SUPREME COURT OF NOVA SCOTIA

Citation: Northbridge Consulting Services Inc. v. Quigley, 2015 NSSC 49

Date: 20150217
Docket: Hfx. No. 352633
Registry: Halifax

Between:

Northbridge Consulting Services Inc., a corporation

Plaintiff

v.

Jason Quigley, an individual
Steven Grant, an individual
Duncan Murray, an individual
and Southridge Technical Services Ltd., a corporation

Defendants

DECISION ON COSTS

Judge:	The Honourable Justice Kevin Coady
Decision:	February 17, 2015
Written Submissions:	January 26, 2015, by the Plaintiff February 6, 2015, by the Defendants
Counsel:	John T. Shanks and Rick M. Dunlop for the Plaintiff James D. MacNeil and Ian Brown, for the Defendants

By the Court:

[1] Northbridge Consulting Services Inc. (Northbridge) was awarded $315,831 in damages plus 3% interest in an assessment of damages hearing (2014 NSSC 361). This assessment followed a summary judgment application in which the defendants conceded breach of contract and a corporate inducement to breach the contract. Northbridge seeks its costs. It requests a lump sum award of $132,000 plus disbursements. Northbridge has provided evidence that it incurred $191,617.50 in legal fees between August 2, 2011 and December 31, 2014 as well as $5478.53 in disbursements during the same period. I am satisfied these expenditures are related to this file only.

[2] Southridge Technical Services Ltd. (Southridge) and Messrs. Quigley, Grant and Murray take the position they were largely successful. They suggest three scenarios. One, each party should bare its own costs; two, if the plaintiffs are entitled to costs they should be based on Tariff "C"; three, Southridge and the individual defendants should be awarded costs for their success.

[3] I do not accept the defendant's submission that they were largely successful. I recognize the defendants successfully turned back an application for an interlocutory injunction. I recognize that the $315,831 award represents only 24% of the damages sought. I recognize that Northbridge failed in their claims for solicitor-client costs and significant punitive damages. These litigation successes must be viewed in the context of the overall case.

[4] It must be remembered that the individual defendants were hired by Northbridge to expand their business in the Atlantic market. They signed an employment contract that required their full time efforts; a promise to not compete; and a requirement that all Northbridge information remain confidential. In time the defendants realized the SHRED business was quite lucrative and decided to take a piece of the action for themselves. Accomplishing this objective required the individual defendants to pass themselves off as Northbridge employees while siphoning accounts to Southridge. Essentially they betrayed the trust placed in them by Northbridge through their employment contracts.

[5] It must also be remembered that the individual defendants posed a real threat to Northbridge's business in the Atlantic region. Once their actions were discovered, Northbridge came after them with "all guns blazing." The first line of

defence, not surprisingly, was to seek an injunction. It failed on the "irreparable harm" test.

[6] The quantification of Northbridge's losses was a difficult task. At the time of filing the action, their losses were not known. Most of the documents necessary to quantify were in the hands of the defendants. Two applications were required to force the defendants to respond to information requests.

[7] I did not award punitive damages as I concluded that this was not one of those exceptional cases of malicious, oppressive and high-handed misconduct that offended the Court's sense of decency. The defendants should not take much solace in this outcome. I did not award solicitor and client costs as I did not consider the defendant's behaviour to warrant chastisement. Once again the defendants should not take much solace in this outcome.

[8] For the purpose of this costs application. I consider Northbridge to be the successful party.

[9] The subject of costs is governed by *Civil Procedure Rule* 77:

> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.
>
> 77.03 (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
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> 77.08 A judge may award lump sum costs instead of tariff costs.
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> 77.10 (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

Costs are intended to provide a substantial but not a complete indemnity against costs incurred by a successful litigant. Various formulae have been discussed but in general an award that reflects an amount equivalent to 50% but less than 100% has been discussed in the cases. See *Landymore v. Hardy* (1992), 112 N.S.R. 410 and *Williamson v. Williams* (1998), N.S.R. (2d) 78.

[10] The objective is to find a number that does justice between the parties. In order to assess whether the tariffs or a lump sum achieves this result, it is necessary to apply the tariffs first.

[11] The defendant's first position is that Tariff "C" applies and that I should consider the assessment of damages hearing a Chambers application. Tariff "C" provides that an application of one day or more attracts a $2,000 award. Guideline 4 of Tariff "C" provides as follows:

> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3, or 4 times, depending on the following factors:
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> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.

Clearly the case was complex and important to the parties. It took a great amount of effort to bring the defendants to the assessment of damages hearing. I take the position that my decision is determinative of the entire matter. While conceding summary judgment did not encompass all heads of damages plead, I do not see this case having a future.

[12] Multiplying the per diem rate by four (4) allows for costs of $8,000 plus disbursements. This figure does not do justice as between the parties. It would not amount to a substantial contribution to Northbridge's legal costs. A review of the legal accounts satisfy me that this case went on with little interruption from mid-2011 until the end of 2014. Much of that work was the result of the defendant's view that they did nothing wrong.

[13] The defendant's alternate position is that Tariff "A" applies. That view is articulated at paragraph 10 of their brief:

> In the alternative, should your [sic] Lordship determine that Tariff A applies, the Defendants submit that the amount involved is $208,351.82, which would be $22,750.00 under Scale 2 (Basic). Although the Plaintiff was awarded $315,831.62, the Defendants consented to $107,479.80 of that amount, leaving $208,351.82.

I conclude that applying Tariff "A", Scale 2, with the added per diem does not do justice as between the parties. Even if I set the amount involved at $315, 831, the award would in all the circumstances be insufficient.

[14] It is my opinion that this case calls for a lump sum award. Such an award does not require "exceptional circumstances." Lump sum awards are appropriate when party-and-party costs under the tariff are inadequate.

[15] In *Geophysical Services Incorporated v. Sable Mary Services Incorporated and Matthew Kimball*, 2010 NSSC 357, Justice Warner stated at paragraphs 29 and 30:

> 29 I agree that the principles respecting court costs in Nova Scotia, since Justice Saunders' analysis in *Landymore* v. *Hardy*, [112 N.S.R. (2d) 410] have focussed on providing a successful party with a substantial contribution to its legal costs, objectively assessed. This may be modified by conduct of the winning party.
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> 30 The analysis of whether the tariff costs constitute a substantial contribution to the plaintiff's actual reasonable costs requires, first, an analysis of what tariff costs would be.

[16] In *Boutcher v. Clearwater Seafood Limited Partnership*, 2010 NSSC 64, Justice MacLellan made the following comments regarding lump sum costs:

> [10] Counsel for both plaintiffs in their submission after the trial requested that the Court approach the matter by looking at Tariff A Scale 2 (Basic) costs based on the amount awarded to each plaintiff plus the daily amount for trial, and then add a lump sum to bring the costs award up to a level which would be a substantial contribution to their actual costs.
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> …
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> [28] I conclude that an award of $22,250.00 would not be a substantial contribution to the plaintiffs' legal costs. The plaintiffs had to deal with two applications prior to trial and the trial took five days to hear. It involved a lot of evidence on the issue of how the defendant came to terminate the plaintiffs' services after many years of employments.
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> [29] To allow costs that would be significantly less than their actual legal costs would result in the plaintiffs using a significant part of their damage awards to pay their lawyer. In the case of *Burns v. Sobeys Group Inc.*, [2008] N.S.J. No. 117, Warner J. of this court made a lump sum award in addition to the tariff amount in circumstances where the tariff amount would not adequately compensate the plaintiff for his actual legal

> costs. In *Morash v. Burke*, [2007] N.S.J. No. 95, Wright J. of this court did the same thing by increasing the tariff amount of costs there from $12,700.00 to $22,500.00.

[17] In *Bevis v. CTV Inc.*, 2004 NSSC 209 Justice Moir commented at paragraph 13:

> … (1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula.

[18] After full consideration of the principles and the circumstances of this case, including the defendant's intransigence, I award Northbridge costs in the amount of $66,000 plus $5,478.53 disbursements. I have adjusted this figure downward to reflect Northbridge's failure on the injunction application. Furthermore, this cost award is joint and several to all four defendants.

Coady J.