

# **Managing Discretion: Addressing Costs in Chambers**

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For:

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Weapons in Chambers

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## Managing Discretion: Addressing Costs in Chambers<sup>1</sup>

To properly request or oppose a costs award, counsel should have a clear understanding of the rules and case law regarding costs decisions, as well as supporting authorities. Given that submissions on costs may arise immediately after the decision, it is important for counsel to have an appreciation for issues that may be fundamental in a positive result of their client. This paper will provide an overview of costs awards and addressing costs in chambers.

### Guiding Principles

Costs are the recoverable costs of litigation awarded by a court during or at the end of an action. Costs awards are governed by Division 2 of the Alberta Rules of Court.<sup>2</sup>

There are a few overriding principles that govern all costs decisions:

1. **The losers compensate the winners:** there is a general presumption that the successful party in the proceeding will be awarded costs against the unsuccessful party;
2. **Partial indemnity:** there is a presumption that the successful party will receive partial indemnity for their legal costs under Schedule C of the Rules;
3. **Court discretion:** the Court has discretion when awarding costs.<sup>3</sup>

Courts will consider the presumptions and previous case law, but ultimately have broad discretion in awarding costs. Based on previous case law, costs awards typically fall into one of the following categories:

1. **Partial indemnity:** typically calculated using Schedule C of the Rules;
2. **Lump sum costs;**
3. **Applying different columns or multipliers** to Schedule C of the Rules;
4. **Solicitor-client costs:** indemnity of all legal fees and disbursements reasonably incurred;
5. **Solicitor and own-client costs:** full indemnity of all legal fees and disbursements incurred, whether reasonable or not;
6. **Costs against counsel:** costs to be paid directly by opposing counsel.<sup>4</sup>

In determining whether to deviate from the presumption of partial indemnity, the conduct of the parties is often considered by the courts. Based on the Rules and case law, the courts consider

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<sup>2</sup> Alberta Rules of Court, Alta Reg 124/2010 [Rules]

<sup>3</sup> Rules, s 10.29, 10.31.

<sup>4</sup> *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2018 ABCA 110, at paras 12, 22 [*Secure 2013*].

problematic or outrageous behaviour<sup>5</sup>, the success of the parties in the action,<sup>6</sup> the amount claimed and amount recovered, any conduct that caused delay,<sup>7</sup> any unreasonable behaviour including refusing a reasonable settlement offer (particularly a formal settlement offer),<sup>8</sup> and any other conduct the courts consider to be important. Courts have also considered outside factors, such as the importance of the proceeding in general<sup>9</sup> and inflation since Schedule C was drafted.<sup>10</sup>

It is rarely a good idea to disparage opposing counsel before the Court. However, when it comes to a costs award, it is worthwhile to make the Court aware of any conduct by another party that was unreasonable, stalled the action, or otherwise increased costs to your client. The Courts has expressed concerns regarding access to justice and the efficiency of the justice system.<sup>11</sup> Costs awards are frequently used to reimburse parties who have experienced issues with difficult or unreasonable parties.

### **Costs in an Interim Application**

In an interim application presumptions and the factors considered by the courts will be the same as in a trial. However, there are a few issues parties should consider when asking for costs in a chambers application.

In general, parties have three options for timing when asking for costs at chambers:

1. **Costs payable forthwith:** the successful party in the application will receive costs immediately;
2. **Costs in the cause:** the party who is successful in the entire action will receive costs for the application, regardless of who was successful in the application;
3. **Costs to the successful party in any event of the cause:** the party who is successful in the application will receive costs at the end of the entire action, regardless of who is successful in the action.

Although courts always have discretion when awarding costs, Rule 10.29 creates a presumption that costs are payable forthwith.<sup>12</sup> This presumption is important to keep in mind during a chambers application. It might be advantageous for your client to receive a costs award

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<sup>5</sup> *Secure 2013*, at para 15-17.

<sup>6</sup> Rules, s 10.33; *Orbis Engineering Field Services v Taifa Engineering Ltd*, 2019 ABQB 592, at para 25 [*Orbis*].

<sup>7</sup> Rule, s 10.33.

<sup>8</sup> Rules, s 4.29; *Baim v North County Catering Ltd*, 2017 ABCA 332, at paras 9, 12, 13; *Singh v Noche*, 2018 ABQB 950, at paras 39-53.

<sup>9</sup> Rules, s 10.33.

<sup>10</sup> *R&R Consilium Inc v Talbot*, 2019 AQB 275; *ASC(AB) Facility Inc v Man-Shield (Alta) Construction*, 2018 ABQB 855; *RVB Managements Ltd v Rocky Mountain House (Town)*, 2015 ABCA 304; *Eaton v HMS Financial*, 2010 ABQB 364; *Canniff v Gardner*, 2008 ABQB 685; *Spar Aerospace Ltd v Aerowerks Engineering Inc*, 2007 ABQB 688; *Sutherland v Encana*, 2014 ABQB 601; *Chisholm v Lindsay*, 2013 ABQB 589; *Bowman v Ralph's Arctic Cat Sales & Services Ltd*, 2012 ABQB 205; *Evans v The Sports Corporation*, 2011 ABQB 616; *Weatherall v Seaba*, 2009 ABQB 173.

<sup>11</sup> *Hryniak v Mauldin*, 2014 SCC 7, at para 2.

<sup>12</sup> Rules, s 10.29; *Athabasca Minerals Inc v Syncrude Canada Ltd*, 2018 ABQB 551 at paras 70-75.

immediately, or there could be a strategic reason to wait until the end of the action. When arguing for costs at an interim application, counsel should consider the entire action, and the timing related to costs payable.

The calculation under Schedule C is narrower for chambers applications than for trials. In interim applications, each item under Schedule C includes all preparatory and incidental steps.<sup>13</sup> The items specifically for applications (items 6, 7, and 8), are assumed to include all documents required for that application. Unlike a costs award for a trial, which will consider every step taken prior to the trial, a costs award for a chambers application will only indemnify a party for the application.

Injunction applications have other specific considerations. Schedule C specifies that orders with no monetary amounts, such as injunctions, will be dealt with under Column 1. The Honourable Mr. Justice D.R. Mah of the Alberta Court of Queen's Bench in *Lac Ste Anne (County) v North West Fire Rescue-Onoway Ltd*,<sup>14</sup> applied this section to an injunction application and calculated costs based on Column 1. However, in *Orbis*,<sup>15</sup> a decision subsequent to *Lac Ste Anne*, Justice Mah distinguished his previous case and refused to apply Column 1 to an injunction application. The distinction was based on the overall action, rather than the application. In *Orbis*, although the application was for an injunction, the entire action involved private companies in a commercial dispute seeking money. In *Lac Ste Anne*, a municipal corporation was seeking a permanent injunction involving the public interest. These two cases show that, although costs are awarded for an interim application, the entire action can and will often be a factor in the Court's decision.

## **Conclusion**

The main takeaway is that all costs decisions are discretionary. It can be very effective to compare a case to previous case law and address particular issue potentially effecting costs. However, the Court is given great latitude to award an amount of costs they deem appropriate. Since costs are dealt with after the merits of a decision, there is minimal harm in asking for a specific costs award, even if it deviates from the presumptions. Consider seeking a lump sum in order to avoid additional steps like taxation or dispute over applicable Schedule C items. In addition, seeking costs payable in the cause may be an effective way of undermining an opposing party's successful application or response, since the end result of the cause may be a long time into the future.

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<sup>13</sup> *Matthews v Matthews*, 2017 ABQB 260 at para 6; *Orbis*, *supra* note 5, at paras 27-31.

<sup>14</sup> *Lac Ste Anne (County) v North West Fire Rescue-Onoway Ltd*, 2018 ABQB 289, at paras 11, 12.

<sup>15</sup> *Orbis*, *supra* note 5 at paras 17, 18.

## Appendix A

### Sample Costs Provisions

1. "The parties will bear their own costs"
2. "The Plaintiff is granted costs in the amount of \$ \_\_\_\_\_."
3. "Costs are awarded to the Plaintiff in the amount of \$500.00 in accordance with Schedule C of the Alberta Rules of Court."
4. "Costs in the amount of \$200.00 are awarded to the Plaintiff in any event of the cause."
5. "The Plaintiff is awarded costs of this action on a solicitor and own client basis. The costs shall be assessed without notice where:
  - a. The Defendant has not appeared at the application where this order was granted, or
  - b. The Defendant has been provided with the proposed Bill of Costs and has not provided the Plaintiff's counsel, within 15 days of mailing or emailing, with notice that the Defendant objects to the Bill of Costs.Otherwise, the costs shall be assessed on notice pursuant to Rule 10.37"
6. "The Plaintiff shall pay costs of this application to the Defendant in the amount of \$500.00."
7. "The Defendants shall pay the costs of the within proceedings on a solicitor and own client, full indemnity basis."
8. "Costs in the action in the amount of \$ \_\_\_\_\_ are awarded to the Defendant and shall be payable forthwith."
9. "There shall be no costs of this order."
10. "The costs of this application shall be in the cause."