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Update on Costs: In Law and Practice

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Overview

1. Overview of Costs Awards
2. Case Review: *Orbis Engineering Field Services v Taifa Engineering Ltd*
3. Formal Orders: Impact on Costs
4. Costs on Appeal

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Overview of Costs Awards



Guiding Principles

1. Losers compensate the winners
2. Presumption of partial indemnity under Schedule C of the Alberta Rules of Court
3. **The Court has complete discretion**



Types of Costs Awards

1. Partial Indemnity under Schedule C
2. Lump Sum
3. Different Column or Multipliers
4. Solicitor-Client Costs: Substantial Indemnity
5. Solicitor and Own-Client Costs: Full Indemnity
6. Costs Against Counsel

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Case Review:

Orbis Engineering Field Services v Taifa Engineering Ltd



Facts

- Applicant brought an Interim Interim Injunction Application against the Respondents
- Applicant gave short notice for the application and refused to adjourn
- Justice Neilson was to hear the case, but adjourned due to a conflict
- Justice Mah dismissed the application in its entirety and found no reason for urgency



Legal Arguments

- Justice Mah wrote a Ruling on Costs addressing:
 - Solicitor-client costs
 - Partial indemnity
 - Inflation
 - Column 1 for injunctions
 - Objections to costs
 - Columns and multipliers
 - Block tariff approach
 - Costs of appearance before Justice Neilson
 - Deferring costs



Solicitor-Client Costs

- Solicitor-client costs generally awarded only when there has been reprehensible, scandalous or outrageous conduct by a party
- They are only awarded in rare and exceptional circumstances
- Justice Mah found misapprehended urgency did not meet this threshold



Partial Indemnity

- Successful party asked for 75% of their actual legal bill
- *Athabasca Minerals Inc v Syncrude Canada Ltd*:
 - Awarded 45% of the actual legal costs
 - Easier to calculate partial indemnity using a percentage of actual costs than applying a multiplier to Schedule C
 - Adjustments are warranted if conduct was egregious
 - Unnecessary to adjust for complexity, compressed time frame, number of deponents, volume of material, or inflation



Partial Indemnity

- Justice Mah distinguished *Orbis* and *Athabasca*
- *Athabasca* involved more complexity and intensity
- *Orbis* is important to the parties, but does not involve the same complexity, compressed time frame, and volume of materials as *Athabasca*
- Does not warrant partial indemnity of actual costs



Inflation

- Justice Mah refused to consider inflation, holding:
 - It is not practical to consider inflation in every case and at every proceeding
 - Schedule C creates consistency
 - The quantum of the tariff is a matter for lawmakers



Inflation: Previous Decisions

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



Column 1 for Injunctions

- *Lac Ste Anne (County) v North West Fire Rescue-Onoway*:
 - Schedule C indicates matters with no monetary value, such as injunctions, are dealt with under Column 1
- Justice Mah refused to apply Column 1 in *Orbis*
 - Distinguished from *Lac Ste Anne* because *Orbis* involves private companies in a commercial dispute where money judgment is the ultimate relief sought



Objections to Costs

- One Respondent brought a summary dismissal cross-application which added a half-day to the application
- Justice Mah refused to award this Respondent costs for the additional half-day
 - This application could have been brought separately



Objections to Costs

- Applicant made a number of arguments regarding the conduct of the Respondents which gave rise to the claim
- Justice Mah dismissed these arguments because they were re-arguing the injunction or were issues to be determined at trial



Columns and Multiplier

- Justice Mah awarded a multiplier of 1.5 on Column 5
- Justice Mah considered:
 - The success of the Respondents
 - The importance of the issue to the Respondents
 - The circumstances in which the application was brought and the trouble to which the respondents were put to address the application
 - Failure to give notice, no evidence of urgency, and refusal to adjourn



Block Tariff Approach

- Alberta Rules of Court, Schedule C
 - Item 1(1): Commencement documents, affidavits, pleadings, and related documents, and amendments.



Block Tariff Approach

- *Matthews v Matthews*:
 - “The block tariff approach continues...an award under item 1(1) includes all steps required for commencement documents and pleadings-related documents”
- Unless specifically mentioned elsewhere, all preparatory and incidental steps are included in an item



Block Tariff Approach

- *HOOPP Realty Inc v Guarantee Company of North America*:
 - The reference to “affidavits” in Item 1(1) refers to commencement-type documents, and does not include an affidavit filed for a summary trial
- Affidavit for an interlocutory injunction application is not a commencement-type document
- Justice Mah held Item 1(1) did not apply



Costs for Previous Appearance

- The application was initially before Justice Neilson, until he adjourned the application due to a conflict
- Justice Mah held that costs of that attendance should be addressed in the current costs application
 - Even though adjournment was imposed by the Court, additional lawyer time and preparation must be addressed



Deferring Costs

- Rule 10.29(1): successful party is entitled to costs forthwith
- Burden is on the losing party to justify why the court should exercise discretion to allow costs in the cause
- Factors to consider:
 - Resources devoted to bringing or defending the application
 - Disparity in financial resources available to the parties
 - Costs are a necessary consequence of a decision to initiate legal proceedings
- Justice Mah held costs of this application are payable forthwith

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Formal Orders: Impact on Costs



Rules of Court

- Rule 4.29:
 - If plaintiff's formal offer is not accepted, and the final judgment is equal to or more favourable to the plaintiff than the offer, the plaintiff is entitled to double costs for all steps after service of the offer
 - If defendant's formal offer is not accepted, and the final judgment is equal to or more favourable to the defendant than the offer, the defendant is entitled to costs for all steps after service of the offer



Genuine Offer

- Formal offer must be genuine, meaning it is:
 - Reasonable and realistic
 - Includes an element of compromise
 - Realistically reflects the merit of the parties' position
 - Made with a reasonable expectation that it will be accepted and is not merely a strategy or tactic
 - Examined in the context of all surrounding circumstances at the time the offer was served and remained open

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Costs on Appeal



Appeal on the Merits

- After a successful appeal, the costs of the initial trial can be overturned or varied
- The Alberta Court of Appeal has jurisdiction to determine the costs at trial as a result of an appeal
- The Court can return the issue to the trial judge, or vary the trial costs themselves
- Appeal courts have complete discretion to determine whether to overturn or vary the costs awarded at trial



Appeal on the Merits

- Factors all courts consider when awarding costs:
 - Difficulty of the case;
 - Length of time involved;
 - Behaviour of the parties;
 - Importance of the issues;
 - Factors affecting the fairness of an award of cost.



Appeal on the Merits

- Factors appeal courts consider when varying costs awarded at trial:
 - Extent the appellant succeeded on appeal;
 - Time spent at trial and appeal on successful issues;
 - Trial costs compared to amount recovered;
 - Whether trial costs were sought in written and oral argument;
 - Whether success was on procedural or substantive issues;
 - Offers of compromise.



Appeal on Costs

- The Alberta Court of Appeal recently confirmed that costs awards are discretionary and “should only be set aside on appeal if the judge below has made an error in principle if the award is plainly wrong”
- An appeal from an assessment officer must go to the Alberta Court of Queen’s Bench, not directly to the Alberta Court of Appeal

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Questions?