

Federal Court



Cour fédérale

**Date: 20161014**

**Docket: T-1540-15**

**Citation: 2016 FC 1133**

**Ottawa, Ontario, October 14, 2016**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**ITKA DALFEN**

**Plaintiff**

**and**

**BANK OF MONTREAL**

**Defendant**

**ORDER AND REASONS**

[1] On July 25, 2016, this Court granted the Bank of Montreal's motion to strike Itka Dalfen's amended statement of claim pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106 (*Dalfen v Bank of Montreal*, 2016 FC 869). The Court permitted the parties to file written submissions on costs within thirty days. Both parties filed their submissions on August 24, 2016.

[2] The brief procedural history of this proposed class action may be summarized as follows: Ms. Dalfen filed a statement of claim on September 14, 2015 naming the Bank of Montreal and Her Majesty the Queen as defendants. On March 8, 2016, Ms. Dalfen filed an amended statement of claim. On March 16, 2016, the Bank of Montreal moved for an order to strike the amended statement of claim. On March 18, 2016, the Court granted Ms. Dalfen leave to discontinue her claim as against the Crown. On July 25, 2016, the Court granted the Bank of Montreal's motion to strike Ms. Dalfen's amended statement of claim.

[3] The Bank of Montreal was successful in its motion to strike Ms. Dalfen's amended statement of claim and should, in the normal course, be entitled to costs (*Paradis Honey Ltd. v Canada (Attorney General)*, 2014 FC 215 at para 122). Despite the relatively short duration of this proceeding, the Bank of Montreal claims to have incurred costs in the amount of \$108,000.00. The Bank of Montreal seeks to be indemnified for all of these costs on a solicitor-client basis. In the alternative, the Bank of Montreal seeks \$65,000.00 in costs, which it says is comparable to the party-party costs that would be awarded in the Ontario Superior Court of Justice. The Bank of Montreal has not provided a draft Bill of Costs or any supporting evidence to justify its extraordinary request for costs.

[4] Ms. Dalfen argues that no costs should be awarded to the Bank of Montreal, because (a) the proposed class action potentially benefited numerous customers of the Bank, not just Ms. Dalfen; (b) Ms. Dalfen's pecuniary interest pales in comparison to that of the proposed class as a whole; (c) the legal issues were novel; (d) the Bank of Montreal is in a superior position to

absorb costs; and (e) Ms. Dalfen encouraged the efficient determination of the jurisdictional question by written motion without evidence, cross-examination or court appearance.

[5] The awarding of costs, including the quantum, is a matter falling within the Court's discretion (Rule 400(1); *Canada (Attorney General) v Rapiscan Systems Inc*, 2015 FCA 97 at para 10). In determining an award of costs, the Court is guided by the considerations found in Rule 400(3). The considerations that are potentially relevant in this case include the following:

- the result of the proceeding;
- the importance and complexity of the issues;
- any written offer to settle;
- the amount of work;
- whether the public interest in having the proceeding litigated justifies a particular award of costs; and
- any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding.

[6] An award of costs on a solicitor-client basis is made only in rare circumstances, including where a party has displayed reprehensible, scandalous or outrageous conduct (*Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 67). Absent special considerations, costs should generally fall within Tariff B of the Rules (*Wihksne v Canada (Attorney General)*, 2002 FCA 356 at para 11; *Dimplex North America Limited v CFM Corporation*, 2006 FC 1403 at paras 8-12, aff'd 2007 FCA 278).

[7] The Bank of Montreal has failed to demonstrate that any conduct on the part of Ms. Dalfen was reprehensible, scandalous or outrageous. Nor has the Bank of Montreal advanced any special considerations that would warrant a departure from the usual Tariff amounts.

[8] Recent costs awards following a successful motion to strike a statement of claim at a preliminary stage suggest a usual range of \$500.00 to \$2,500.00 (see, for example, *Bouchard v Canada*, 2016 FC 983; *Dickson v Canada*, 2016 FC 836; *Olumide v Canada*, 2016 FC 558). Even in cases where elevated costs have been awarded to reprimand an unsuccessful party for inappropriate conduct, the awards have been comparatively modest. In *Thompson Bey v Kershman*, 2016 FC 1093, Prothonotary Tabib struck the plaintiff's statement of claim on the grounds that it was vexatious, scandalous, frivolous and an abuse of process, and ordered costs in the amount of \$5,000.00. In *Shebib v Canada*, 2016 FC 539, Justice Hughes awarded \$5,000.00 to each group of defendants in a case where he found that the plaintiffs had been careless, and even reckless, in the naming of defendants.

[9] Applying the relevant considerations found in Rule 400(3) to this case, the Bank of Montreal has been wholly successful in its motion to strike Ms. Dalfen's statement of claim. The issues were of moderate complexity. While the case potentially transcended the interests of Ms. Dalfen alone, its merits were doubtful and the public interest component was correspondingly weak. The Bank of Montreal offered to settle the matter only by permitting discontinuance without costs. The amount of work was modest. Ms. Dalfen's estimate of costs on a substantial indemnity basis in the approximate amount of \$5,000.00 is considerably more

reasonable than the Bank of Montreal's estimate of more than \$100,000.00. The conduct of the parties is a neutral factor.

[10] Having regard to the foregoing, and considering prior decisions of this Court in comparable cases, costs are awarded to the Bank of Montreal in the lump sum amount of \$2,000.00.

**ORDER**

**THIS COURT ORDERS** that costs are payable to the Bank of Montreal in the lump sum amount of \$2,000.00.

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1540-15

**STYLE OF CAUSE:** ITKA DALFEN V BANK OF MONTREAL

**ORDER AND REASONS:** FOTHERGILL J.

**DATED:** OCTOBER 14, 2016

**BY WRITTEN SUBMISSIONS:**

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