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The Chilling Effect of Costs on Appeals from Residential Tenancy Dispute Resolution Service Orders

By: Jonnette Watson Hamilton

Case Commented On: *Chisholm v Boardwalk General Partnership*, 2021 ABQB 991 (CanLII)

This brief decision by Justice John T Henderson concerns the costs of appealing a decision of the Residential Tenancy Dispute Resolution Service (RTDRS) to the Court of Queen's Bench of Alberta. Following an April 2021 hearing, the RTDRS' Tenancy Dispute Officer ordered the tenant, Ms. Chisholm, to pay her landlord, Boardwalk, the sum of $2,606.78 for arrears in rent, utilities, and parking, plus $75 in costs. The tenant appealed, but Justice Henderson dismissed her appeal in November 2021. Boardwalk then asked Justice Henderson to award them $4,556.25 in costs for that appeal. Not only did they want costs of $4,556.25 for winning an appeal from a judgment for $2,606.78, they had threatened to ask for costs of $7,087.50 (at para 5g). And they wanted these costs from a tenant whose source of income was Alberta's Assured Income for the Severally Handicapped (AISH), i.e., a tenant who by definition has a permanent and untreatable medical condition that substantially limits their ability to earn a living (AISH Overview – Eligibility). For people living in privately-owned housing like this tenant, the maximum AISH monthly allowance has been $1,685 for the past two years (AISH Policy Manual). Her rent at Boardwalk was $1,079 per month (para 5b), leaving $606 per month for food, clothing, transportation, and all other needs.

Neither the RTDRS April 2021 decision nor Justice Henderson's November 2021 decision on the appeal are publicly available. That means that details about the arrears, the tenant's claim for an abatement of rent, and the reasons the tenant lost before the RTDRS and on appeal are missing. We are told that the issues in the case were of "no particular importance" and of "no complexity" (paras 5c and 5d). It seems that this case was – from the perspective of the corporate landlord, the Tenancy Dispute Officer and the judge hearing the appeal – an ordinary collection of unpaid rent type of case.

However, as Justice Henderson said, the amount of costs sought by Boardwalk made this case quite remarkable:

> What is striking about this appeal is that the amount of costs being sought are almost twice as great as the amount at stake in the litigation. The costs sought in the *Calderbank* offer were almost three times the value of the amount in issue. (at para 6)

The idea of "*Calderbank* offers" comes from an English Court of Appeal decision: *Calderbank v Calderbank*, [1975] 3 All ER 333, [1975] ADRLR 06/05. These types of offers are usually

identifiable by a disclaimer stating that their offers to settle are made "without prejudice, save as to costs." In other words, a *Calderbank* "without prejudice" offer to settle expressly reserves the ability to reference that offer in a subsequent costs hearing and usually results in a doubling of costs when the offer is not accepted: see e.g. *Holizki v Alberta (Public Trustee)*, 2009 ABQB 260 (CanLII) at paras 39, 45.

In this case, Justice Henderson dramatically reduced the amount of costs claimed by Boardwalk from the claimed amount of $4,556.25 to what he found to be the "appropriate amount" of $150 (at para 9). But he nevertheless doubled the costs award to $300 simply because Boardwalk had made the *Calderbank* offers. The doubling of what was found to be the "appropriate costs" was not automatic or legally required; doubling costs due to a *Calderbank* offer is discretionary and Justice Henderson did not explain why he chose to exercise his discretion in favour of doubling.

The Costs Decision

Justice Henderson began by noting that a party who is successful in a court action is presumed to be entitled to costs from the unsuccessful party (at para 3). Costs in the Court of Queen's Bench are governed by Part 10, Division 2: Recoverable Costs of Litigation in the *Alberta Rules of Court*, Alta Reg 124/2010, which makes the presumption subject to the general discretion of the court under Rule 10.31. A court often uses Schedule C of the Rules of Court – the Tariff of Recoverable Fees – as a guideline in deciding on the amount to award, but courts have a wide discretion in deciding how much to award. They may award, for example, Schedule C costs, a multiple or portion of any column in Schedule C, a lump sum, or a percentage of full indemnity costs (at para 3, quoting *McAllister v Calgary (City)*, 2021 ABCA 25 (CanLII)).

In seeking $4,556.25 for costs of the appeal, Boardwalk was seeking an amount equal to 75% of double Column 1 of Schedule C. They sought 75% because Rule 10.42(2)(a) specifies that, when the amount sued for is within the jurisdiction of the Provincial Court, "the costs … must be assessed, if at all, at not more than 75% of the amount specified in Column 1 …." They sought double costs because they made two *Calderbank* offers to settle before the appeal was heard and the judgment in their favour was greater than the amount in those *Calderbank* offers (at para 2).

Justice Henderson went on to state that when a *Calderbank* offer has been made and the amount of the judgment is greater than the amount of the offer that the successful party was willing to settle for, costs will usually be doubled unless there are "special circumstances" (at para 4). To determine the amount of costs that should be awarded, Justice Henderson considered the factors set out in Rule 10.33(1). In applying these considerations, he observed that Boardwalk was "entirely successful" on the appeal, the $2,606.78 Boardwalk claimed was "very small", the issues had "no particular importance" and "no complexity", apportionment of liability was not a factor, and neither party acted to shorten the proceedings (at para 5a-f). Under Rule 10.33(1)(g), Justice Henderson also noted that the tenant was on AISH and "a person of very limited means", that she was a self-represented litigant, that the appeal was from "an administrative tribunal that was established using procedures to permit self-represented litigants to have access to justice in a speedy and economical way", that the RTDRS awarded costs of $75, and that the September 24, 2021 *Calderbank* offer expressly told the tenant that if she did not accept their offer to reduce

Boardwalk's claim for rent and utilities in arrears to $2,000 Boardwalk would ask for $7,087.50 in costs (at para 5g).

While noting that formal offers of settlement are important when they are "genuine attempts at resolution", Justice Henderson acknowledged that Boardwalk's offer to settle was genuine from their perspective because they were prepared to take almost $350 less than was owed and to accept monthly payments of $130 (at para 7).

However, Justice Henderson concluded the amount of costs sought by Boardwalk was "simply not appropriate" because only $2,606.78 was at stake, the legal issues were simple, and the party from whom costs were sought was disabled and "close to impecunious" (at para 8). Not only were costs of $4,556.25 inappropriate from the perspective of this tenant, but costs at that level – almost twice as great as the amount sued for – would have a "chilling effect" on other tenants who want to appeal an RTDRS decision (at para 8).

In the end, because Boardwalk was the successful party and therefore entitled to costs, Justice Henderson concluded that costs of $150 – twice the amount of costs at the RTDRS – would be appropriate. He then doubled that amount and awarded costs of $300 in light of Boardwalk's *Calderbank* offer (at para 9).

Commentary

The Discretionary Nature of Doubling Costs for Calderbank Offers

Justice Henderson noted that the amount of costs claimed by Boardwalk was "striking" (at para 6). What is equally remarkable is that the basic rules about how much winning parties get from losing parties in costs did allow Boardwalk to claim the excessively large amounts that they did claim despite the small amount of their judgment and the ease of their win.

Part 5 of Division 4 in the *Alberta Rules of Court* is about "Settlement Using Court Process." Rule 4.24 sets the parameters for formal offers to settle, including the information that must be in an offer in order for it to be valid, how long an offer must remain open, and how an offer can be withdrawn. Rule 4.29 specifies the cost consequences of these formal offers to settle. It provides that, when a party makes a formal offer to settle that is not accepted and a judge later awards them a judgment or order that is as or more favourable to the maker of the offer, the maker is entitled to double the costs to which they would otherwise have been entitled. But, in addition to these formal offers to settle, Rule 10.33(2)(h) provides that when a court is deciding whether to impose, deny or vary an amount in a costs order, it may consider "any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5."

The fact that Rule 10.33(2)(h) allows courts to consider offers to settle that are not valid formal offers opens the door to informal *Calderbank* offers. The main difference between a formal offer to settle and a *Calderbank* offer to settle is the mandatory versus optional nature of the doubling of costs. The use of a formal offer entitles the maker of the offer to double the amount of costs the maker would otherwise be entitled to. The doubled cost award made pursuant to Rule 4.29 is required except in "special circumstances" or under Rule 4.29(4): *Abt Estate v Ryan*, 2020

ABCA 133 (CanLII) at paras 66-69. On the other hand, the use of a *Calderbank* offer does not entitle the maker to double their usual costs. Doubling is not automatic or presumed: *Bruen v University of Calgary*, 2019 ABCA 275 (CanLII) (at para 7). The decision to double costs is in the discretion of the judge: *Kent v MacDonald*, 2021 ABCA 274 (CanLII) at para 10.

However, Justice Henderson appears to conflate formal offers and Calderbank offers in his judgment. He stated: "[w]here a *Calderbank* offer is made and the amount of the final judgment is in excess of the amount of the offer then the costs will generally be doubled, unless there are 'special circumstances' that the general rule should not apply" (at para 4). That is the rule for the cost consequences of formal offers according to Rule 4.29. It does not acknowledge the discretionary nature of decisions to double costs when *Calderbank* orders are considered, as allowed by Rule 10.33(2)(h).

Justice Henderson did double the costs that he held Boardwalk was entitled to. He concluded that "$150 would be an appropriate award for costs" (at para 9). And then he added: "[s]ince Boardwalk made a successful *Calderbank* offer, the cost award should be doubled to $300." No reasons were given for what costs "should be doubled" other than Boardwalk had made two *Calderbank* offers. The doubling of costs was treated as mandatory. At law, it was not. A reason for exercising his discretion to double the costs should have been given, particularly because the exorbitant amount of $7,087.50 in costs threatened in at least one of the *Calderbank* offers and the still inappropriate amount of $4,556.25 claimed in the court application.

The Chilling Nature of Boardwalk's Costs Claims

Justice Henderson recognized the *in terrorem* nature of the amounts claimed by Boardwalk for costs: the $7,087.50 in one of its *Calderbank* offers to settle (at para 6) and the $4,556.25 in its application to the court (at para 8). When referring to the $4,556.25 in costs, he stated:

> If costs at that level were granted it would have a chilling effect on those persons who seek to appeal from a decision of the RTDRS. This would render appeals out of reach of virtually all tenants who appear before the RTDRS. (at para 8)

Justice Henderson could have added that one of the five purposes of costs rules is "to facilitate access to justice, including access for impecunious litigants" (*Strategic Acquisition Corp v Multus Investment Corporation*, 2017 ABQB 29 (CanLII) at para 17).

The *Calderbank* offer was an offer to settle for $2,000 backed by a threat to ask for the full judgment of $2,606.78 plus costs of $7,087.50 – a total of $9,694.28. The effect of this intimidation on the tenant (described as "close to impecunious" at para 8) is not discussed in the judgment. However, if you have only $606 each month to pay for everything you need after paying only your rent, the $2,000 offer may have seemed as out of reach as the almost $10,000 threat.

Justice Henderson certainly seems correct to suggest that if he upheld Boardwalk RTDRS judgment of $2,606.78 for rent arrears and added almost twice that amount in costs of an unsuccessful appeal – a total of $7,163.03 – other tenants would be intimidated and unlikely to attempt to appeal RTDRS orders. The RTDRS is enough of a "black hole" of decision-making

(making public less than one percent of reasons for their decisions) and appeals from their orders are difficult enough to mount (see "Expensive, Complex Appeals from Residential Tenancy Dispute Resolution Service Orders") that a costs award in the amount sought by Boardwalk in this case would deter almost all tenant appeals.

Was the threat of costs three times the amount of rent in arrears in the *Calderbank* offer and the request for costs that were almost double the amount of rent in arrears meant to dissuade other tenants from appealing?

On the one hand, Boardwalk holds itself out as being about community. Boardwalk claims to strive "to provide Canada's friendliest communities, *where love always lives*" (January 10, 2022, News Release, "Boardwalk REIT Provides an Operational Update and Timing of Release of its 2021 Fourth Quarter and Year-End Financial Results"). On the other hand, Boardwalk is a Real Estate Investment Trust (REIT) whose business is the acquisition, development, and management of residential multifamily communities in Canada and makes almost all of its money from rental revenue from leasing its residential properties (Boardwalk Real Estate Investment Trust). As such, it needs to provide its investors with monthly cash distributions and it needs to increase the value of its trust units held by investors.

REITs in general are prime examples of the financialization of housing. A recent study of five metropolitan areas — Toronto, Vancouver, Montreal, Edmonton and Calgary — from 1981 to 2016 revealed entrenched housing inequality in accessing affordable housing in the past two decades due to a neoliberal shift in housing policy from a welfare to a market orientation and due to housing financialization: The Conversation, "New study reveals intensified housing inequality in Canada from 1981 to 2016" December 23, 2021. See also "A Feminist Perspective on the Financialization of Housing: Housing as a Human Right and Not as a Commodity" on the financialization of housing and its impact on women and gender-diverse Canadians. In the words of the United Nations Human Rights, Office of the High Commissioner, "housing is treated as a commodity—a vehicle for wealth and investment—rather than a social good" and "the impact of the shift from housing as a place to build a home to housing as an investment has been devastating" ("Financialization of housing"). Large corporate ownership of residential properties in REITs play a major role in the intensifying housing inequality that entrenches the poverty and inaccessibility of safe, appropriate and affordable housing for persons with disabilities.

The fact that this attempt to get costs in amounts two to three times the amount of rent in arrears was unsuccessful does not mean that equally inappropriate *Calderbank* offers to settle have not worked before this or that they will not be tried after this. If this is a common practice when tenants try to appeal from successful RTDRS rent collections, Justice Henderson's decision does little to discourage the practice. In fact, by doubling the amount of costs judged to be appropriate simply because a *Calderbank* offer was made, this decision rewards rather than punishes the in terrorem tactic.

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