

## Summary Judgment Applications: Merit vs. Efficiency

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In *ET v. Rocky Mountain Play Therapy Institute Inc.*, 2015 ABQB 61 (click [here](#) to view the decision), the Alberta Court of Queen's Bench recently awarded enhanced costs to the respondent of an abandoned summary judgment application.

ET hired the defendant to provide therapy to his son because the son experienced trauma after being left alone at night by his mother after a period of hospitalization. ET alleged that after providing therapy, the defendant issued a report to Child and Family Services in which they stated that ET had coached his son to lie and speak negatively about his mother. ET sued for defamation. The defendant applied for summary judgment (to dismiss the claim). An application, affidavit, amended application, and supplementary affidavit were filed, compelling ET to file two affidavits in response, and resulted in three rounds of cross-examinations. The defendant later abandoned the summary judgment application. ET sought full indemnity costs plus \$20,000 in penal costs. The issue before the court was whether ET was entitled to costs on an enhanced, indemnity, or penal basis.

Indemnity and penal costs are normally awarded if the application is without merit and conducted in a scandalous manner. While ET argued the application was without merit and doomed to fail from the outset, the court disagreed quoting from another case, "one counsel's, or one judge's no brainer, is another's arguable case." At some point, the defendant realized there were triable issues and abandoned the application for summary judgment.

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The court rejected ET's assertion that higher costs should be awarded for an abandoned application compared to the costs that would have been awarded had the application been dismissed. The court said, "why would you make it more expensive for an applicant to withdraw a weak application than to forge ahead with it and waste the time of the other litigants and the court?" This type of ruling would create an incentive for defendants to persist in weak applications even after realizing that weakness.

However, the court did find a basis for an enhanced costs award of \$4,375 since the application was prosecuted in an inefficient manner. The court exercised its discretion and awarded ET a lump sum of \$5,000 (instead of the \$625 for an abandoned application under the Tariff in the *Alberta Rules of Court*), plus the stipulated amount in the Tariff of \$1,250 for each half-day attended for all cross-examinations, plus disbursements.

The case of *ET* demonstrates that the courts will not award indemnity or penal costs for an abandoned application unless it was conducted in a scandalous manner. However, those who bring summary judgment applications must proceed efficiently or will risk an enhanced costs award should they late abandon the application.