasonable disbursements and other charges incurred in relation to the application. If the parties cannot agree on the disbursements and other charges, they shall be determined by a Review Officer. The costs award in favor of Merchant Law Group LLP is payable solely by Alberta.

[42] To aid in the efficient payment of costs, any payment to the Bank by Alberta exceeding 50% of the total costs payable to the Bank may be offset as against any costs owing by Alberta to Merchant Law Group LLP. For example, if Alberta pays 100% of the Bank's cost award of \$27,300, then it may deduct \$13,650.00 of the costs it owes to Merchant Law Group LLP and discharge its obligation to Merchant Law Group LLP upon payment of the outstanding \$2,850.00.

Dated at the City of Edmonton, Alberta this 23rd day of October, 2023.

R.W. Armstrong
J.C.K.B.A.

Appearances:

E.F. Anthony Merchant, K.C.
Merchant Law Group LLP
for the Plaintiff

Lindsey E. Miller
Field LLP
for the Defendant

Lisa Friesenhan
Alberta Justice and Solicitor General
Legal Services Division - Civil Litigation
for the Third Party