

# Court of Queen's Bench of Alberta

**Citation: Barkwell v McDonald, 2022 ABQB 208**

**Date: 20220316**  
**Docket: 4803 180371**  
**Registry: Edmonton**

Between:

**Jay Allison Barkwell**

Plaintiff/Defendant by Counterclaim

- and -

**John Darrell McDonald**

Defendant/Plaintiff by Counterclaim

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**Judgment on Costs  
of the  
Honourable Mr. Justice R. Paul Belzil**

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[1] The Defendant argues that he was entirely successful in this litigation and should be entitled to enhanced costs and full reimbursement for his disbursements, including expert fees.

[2] It is well established that a court has a broad discretion in awarding costs.

[3] Rule 10.31 dealing with court ordered costs, is broadly drafted and does not define the term "reasonable and proper costs".

[4] Rule 10.33(1) outlines a number of factors which the court may consider in making a costs award.

**a. The Result of the Action and the Degree of Success of Each Party.**

[5] The Defendant was overwhelmingly successful at trial

**b. The Amount Claimed and the Amount Involved.**

[6] The Plaintiff claimed an equalization payment under the *Matrimonial Property Act (MPA)* of \$1,259,000.

**c. The Importance of the Issues**

[7] The litigation engaged a number of significant issues arising from the interpretation of the *MPA*

**d. The Complexity of the Action**

[8] The trial was document intensive. Seventeen three inch binders of documents were filed with the Court, along with a number of other documents.

[9] Rule 10.33(2) outlines a number of factors a court may consider in determining a cost award.

[10] Rule 10.33(2)(g) reads as follows:

**Whether a party has engaged in misconduct.**

[11] During initial Questioning by original counsel for the Defendant in 2018, the Plaintiff, who is a lawyer, stated that she had identified all bank accounts which existed during the marriage.

[12] She later admitted that two other bank accounts existed, in her name only, during the marriage being BMO accounts ending in 381 and 525. She testified at trial that she “forgot” about these two accounts.

[13] In my trial decision, I did not accept that she “forgot “about these accounts and that in this regard was not truthful.

[14] Counsel for the Defendant argues that the litigation engaged issues of importance not only to the parties but to the public, including misconduct by the Plaintiff in her capacity as a lawyer, which should be deterred through an enhanced award of costs.

[15] In *Michel v Graydon*, 2020 SCC 24, at paragraph 33, the following passage appears:

Failure to disclose material information is the cancer of family law litigation...

[16] In *Faulkner v Faulkner*, 1998 ABCA 308, the Appellant was found to have failed to make full and frank disclosure.

[17] At paragraphs 25 -27 the court made the following observations:

The trial judge ordered the appellant husband to pay the full costs of the suit. No one had made any formal offer to settle before trial. It is true that often neither side is awarded costs in such a suit, and that there were arguable points to be made on both sides, and that a number of things were agreed before trial. Had the trial judge ordered each side to bear its own costs, or most of them, that could have been upheld.

However, costs are expressly in the discretion of the trial judge. This trial judge made a number of credibility findings adverse to the appellant and found that he had failed to make a number of information disclosures promptly and frankly. We were shown failure until trial to disclose certain studies of the oil reserves, despite earlier affidavits of documents and other disclosure not listing them. The excuse now is that they were stale and not helpful. That is no reason to tell an untruth under oath, especially when one is a lawyer. Such considerations may not have total weight, but they are relevant to the discretion as to costs.

It takes strong grounds to upset a trial judge's discretion as to costs, and we cannot find here any reason nearly strong enough to interfere.

[18] The significance of the Plaintiff's nondisclosure of these bank accounts can only be fully appreciated in the context of the procedural history of this matrimonial property litigation.

[19] One of the key issues in the matrimonial property litigation was the Defendant's claim for exemptions under the *MPA*.

[20] It was not until late in the litigation that the existence of the two BMO accounts was discovered.

[21] The late discovery of the two BMO accounts impeded the Defendant's ability to advance his claim for exemptions, in that some of the records relating to these accounts no longer exist.

[22] I conclude that the Plaintiff's failure to disclose the existence of BMO accounts 381 and 525 at the time of initial Questioning constitutes serious litigation misconduct.

[23] Rule 10.33(2)(h) reads as follows:

**any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.**

[24] The Defendant made three offers to settle the litigation.

[25] The first without prejudice offer made on December 6, 2018 was open for acceptance until December 14, 2018. This detailed offer was consistent with the outcome at trial.

[26] On May 28, 2021 a Calderbank Offer was made, which was open for acceptance until June 4, 2021.

[27] On June 9, 2021 a formal Offer to Settle was sent to Counsel for the Plaintiff pursuant to Rule 4.24, expiring on June 14, 2021.

[28] This offer did not comply with Rule 4.24, thus, the doubling provision under that rule does not apply. However, the letter does operate as an informal offer in considering the issue of enhanced costs.

[29] In *Mahe v Boulianne*, 2010 ABCA 74 at paragraphs 8-10, it was observed that "without prejudice" offers of settlement can be referred to in dealing with costs.

[30] By any objective measure, the three settlement offers were genuine, comprehensive offers of settlement worthy of serious consideration by the Plaintiff, who rejected all of them.

[31] In *Seidel v Kerr*, 2004 ABCA 157, it was held that second counsel fees may be allowed in considering the value of the case and its complexity. In this case, second counsel was not merely a note taker, rather she was actively involved in the litigation. Second counsel fees are requested for trial only. This is an additional factor supporting a claim for enhanced costs.

[32] Considering all of the foregoing, I conclude that the Defendant is entitled to enhanced costs.

### **Determining the Appropriate Level of Indemnification for Costs Incurred**

[33] Rule 10.31(1)(b) authorizes lump sum awards of costs and Rule 10.31(3)(c) makes it clear that there is no requirement to reference Schedule C.

[34] In *McAllister v Calgary (City)*, 2021 ABCA 25 at paragraphs 31-34 it was observed that an award of 40 – 50 percent of a successful party's incurred fees was desirable.

[35] To date, the Defendant has incurred legal fees of \$388,611.50 plus GST of \$19,430.56 for a total of \$408,042.06.

[36] The Defendant seeks indemnification of 53 percent of the actual legal fees he has incurred together with 100% of disbursements, including expert expenses.

[37] Given that enhanced costs are warranted, I have concluded that the Defendant should be entitled to recover 50% of the actual legal fees incurred to date for a total of \$204,021.03 inclusive of GST.

## **Disbursements**

### **a. Non Expert Disbursements**

[38] The non expert disbursements relating to photocopying, courier and related charges are in the amount of \$27,877.61 inclusive of GST, which are allowed.

### **b. MNP Accounts**

[39] Rule 10.31 provides that an unsuccessful party may have to pay the reasonable costs of Expert Reports. In *Seidel v Kerr* at paragraph 15, it was observed that the key issue is whether the expenditure was reasonable.

[40] At trial, the Defence called Ms. Bailey Rivard of MNP, who was qualified as an expert in the field of asset tracing.

[41] She prepared an original Asset Tracing Report dated April 6, 2021 and a Surrebuttal Asset Tracing Report dated June 24, 2021. Both reports are very detailed and contain a number of appendices.

[42] MNP rendered accounts in the amount of \$160,754.58 inclusive of GST. The Defendant seeks to recover 100% of this amount from the Plaintiff.

[43] Counsel for the Plaintiff argues that it was not necessary to retain a tracing expert and that the Defendant's exemptions could be traced through bank accounts and investment statements, some of which are set out in an Agreed Statement of Facts.

[44] He also argues that the tracing reports were "frills or extras" and submit that each party should pay their own expert costs, but in the alternative submits that the Plaintiff should only be responsible for paying a portion of the MNP accounts.

[45] He also argues that allowing the Defendant to claim the cost of MNP accounts from the Plaintiff would encourage wealthier parties to take advantage of less well off parties.

[46] The issue of which party should be responsible for payment of MNP accounts must be decided in the context of this particular matrimonial property litigation.

[47] By any measure this was complex, document intensive matrimonial property litigation involving large sums of money. Evidence was presented over seven trial days, exclusive of argument.

[48] The retaining of experts is quite common in complex litigation and indeed, the Plaintiff retained an expert herself.

[49] In my trial decision, I found Ms. Rivard's evidence to be credible and reliable. Her conclusions were based on a very thorough analysis of documentation.

[50] There is no evidence that the Defendant deliberately ran up expenses. The MNP accounts are not disproportionate to the amounts in dispute in the litigation.

[51] When he retained MNP, the Defendant agreed to be responsible for their accounts and could not have predicted the outcome of the litigation. Similarly, the Defendant cannot predict the outcome of this costs application.

[52] The issue of which party should pay MNP accounts is also rooted in the issue of why MNP was retained to conduct an asset tracing analysis.

[53] As noted above, on initial Questioning, the plaintiff denied the existence of other bank accounts which existed during the marriage.

[54] She later disclosed the existence of BMO accounts ending 318 and 525, which were in her name only.

[55] On this evidentiary record, had the plaintiff truthfully disclosed the existence of her BMO accounts during initial Questioning in 2018, there is a strong likelihood that an asset tracing analysis would not have been required at all.

[56] In the alternative, had the two BMO accounts been disclosed at the time of initial Questioning and if the Defendant decided to call tracing evidence because of the missing bank records, it may have been possible to reduce the scope of the tracing analysis and the scope of Ms. Rivard's testimony at trial.

[57] The Plaintiff's nondisclosure of these two BMO accounts during initial Questioning in 2018 caused serious prejudice to the Defendant. His claim for exemptions under the *MPA* was hampered because some of the records relating to the undisclosed bank accounts are no longer available, whereas, they likely would have been available if the accounts had been disclosed in 2018.

[58] A party in matrimonial litigation who discovers that the opposing party has failed to disclose material information in a timely manner is faced with a very difficult situation. What if the opposing party has failed to disclose other material information?

[59] A party who has been victimized by material late disclosure, is under no obligation to accept that the offending party has indeed made belated full material disclosure.

[60] I do not accept that a party in matrimonial litigation who discovers that the opposing party has failed to disclose material information should be unduly restricted in responding.

[61] Failing to provide timely full disclosure must attract serious consequences, including the risk that the opposing party will retain expert advice to support their position in the litigation and claim the cost of same from the offending party.

[62] A tracing analysis allows the victimized party to verify to the extent possible that he or she is in a position to fully advance their position in the litigation even in the face of some missing records.

[63] In the result, I conclude that the Defendant acted reasonably and prudently in retaining MNP to conduct a tracing analysis.

**Was it reasonable for the Defendant to obtain a Surrebuttal Report from MNP?**

[64] The Surrebuttal report was prepared in response to a report from Mr. Raj Manek of Odyssey Accounting, which disagreed with a number of the conclusions reached by Ms. Rivard in her original report.

[65] Ms. Rivard testified that in her opinion the Odyssey report contained a number of inaccuracies and needed to be responded to.

[66] Surprisingly, when Mr. Manek testified, he resiled from his own report and stated that he has no expertise in asset tracing. He then went on to state that he no longer disagreed with the conclusions reached by Ms. Rivard.

[67] This reversal of position during trial by Mr. Manek could not have been anticipated by the Defence. In my trial decision, I attributed no weight to Mr. Manek's report or testimony. His testimony was a complete waste of Court time.

[68] I conclude that the Defendant acted reasonably and prudently in obtaining a Surrebuttal report.

**Conclusion on the Defendant's Claim for Full Reimbursement of MNP Accounts**

[69] Given all of the foregoing, I conclude that the Defendant is entitled to recover from the Plaintiff, the full amount of the MNP accounts totaling \$160,754.58 inclusive of GST.

**Costs of the Contested Costs Application**

[70] I award the Defendant \$5000.00 inclusive of GST.

**Summary of Costs Award**

[71] The Defendant is entitled to recover from the Plaintiff the following:

- a. Indemnification for legal fees incurred in the amount of \$204,021.03 inclusive of GST.
- b. MNP accounts in the amount of \$160,754.58 inclusive of GST.
- c. Other disbursements and charges in the amount of \$27,877.61 inclusive of GST.
- d. Costs for the contested Costs Application in the amount of \$5000 inclusive of GST.

[72] Total \$397,653.22.

Heard on the 11<sup>th</sup> day of March, 2022.

**Dated** at the City of Edmonton, Alberta this 16th day of March, 2022.

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**R. Paul Belzil**  
**J.C.Q.B.A.**

**Appearances:**

Ken Proudman  
BARR LLP  
for the Plaintiff/Defendant by Counterclaim

Caroline P Lee, Q.C.  
Kyra Bradley  
DBB LLP  
for the Defendant/Plaintiff by Counterclaim