

# Court of King's Bench of Alberta

**Citation: Northern Air Charter (P.R.) Inc. v Alberta Health Services and Can-West Corporate Air Charters Ltd., 2024 ABKB 574**

**Date:** 20240930  
**Docket:** 2201 14310  
**Registry:** Calgary

Between:

**Northern Air Charter (P.R.) Inc.**

Applicant

- and -

**Alberta Health Services and  
Can-West Corporate Air Charters Ltd.**

Respondents

---

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

---

## **Background**

[1] In September 2017 Northern Air Charter (P.R.) Inc. (“Northern Air”) filed an originating application seeking judicial review of a decision of Alberta Health Services (“AHS”). The decision in question related to AHS’s 2016 Request for Proposals to provide aviation services for AHS’s air ambulance service.

[2] Northern Air submitted a proposal in response to the Request for Proposals, but it was not successful. The Respondent, Can-West Corporate Air Charters Ltd. (“Can-West”), submitted the successful response. Northern Air alleged that AHS acted unfairly and breached its duty of good

faith when it awarded the contract for aviation services to Can-West. In September 2017, Northern Air commenced an application for judicial review of AHS's decision to award the contract for aviation services to Can-West.

[3] The litigation proceeded slowly and was marked by several interim applications including an application for an interim injunction and an application to strike the originating application and affidavits that were filed in support. Eventually, after approximately 6 years of litigation and on the eve of its deadline to file written submissions, Northern Air unilaterally discontinued its application for judicial review.

[4] The parties now seek a ruling on costs.

### **Governing Principles in Awarding Costs**

[5] Division 2 of Part 10 of the Alberta *Rules of Court* governs recoverable costs of litigation. Rule 10.29 sets out the general rule that a successful party in a proceeding is entitled to a costs award against the unsuccessful party or parties.

[6] The court has considerable discretion in making 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.

[7] 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*. However, 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.

[8] 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), including the result of the action or degree of success of each party, the amount claimed and the amount recovered, the importance of the issues, the complexity of the action, and any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[9] In addition to the factors set out in rule 10.33(1), rule 10.33(2) obliges the Court 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 of Court* or a court order or otherwise engaged in misconduct. Any offers of settlement may also be considered.

[10] Absent misconduct on the part of one or more parties or other unusual circumstances, a fair and reasonable costs award should generally provide a level of indemnification in the range of 40% to 50% of costs reasonably incurred by the successful party: *McAllister* at para 51. An award of solicitor-client costs, which typically results in indemnification of approximately 80% of costs actually incurred, may be awarded in some rare or exceptional cases such as where a party has engaged in some form of litigation misconduct: *Secure 2013 Group Inc. v Tiger Calcium Services*, 2018 ABCA 110 at para 15.

## Position of the Parties

[11] AHS argues that the within litigation was protracted and complex. According to AHS, Northern Air exacerbated the complexity and length of litigation by taking improper steps, disregarding court orders, and failing to prosecute its claim in a timely manner. AHS also argues that the settlement offers it made to Northern Air provided for a more favourable resolution than Northern Air obtained by filing the discontinuance and therefore enhanced costs should be awarded.

[12] AHS provides a summary of costs claiming total fees incurred in the amount of \$952,522. It seeks indemnification for costs equal to 60% of those fees.

[13] AHS claims that Schedule C costs would be inadequate to fairly and reasonably compensate it for the expenses incurred and that if Schedule C costs are awarded, the costs should be awarded on column five with a multiplier of three.

[14] Can-West seeks Schedule C costs on column five for all steps taken in the matter for which costs have not already been awarded. Can-West relies on the complexity of the action, which involved an extensive certified record of proceedings, and the prolonged nature of the litigation, as justification for costs on column five.

[15] Can-West seeks double costs in relation to its preparation of materials for the hearing of the judicial review on its merits as it had made an offer of settlement to Northern Air prior to that step being taken. Northern Air rejected the offer causing Can-West to have to prepare for the hearing before Northern Air filed its discontinuance on the day its own written submissions were due.

[16] Northern Air acknowledges that it must pay costs; however, it argues that Schedule C costs ought to apply. Northern Air's position is that much of the delay in the action resulted from AHS's failure to provide the Certified Record of Proceedings in a timely manner and that what was provided was deficient resulting in Northern Air having to bring an application regarding the adequacy of the record.

## Decision

[17] Considering all the circumstances of this case, I am satisfied that both AHS and Can-West are entitled to their costs. They were wholly successful in the action. Northern Air unilaterally, and without leave of the court, discontinued its action on the day its written submissions were due and shortly before the hearing of its application for judicial review.

[18] Costs shall be awarded to AHS and to Can-West based on column 5 of Schedule C. I am awarding costs based on column 5 of Schedule C for two reasons.

[19] First, AHS has not provided sufficient information for me to assess a costs award based on a percentage of actual fees incurred. The starting point for such an analysis must be the "reasonable and proper" fees incurred. As the Court of Appeal of Alberta said in *Kantor v Kantor*, 2023 ABCA 329 at para 12: "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."

[20] Other than dividing the fees claimed into three periods (September 1, 2017 to September 30, 2019, October 1, 2019 to June 30, 2023 and July 1, 2023 to February 29, 2024), AHS has not

provided any information as to the basis for the fees claimed. It is impossible for this court to determine whether the fees incurred were reasonable and proper in all the circumstances without basic information such as hourly rates applied, the identity of the billing lawyers and the time spent on the various steps taken in the action.

[21] Second, the complexity of the judicial review does not justify costs over and above Schedule C costs. There was an interim injunction application that had some complexity associated with it; however, AHS and Can-West already received enhanced costs awards in respect of that injunction application. They have been properly compensated in costs for that application and the associated complexity.

[22] To the extent there was some complexity in this matter, I have accounted for that by awarding costs on column 5 rather than on column 1. Generally, where a claim seeks relief for something other than a monetary award, costs are assessed on column 1 of Schedule C. Increasing the scale of costs from column 1 to column 5 addresses the complexity and scale of this judicial review. Furthermore, the complexity of the matter may be recognized by awarding costs relating to an appearance before the Court of Appeal for item 8(1) and I agree that is an appropriate costs enhancement to award where claimed by Can-Air and AHS.

[23] Any further enhancement by way of a multiplier is not reasonable and I decline to order a multiplier on the column 5 costs. It is worth noting that Can-West, who was a full participant in the judicial review application, takes the position that costs on column 5 adequately recognizes the complexity of the action and they do not seek a multiplier. While AHS was solely responsible for preparing the Certified Record of Proceedings, Schedule C costs do compensate them for that additional step.

[24] AHS seeks fees for second counsel for all steps taken in the litigation. Again, in the absence of any information as to what functions second counsel performed, it is difficult to assess whether second counsel was necessary, valuable, or simply a luxury: *Camacho v Lacroix*, 2024 ABKB 179 at para 22.

[25] Effective use of second counsel should have the effect of reducing the overall costs incurred by a party rather than increasing them. Often, effective use of second counsel means that more routine tasks, appropriate for a less experienced lawyer, can be completed more economically. Of course, there will be some duplication of effort in having second counsel familiarize themselves with the file; however, the overall effect of the proper use of second counsel should be increased efficiency. I do not accept that proper use of second counsel results in an automatic entitlement to a full second set of costs as claimed by AHS. It is incumbent on AHS to demonstrate the utility of second counsel, and it has not done so in this case.

[26] Having said that, I am prepared to accept, given the volume of records comprising the Certified Record of Proceedings and the number of applications that were heard, that second counsel did bring some value to the proceedings and I therefore award second counsel fees of 50% of the Schedule C costs on column 5.

[27] AHS has prepared a draft bill of costs based on Schedule C. They have claimed item 3(1) for document disclosure twice. I do not allow the second claim for item 3(1). It was AHS's responsibility to prepare the Certified Record of Proceedings. They are not entitled to claim a second set of costs for having to do a second version of the Certified Record of Proceedings after the first one was deemed inadequate.

[28] AHS has also claimed amounts for preparation for trial. Preparation for trial is meant to compensate a party for the expense of, among other things, preparing direct examinations, meeting with, and preparing witnesses, and preparing cross examinations. None of these steps are required in an application for judicial review which is a chambers application argued based on a Certified Record of Proceedings. The parties do not call witnesses. AHS's claim for trial preparation is not allowed.

[29] Given that Northern Air abandoned the application for judicial review prior to the hearing, AHS and Can-West are entitled to 50% of the amounts allowed in item 8(1) which includes preparation for the judicial review application. Again, given the volume of records at issue and the fact that the application was set for four days, I award costs relating to the hearing of the matter on its merits on the basis of an appearance at the Court of Appeal as contemplated by item 8(1) for complex matters. Given the late withdrawal of the application, I also decline to limit the claim for costs for the hearing of the application to ½ day plus one additional ½ day. The claim is allowed for the four days of the hearing, reduced by 50% because the application was abandoned.

[30] The last issue to consider is whether AHS and Can-West are entitled to double costs due to offers of settlement that they made.

[31] On June 10, 2022, AHS sent a formal offer of settlement in accordance with rule 4.24 to counsel for Northern Air. The offer sought a discontinuance of the application for judicial review by Northern Air in exchange for a waiver of costs. Northern Air did not accept the offer. AHS has achieved a result that is more favourable to it than the offer it made. The unilateral withdrawal of the application for judicial review has the same effect as if the application had been dismissed in its entirety. Accordingly, in accordance with rule 4.29(3), AHS is entitled to double costs for all steps taken after June 10, 2022.

[32] Can-West did not make any formal offers to settle pursuant to rule 4.24. However, it did make a series of informal offers, starting on April 5, 2023, to settle for a discontinuance of all proceedings, including Access to Information requests made pursuant to the *Freedom of Information and Protection of Privacy Act*, in exchange for a waiver of costs. While these are not formal offers subject to the application of rule 4.29(3), I must consider the existence of these offers as a factor in setting costs pursuant to rule 10.33(2)(h).

[33] I am satisfied that Can-West made repeated and genuine attempts to resolve this matter on terms more favorable to Northern Air than the ultimate result. Northern Air had ample opportunity to consider the offers and it rejected them, repeatedly refusing to discontinue the action in exchange for a waiver of costs. Given that Northern Air had multiple opportunities to consider the offers made by Can-West and given that the action ended as a result of Northern Air unilaterally discontinuing its application just as its written submissions were due, I award double costs to Can-West for all steps taken after April 5, 2023.

[34] Given the foregoing, AHS's costs based on column 5 of Schedule C are set out below. Items denoted with an \* have been doubled due to the formal offer to settle made by AHS on June 10, 2022.

ITEM NO.	ITEM	AMOUNT
3(1)	Disclosure of Records (preparation of Certified Record of Proceedings)	\$2,025
4	Agreed Statement of Facts (May 10, 2019)	\$2,160
8(1)	Application requiring written brief (Security for Costs Jan. 21, 2020)	\$4,050
8(1)	Application requiring written brief (Northern Air application Nov 3, 2021)	\$4,050
8(1)	Application requiring written brief (2 applications resolved by order of June 13, 2019)	\$8,100
8(2)	Application on the merits (Scheduled for April 23-26, 2024 first half day at \$4,050, plus 7 half days at \$2,160, all reduced by 50%)	\$19,170 *
9(1)	Case Management Conference (December 10, 2019)	\$1,350
13(1)	Writ of Enforcement x 2	\$2,160 *
14(1)	Financial Statement of Debtor	\$1,350 *
14(2)	Examination in Aid of Enforcement	\$1,350 *
16	Garnishee Summons	\$1,080 *
	Total First Counsel	\$46,845
	Second Counsel (50% of first counsel's fees)	\$23,423
	<b>Total Schedule C Costs to AHS</b>	<b>\$70,268</b>

[35] Can-West has not claimed enhanced costs based on a Court of Appeal appearance for complex applications requiring a brief for the interim applications. It has claimed those enhanced costs for the hearing on the merits. Accordingly, Can-West's costs based on column 5 of Schedule C are set out below and items denoted with an \* have been doubled due to the offers of settlement made by Can-West starting on April 5, 2023:

ITEM NO.	ITEM	AMOUNT
	Agreed Statement of Facts (May 10, 2019)	\$2,160

8(1)	Application requiring written brief (Security for Costs Jan. 21, 2020)	\$2,700
8(1)	Application requiring written brief Application resolved by order of June 13, 2019)	\$2,700
8(2)	Application on the merits (Scheduled for April 23-26, 2024 first half day at \$4,050, plus 7 half days at \$2,160, all reduced by 50%)	\$19,170 *
9(1)	Case Management Conference (December 10, 2019)	\$1,350
13(1)	Writ of Enforcement x 2	\$2,160 *
<b>Total Schedule C Costs to Can-West</b>		<b>\$30,240</b>

[36] Neither AHS nor Can-West have claimed any disbursements or other charges. Accordingly, no costs for disbursements or other charges are allowed. Any applicable GST on the fees shall be added to and included in the award of costs.

**Dated** at the City of Calgary, Alberta this 30th day of September 2024.

---

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

**Appearances:**

**Patrick Coones**

Bennett Jones LLP

for Northern Air Charter (P.R.) Inc.

**Aimee E Louie**

Wilson Laycraft

for Can-West Corporate Air Charters Inc.

**Frank Tosto, Matthew Schneider, and Erik Juergens**

Borden Ladner Gervais LLP

for Alberta Health Service