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Docket: CI 18-01-15842  
and CI 21-01-30158  
(Winnipeg Centre)

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**COURT OF KING'S BENCH OF MANITOBA**

CI 18-01-15842 )  
)  
**B E T W E E N :** )  
)  
BRENT WILLIAM SCHELLENBERG, ) Paul R. Kathler  
) for the plaintiff/  
) plaintiff ) defendant by counterclaim  
) (defendant by counterclaim), )  
)  
- and - )  
)  
ALLAN RONALD GENDZELEVICH, aka RON ) Stephan J. Thliveris  
GENDZELEVICH and BLACK SANDS ) Scott W. Cannon  
FARMS INC., ) Evan F.P. Podaima  
) for the defendants/  
) defendants ) plaintiffs by counterclaim  
) (plaintiff by counterclaim), )  
)  
CI 21-01-30158 )  
)  
**B E T W E E N :** )  
)  
ALLAN RONALD GENDZELEVICH and ) Stephan J. Thliveris  
BLACK SANDS FARMS INC. ) Scott W. Cannon  
) Evan F.P. Podaima  
) plaintiffs, ) for the plaintiffs  
)  
- and - )  
)  
JULIUS SCHELLENBERG, FRANCIE ) Paul R. Kathler  
SCHELLENBERG, JF HAY SALES INC. and ) for the defendants  
BRENT SCHELLENBERG, )  
) Judgment Delivered:  
) defendants. ) April 9, 2026

# **McCARTHY J.**

## **INTRODUCTION**

[1] This decision arises from a contested motion with respect to costs following a nine-day trial in the above-consolidated matters.

[2] The original Statement of Claim (the "2018 claim") was filed by Brent Schellenberg ("Brent") who sought relief against Allan Ronald Gendzelevich ("Ron") and Black Sands Farms Inc. ("BSF"), with respect to a farming partnership they were alleged to have formed. Brent also sought relief for being dismissed as an employee of BSF. The causes of action asserted include oppression remedies pursuant to *The Corporations Act*, CCSM c C225 (the "**Act**"), as well as claims for unjust enrichment and wrongful dismissal.

[3] Ron and BSF (together the "BSF parties") disputed that a partnership agreement had ever been formed between the parties, or that there was any basis for relief under the **Act** or the equitable claim of unjust enrichment. They also alleged that Brent's employment had been terminated for just cause. In addition, the BSF parties brought a counterclaim in conversion, unjust enrichment, and the tort of interference with contractual relations. They also sought punitive, aggravated, and exemplary damages against Brent. The counterclaim alleged that Brent had wrongfully converted or retained BSF assets and revenue and had interfered with BSF leases causing losses to BSF in the total amount of \$435,483. Of that amount, \$347,000 was comprised of damages related to the allegations of lease interference.

[4] After Brent revised his answers to certain examination for discovery questions in the 2018 claim, the BSF parties filed a separate Statement of Claim (the "2021 claim")

against Brent and his parents Julius and Francie Schellenberg and their company JF Hay Sales Inc. (all defendants in this action are together referred to as the "Schellenberg parties"). The allegations contained in the 2021 claim were that the Schellenberg parties had made fraudulent and/or negligent misrepresentations by registering certain mortgages against land owned by Brent, which the BSF parties had relied upon to their detriment. The 2021 claim sought indemnification from the Schellenberg parties if the BSF parties were found liable for any damages or restitution under the 2018 claim.

[5] By virtue of an order of consolidation, both matters were heard together and a decision with respect to all claims was delivered on October 9, 2025. Brent Schellenberg was successful on claims under more than ten separate heads of damage in the 2018 claim. Judgment was granted in Brent's favour in the total amount of \$858,298.68, including interest. The wrongful dismissal portion of the 2018 claim was not pursued at trial.

[6] With respect to the counterclaim under the 2018 claim the BSF parties were unsuccessful on all contested portions of their claim, except with respect to a relatively nominal claim in the amount of \$3,000, which was deducted from the amounts found to be due to Brent. With respect to the counterclaim for \$347,000 in damages for interference with BSF leases, several witnesses were called and that claim was pursued through trial. On cross-examination Ron admitted that there was in fact no evidentiary basis to support that claim. It was my finding that there was absolutely no basis in fact or law to support the lease interference claim.

[7] With respect to the 2021 claim the BSF parties abandoned their claim of fraudulent misrepresentation at the outset of trial. The Schellenberg parties were advised only the day before trial commenced that the claim for fraud was no longer being pursued. With respect to the balance of that claim, I found that there was no evidence to establish that the conduct of any of the Schellenberg parties constituted negligent misrepresentations and that even if there had been such misrepresentations, they were not relied upon to the detriment of the BSF parties. The 2021 claim was dismissed in its entirety.

[8] The parties to both actions, having been unable to agree upon appropriate costs, filed comprehensive briefs and made oral submissions before me on February 3, 2026. Evidence was also filed by the Schellenberg parties setting out their actual legal fees and disbursements incurred with respect to both actions, together with a bill of costs at the applicable tariff rate.

[9] The Schellenberg parties argued that this is an appropriate case for solicitor-client costs having regard to the totality of the circumstances. All parties agreed that the threshold for awarding solicitor-client costs is very high and requires conduct that is either scandalous, outrageous, or reprehensible as set out in *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p 134 (see also *Ultracuts v. Magicuts*, 2024 MBCA 45, at para 15; *Bibeau et al. v. Chartier et al.*, 2022 MBCA 2, at para 102; and *Manitoba Keewatinowi Okimakanak Inc. v. McIvor*, 2007 MBCA 134, at para 8).

[10] In this case the Schellenberg parties rely upon three categories of conduct which they say, in totality, warrant an award of solicitor-client costs. First, they argued that making allegations of fraud, which were so clearly without merit that they were

abandoned at the outset of trial, constitutes litigation conduct which is reprehensible and warrants reproof by the court. Second, they argued that there was additional litigation conduct which was inappropriate and extremely prejudicial. Third, they argued that the conduct of the BSF parties which led to this litigation warrants full indemnification of the costs that the Schellenberg parties were required to incur to obtain their just compensation.

[11] Although the Schellenberg parties argued strenuously that solicitor-client costs should be awarded in this case, in the alternative it was their position that at a minimum, enhanced costs in an amount representing approximately 67% of their actual costs would be appropriate (citing the approach taken in ***WSIB Investments (Infrastructure) Pooled Fund Trust et al. v. Plenary Group (Canada) Ltd et al.***, 2025 MBKB 73 (***WSIB***)).

[12] The BSF parties argued that this is not one of the very rare cases where solicitor-client costs are appropriate. They also argued that enhanced costs are not warranted in the circumstances of this case. It was their position that these claims were first initiated by the Schellenberg parties, and that they were entitled to strenuously defend that claim. They also argued that they did not initially raise allegations of fraud, but that those allegations naturally arose out of evidence given by Brent during an examination for discovery on the 2018 claim. It was their position that they were entitled to add any parties at that point that they believed were reasonably connected to the allegations. They also argued that there was no malice or recklessness with respect to

the claims made and that costs should recognize that the fraudulent misrepresentation claims were not pursued at trial.

[13] With respect to the counterclaim BSF argued that their claims were not entirely without merit, but rather that the outcome was largely based upon credibility findings at trial. Specifically, regarding the lease interference portion of the counterclaim, they argued that the outcome was based upon evidence at trial that they had not anticipated.

[14] It was their position that there was no litigation conduct by the BSF parties which unnecessarily lengthened or complicated the proceedings, and that there was no basis in this case for a punitive cost award. They argued that any prejudice caused by a prior adjournment of the trial was occasioned by third party actions and not by BSF and could not have been anticipated by the BSF parties at the time that the adjournment was requested and is therefore not an appropriate consideration on the issue of costs. They also argued that there were no steps taken in the proceedings for any inappropriate purpose.

[15] Finally, while the Schellenberg parties argued that the existence of a written offer to settle should be taken into account with respect to determining appropriate costs, the BSF parties argued that the offer was not in the form required by the Court of King's Bench Rules to trigger double cost consequences. They further argued that the offer was not sufficiently favorable to justify being penalized for not accepting it.

### **SOLICITOR-CLIENT COSTS**

[16] As stated by the Manitoba Court of Appeal in *Ultracuts*, solicitor-client costs should not be the rule and should only be awarded in rare circumstances. The court also

stated that where circumstances do not rise to the level of attracting solicitor-client costs, they may still lead to an award of elevated costs.

[17] Having considered the arguments in this case there are a number of considerations which, in my view, militate in favour of costs well above the tariff. In fact, the circumstances as a whole very nearly warrant a punitive award of solicitor-client costs.

[18] Having said that, there are also a few considerations which satisfy me that this is not an appropriate case for full indemnity costs. First, unlike many of the cases cited by the Schellenberg parties, this action was not initiated by the BSF parties as a fraud claim. Fraud was not even raised in the 2018 claim. Fraudulent misrepresentation was first raised in the 2021 claim as a result of evidence that arose out of the 2018 proceedings. I am reluctant to award punitive costs against a party who was taking what steps they felt had a basis in evidence and were necessary to properly defend a claim. They were also entitled to add parties to the 2021 claim, which does not seem to have been entirely disingenuous or born of malice, even though it was ultimately unsuccessful. There should also be some recognition for the fact that the fraud claim was discontinued (albeit just prior to the commencement of trial).

[19] With respect to the claim that litigation conduct, and in particular the request for an adjournment which worked to the significant prejudice of the plaintiffs, warrants solicitor-client costs, it is my view there was no evidence of any conduct by the BSF parties during that delay (such as selling off or hiding assets) that caused the prejudice. I am not satisfied that the adjournment was sought for an improper purpose even if it

did not result in an expert report which was relied upon for trial purposes. Also, throw away costs were awarded when that adjournment was granted.

[20] Finally, with respect to pre-litigation conduct I did make some very serious adverse findings with respect to Ron's conduct, which necessitated this litigation. However, the Schellenberg parties also chose not to plead punitive or exemplary damages which are more appropriately awarded to address those kinds of findings. For reasons which follow I find that pre-litigation conduct should be reflected in an appropriate cost award in this case, but not to the extent of full indemnity costs.

[21] It is my view that this is not one of the rare circumstances that warrant full indemnity costs. However, I am satisfied that enhanced costs are appropriate for the reasons outlined below.

### **ENHANCED COSTS**

[22] First, while I am cognizant of the fact that costs should not act as a barrier to litigation and unduly interfere with access to justice, there is also an obligation on parties to assess the merits of their claims as early in the process as possible, and on an ongoing basis, and to not pursue meritless claims. This is particularly the case where the claim involves allegations of fraud or comparable claims. Such allegations, even if not pursued through trial, often have negative employment, business, and personal impacts on parties accused of such conduct. There is, therefore, an increased onus upon litigants and their counsel to make and pursue claims of fraud only where they are believed to have merit, and to discontinue such claims as early as possible where the disclosure and evidence

suggests that there is no likelihood of success. The fraud claim surely could have been withdrawn at a much earlier stage in this litigation.

[23] In this case, the BSF parties also maintained a very significant claim for interference with contractual rights through trial, despite the fact that I found that there was no evidence to support that claim.

[24] The BSF parties also opposed aspects of virtually every claim made by Brent. Even when they acknowledged that Brent was entitled to compensation for such things as use of his land or equipment, they still refused to pay him and unsuccessfully disputed aspects of every head of damage. Brent was left with no option but to pursue litigation right through trial to recoup amounts that were acknowledged to be due to him.

[25] Other litigation conduct, such as initiating the 2021 claim without notice to the Schellenberg parties (despite the fact that they were known to be preparing for a judicial mediation at the time), and failing to comply with deadlines related to the provision of expert reports after pursuing an adjournment of trial for that purpose, was also conduct which is relevant to the issue of the appropriate level of costs. Those failures caused the Schellenberg parties to incur additional and unnecessary legal costs.

[26] With respect to the offer to settle, notwithstanding that it is not in the form provided in the Court of King's Bench Rules, it was made in writing, and in my view was sufficiently clear and specific to invoke Rule 49.10(1). There is no requirement that the offer be in a specified form in order to invoke the double cost provisions, provided that the offer is clear (see *Gaudry v. Dreger*, 1994 CanLII 16856 (MB QB), [1994] MJ No 197 (QL)). While a party is not required to accept any offer, the Rule is

clear that where a defendant declines to do so, and the result is less favourable than the offer made, the plaintiff is entitled to double party-and-party costs from the date of the offer forward. The intent behind the double cost rule is to encourage settlement, and the court should dispense with double cost consequences only in exceptional circumstances (*Feniuk v. Chivers and 59597 Manitoba Ltd.*, 1991 CanLII 12018 (MB QB), [1991] M.J. No. 576 (QL)).

[27] Further, with respect to the conduct that gave rise to the litigation, I agree that this is generally not a consideration in the assessment of costs. However, costs are discretionary and must be fair and reasonable in all of the circumstances of the case. This is a situation where Ron was found to have acted, on behalf of himself and BSF, in a manner that misled and took advantage of Brent to his significant detriment. This left Brent with no option but to pursue litigation to obtain compensation for the losses he suffered as a result of his treatment by Ron and the refusal by the BSF parties to pay even those amounts clearly due to Brent. This conduct caused the Schellenberg parties to incur significant legal expense. Ron's conduct prior to and during the litigation fits within several of the criteria set out in Rule 57.01(1) and warrants a cost award which covers more than a fraction of the costs the Schellenberg parties were required to incur.

[28] Finally, I find that the cost award should appropriately include costs of the motion made by the BSF parties to consolidate the actions. Contrary to the position taken by the BSF parties, the costs of the motion do not go to the successful party on the motion, but rather to the successful party in the action as a whole given the motion judge's ruling that costs would be payable "in the cause".

[29] Straight tariff costs in this case represent approximately 30% of the legal expenses actually incurred by the Schellenberg parties, with double costs from the date of the offer that would rise. The aim is to set an amount that is fair and reasonable (*WSIB* at para. 12) and that bears some recognition of the reality of the actual costs incurred (*The Manufacturers Life Insurance Company (formerly North American Life Assurance Company) v. Pitblado & Hoskin et al.*, 2008 MBQB 11, at para 16).

[30] In the circumstances of this case, I find that costs should be paid in an amount equivalent to 75% of the actual fees incurred, plus disbursements and applicable taxes. This cost award will be reduced as agreed between the parties by the throwaway costs of the trial adjournment already paid by the BSF parties in the amount of \$23,824.47 and \$1,198.87 for the cost of an Agreed Book of Documents, which have already been paid.

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McCarthy J.