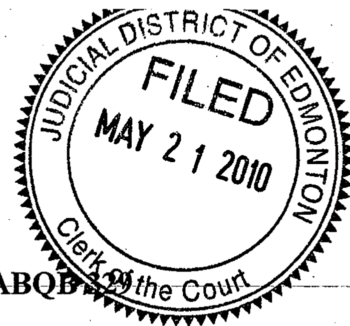


# Court of Queen's Bench of Alberta

**Citation: Maverick Equities Inc. v. Condominium Plan No. 942 2336, 2010 ABQB 329**

**Date:**
**Docket:** 0503 18311, 0503 18193
**Registry:** Edmonton

Between:

Action No. 0503 18311

**Maverick Equities Inc.**

Applicant

- and -

**The Owners: Condominium Plan No. 942 2336**

Respondent

And Between:

Action No. 0503 18193

**The Owners: Condominium Plan No. 942 2336**

Applicant

- and -

**Maverick Equities Inc.**

Respondent

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**Memorandum of Decision (re Costs)**
**of the**
**Honourable Madam Justice J.B. Veit**

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**Summary**

[1] Invoking the condominium by-laws which specifically authorize The Owners to charge "costs as between solicitor and client", The Owners: Condominium Plan No. 9422336 ask for solicitor-client costs of the recent special chambers application in which this court held that their refusal to grant a development permit to Maverick Equities Inc., based on Maverick's failure to pay a $5,000.00 fee, was not unreasonable.

[2] The Owners also ask for solicitor-client costs of the original chambers hearing.

[3] Maverick urges that, although the final issue was decided against them, there was divided success on this application. Originally, The Owners maintained that there were three bases on which Maverick's request for development approval could be denied: the failure to submit proper plans, the failure to accept parking restrictions and the failure to pay a $5,000.00 damage deposit. However, at the hearing before this court, The Owners did not press the first two grounds. The Court held that it would have been unreasonable for The Owners to refuse Maverick's proposal on either of those two grounds.

[4] The Owners' request for solicitor and client costs for the substantive hearing is denied: Maverick was successful on two of the three conditions originally in dispute. In light of that divided success, each party will bear their own costs of the substantive hearing before me.

[5] On the issue of costs of the original special chambers hearing, the Court awards costs to The Owners on a solicitor and client basis, as is set out in the Bylaws. When a trial level court is asked by the Court of Appeal to determine the costs of an earlier hearing held before another trial level court, the court making the costs award must "ascertain which party, if either, enjoyed overall trial success after the appeal results are factored in": ***Taylor***. Here, given the Court of Appeal decision, The Owners enjoyed overall success on the first special chambers application. Therefore, The Owners are entitled to costs of the original special chambers hearing. The scale of those costs is determined by the Bylaws.

**Cases and authority cited**

[6] **By the court:** ***Dunn v Vicars*** 2010 BCCA 144, [2010] B.C.J. 474; ***S. Maclise Enterprises Inc. v Union Securities Ltd.*** 2010 ABCA 63, [2010] A.J. No. 207; ***Ambrozic v Burcevski*** 2009 ABCA 194, [2009] A.J. No. 544; ***Taylor v Taylor*** 2010 ABCA 103, [2010] A.J. No. 334; ***Kerr v Baranow*** 2010 BCCA 32, [2010] B.C.J. No. 88;

## 1. Background

[7] In a previous decision, this court held that The Owners had not unreasonably withheld their consent to Maverick's development request. The issue that is currently before the court is the award of costs for the substantive hearing.

[8] Bylaw 6.01 of the condominium's bylaws reads as follows:

> **Part VI - Violation of By-laws**
>
> 6.01Any infraction or violation of or default under these By-laws or any rules and regulations established pursuant to these Bylaws on the part of an Owner, its servants, agents, licensees, invitees or tenants may be corrected, remedied or cured by the Corporation and any costs or expenses expended or incurred by the Corporation in correcting, remedying or curing such infraction, violation or default (including costs as between solicitor and client) shall be charged to such Owner and shall be added to and become part of the

> assessment of such owner for the month next following the date when such costs or expenses are expended or incurred . . . shall bear interest at the rate of twenty-four (24%) percent .

[9] Following their successful appeal of the first special chambers decision, and relying on Bylaw 6.01, our Court of Appeal awarded appeal costs on a solicitor and client scale to The Owners. The parties agree with one another, and I agree with them, that, in the circumstances here the scale described as "solicitor and client" is not intended to provide an indemnity of costs; rather it is only intended to provide payment of all reasonable costs, as determined by a Taxing Officer.

[10] The Court of Appeal also directed that this court should deal with the costs of the original first chambers hearing.

**2. Costs of this special chambers hearing**

[11] The Owners were successful in this special chambers hearing.

[12] If the court were to award costs to The Owners, it would do so on a solicitor and client basis: the condominium by-laws provide for that scale of costs and the by-laws create a relationship that can be analogized to a contractual one. Maverick has therefore accepted that scale of costs.

[13] However, it is also clear that the award of costs is discretionary. Within the scope of its discretion, the court is entitled to consider whether an award of costs is, in the circumstances, fair.

[14] The issue before this court was whether The Owners had unreasonably withheld their consent to Maverick's development request. Originally, The Owners refused consent based on three concerns: the failure to provide proper plans, the failure to accept parking restrictions and the failure to provide a damage deposit. Maverick contested all three of those concerns before the court. However, at the hearing, The Owners did not press the first two bases for the refusal. It was indeed sufficient for The Owners' purposes to have one legitimate ground for refusal of the permit. From that perspective, their application before me was totally successful.

[15] However, Maverick was put to considerable expense by reason of the fact that it believed that all three bases for refusal were still in play; given that situation, they could not ignore the first two bases originally advanced by The Owners. Moreover, they were successful on those two grounds. In those circumstances, I conclude that it would be fair if each of the parties were to bear its own costs of the hearing before me.

**3. Costs of the first special chambers hearing**

[16] When the Court of Appeal allows an appeal, if often fixes the costs of the trial or other proceeding which preceded the appeal. Because it is short, I will reproduce the whole of the ***Dunn*** decision in the British Columbia Court of Appeal which summarizes the usual approach:

> THE COURT:-- In its pleadings the appellant resisted the respondents' counterclaim, in part, alleging waiver and estoppel. At trial, although the appellant emphasized waiver, she also

alleged and to some extent addressed, estoppel. The trial judge rejected waiver and did not deal with estoppel. This Court allowed the appeal on the basis the respondents were estopped. This meant the appellant succeeded in her appeal in this Court and as a result in her claim and response to the counterclaim in the court below.

2 In this Court the appellant sought the costs of the appeal and of the trial. On the appeal, the respondent did not address costs.

3 The appellant now seeks an order of costs in this Court, including the costs of making submissions on the issue of costs and the costs of the trial. The respondents submit that each side should bear its own costs of the appeal and the trial.

4 Having considered the submissions of the parties it is our conclusion that we should not depart from the usual practice of this Court and that costs should follow the event (Court of Appeal Act, R.S.B.C. 1996, s. 23). This applies as well to the trial costs. In Catalyst Paper Corp. v. Companhia de Navegaçao Norsul, **2009 BCCA 16**, Mr. Justice Hall stated in para. 1:

> In my reasons for judgment dated 2 September 2008, I requested submissions from the parties concerning entitlement to costs in this Court and in the Supreme Court of British Columbia. The plaintiff succeeded in its claim for breach of contract at trial but that verdict was reversed in this Court. Costs should normally follow the event (R. 57(9) of the Rules of Court) and be payable to the successful appellant unless there is some principled basis for departure from that normal rule. Section 9(1)(a) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, permits this Court to make any order that could have been made by the trial court.

5 The appellant is entitled to her costs of the appeal and of making submissions in this Court on the issue of costs at Scale 1 and of the trial at Scale B.

[17] In ***S. Maclise Enterprises,*** our own Court of Appeal recently provided additional clarity on the issue of trial costs on appeal and on its own previous decision in ***Ambrozic***:

> 6 Dobler was successful on the appeal and cross-appeal but does not seek costs for that. However, the costs award granted at trial against Dobler is set aside. He is entitled to trial costs to be taxed on Column 3 up to his offer of October 2006, and double costs on Column 3 after his offer of that date. While it is highly desirable for an appellant to claim trial costs in his factum, the decision in West Edmonton Mall Ltd. v. McDonald's Restaurants of Canada Ltd. (1993), 145 A.R. 76, 20 C.P.C. (3d) 182 (C.A.) does not set down a universal rule that the failure to claim trial costs is fatal: MacPhail v. Karasek, 2006 ABCA 354, 69 Alta. L.R. (4th) 16, 401 A.R. 100, 33 R.F.L. (6th) 311 at para. 6. The death of Dobson, even if his estate is insolvent, is not a "special circumstance" that would displace the double costs rule.

[18] Occasionally, as in this case, the Court of Appeal remits the issue of the previous trial level costs to the court that will hear the new process whether it be a motion or a trial. In that situation,

the trial level court will "ascertain which party, if either, enjoyed overall trial success after the appeal results are factored in": ***Taylor***.

[19] An example of the way in which the retrospective award of costs will be made is provided in ***Kerr***:

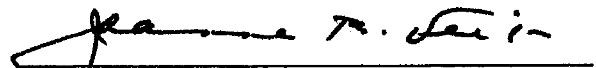
> 9 The appellant also seeks an order for costs in the court below. Given the disposition of the appeal, I am not persuaded the appellant can be said to have achieved the same degree of success on the claims before the trial court. While he has succeeded in having the respondent's trust claims dismissed, the respondent succeeded on her claim for spousal support, which the appellant opposed at trial and which was upheld on appeal.

[20] In the circumstances here, The Owners enjoyed overall success on the first special chambers hearing: the appeal established, among other results, that The Owners were entitled to establish development standards that were higher than the minimal municipal ones. This is coupled with the Court of Appeal's conclusion that there is nothing objectionable in The Owners setting down rules and regulations concerning how it will exercise its discretion on requests for development. In the result, on the main issues decided in the original chambers application, the Court of Appeal upheld the position advanced by The Owners. Therefore, The Owners are entitled to costs of the original special chambers hearing. The scale of those costs is determined by the Bylaws.

## 4. Costs of the costs hearing

[21] Success was divided on the costs hearing; therefore, each party will bear their own costs of the costs hearing.

Heard on the 12th day of May, 2010.
**Dated** at the City of Edmonton, Alberta this 20th day of May, 2010.



**J.B. Veit**
**J.C.Q.B.A.**

**Appearances:**

Roberto Noce, Q.C., Miller Thomson LLP
for Maverick Equities Inc.

Jerritt R. Pawlyk, Bishop & McKenzie LLP
for The Owners: Condominium Plan No. 942 2336