SUPREME COURT OF NOVA SCOTIA

Citation: Trinity Western University v. Nova Scotia Barristers' Society, 2015 NSSC 100

Date: April 21, 2015
Docket: Hfx. No. 427840
Registry: Halifax

Between:

Trinity Western University and Brayden Volkenant

Applicants

and

Nova Scotia Barristers' Society

Respondent

and

Justice Centre for Constitutional Freedoms
The Association for Reformed Political Action (ARPA) Canada
The Evangelical Fellowship of Canada and Christian Higher Education Canada
The Catholic Civil Rights League and Faith and Freedom Alliance
The Christian Legal Fellowship
The Canadian Council of Christian Charities
The Nova Scotia Human Rights Commission
The Attorney General of Canada

Intervenors

Costs Decision

Judge: The Honourable Justice Jamie Campbell

Final Written Submissions: March 26, 2015

Written Decision: April 21, 2015

Counsel: Brian Casey, Q.C. for the Applicants
Peter Rogers, Q.C., Marjorie Hickey, Q.C. and Jane O'Neill for the Respondent

Campbell, J.

[1] In December 2014, when this case was argued in court, principles of equality and religious freedom were at the forefront. Money it seemed was the last thing on anyone's mind. As is often the case when the legal system is involved, eventually, the issue of who pays inserts itself into the more lofty conversation. But, it's a practical reality. Someone has to pay. Lawyers spent hundreds of hours, in preparation for making legal arguments on both sides of the case and there is nothing at all unseemly about their being paid.

[2] The successful party in court usually gets a contribution toward its legal costs paid by the other side. Trinity Western University (TWU) has spent $156,000 on legal fees. To that is added taxes and disbursements for a total of a bit more than $184,000. As the successful party it is seeking an award of costs in the range of $120,000 which represents about two thirds of its legal fees. It says that that amount amounts to substantial but not complete recovery of its costs.

[3] The Nova Scotia Barristers' Society (NSBS) says that it should not be required to pay any costs at all. This is not the kind of matter and it is not the kind of litigant that should attract an award of costs.

Summary

[4] Costs awarded under Tariff C of the Nova Scotia Civil Procedure Rules would amount to $32,000. That falls well short of the substantial recovery of reasonable costs normally granted to a successful litigant. Given the nature of the application that amount should be increased. There are public interest elements to the litigation. Even though the NSBS is not a public interest litigant its position

was not taken to advance any pecuniary interest of the society or of its members. It was to both assert its jurisdiction and to advance what it believed to be the equality rights of the LGBT community. Those elements justify a reduction of the costs award.

[5] Costs are set at $70,000 inclusive if taxes and disbursements.

The Procedure

[6] The decision in this case was issued in late January 2015.[1] TWU was the successful party and there is no issue of there having been only partial success.

[7] The matter included both an Application for Judicial Review and an Application in Court. It was not what might be considered an average application. It involved more than one appearance. Counsel had to appear on a motion for directions on 3 July 2014 and then again on 5 September 2015 on the application to add intervenors and to amend the nature of the proceedings. There was also a motion by correspondence to deal with questions asked of affiants and to strike parts of the affidavits filed by the NSBS. The matter itself involved 4 days of hearing.

[8] Lengthy affidavits were prepared containing the opinions of experts and background information from others. The filing of social context evidence broadens the scope of the information that is put before the court. That means that counsel are required to review that information, take steps to assess its accuracy and determine the response if any.

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[1] *Trinity Western University v. Nova Scotia Barristers' Society* 2015 NSSC 25

[9] The volume of materials filed is not a consistently reliable measure of complexity. In this case it is consistent with the thoroughness with which the arguments were presented. The issues were challenging but it is worthy of note that the evidence was not technical nor was it substantially in dispute as it related to matters that were directly relevant. Each party had intervenors in support. Only one appeared on behalf of the NSBS. That required each party to review the materials filed by the intervenors. Almost all of the intervenors remained within the scope contemplated by the court but even with that, the volume of material to review was increased.

[10] It was assumed that the importance of the issues is such that an appeal would be realistically anticipated regardless of the outcome. This matter has significance beyond the parties. The application involved establishing the record for purpose of that appeal and as such, amounts to what might be called the first round.

[11] It is also part of a larger legal dispute that will likely play itself out over the course of years in courts across Canada. That dispute will involve TWU and other legal regulators.

Tariff C

[12] An ordinary application in Chambers or a proceeding for judicial review is governed by Tariff C under the Civil Procedure Rules. The tariff provides for costs in the amount of $2000 for each day of hearing. In this case, there were four hearing days, for a total of $8000.

[13] Tariff C also provides for the application of a multiplier to that amount. When an order is determinative of the entire matter at issue, the judge may

multiply the amount by 2, 3 or 4 times depending on "the complexity of the matter", the "importance of the matter to the parties" and "the amount of effort involved in preparing for and conducting the application". Tariff C, with the multiplier, contemplates circumstances where the matter is unusually complex, unusually important and involves an unusual amount of preparation. That is just what the multiplier is for.

[14] If the multiplier of 4 were applied here, to reflect the complexity and importance of the matter, the costs award would be $32,000.

Judicial Discretion

[15] The Rules also recognize that there will be situations where a judge may exercise discretion in order to do justice between the parties. There are times when Tariff C costs simply aren't fair having regard to all of the circumstances. An award of costs should provide "substantial contribution towards the party's reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".[2] That may require fixing a lump sum amount in excess of the tariff.

[16] Freeman J.A. in *Williamson v. Williams*[3] went on to interpret what a substantial contribution not amounting to complete indemnity might actually be. He noted that it "must initially have been intended to mean more than fifty and less

[2] *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410, per Saunders J. quoting the Statutory Costs and Fees Committee.

[3] 1998 NSCA 195

than one hundred percent of a lawyer's reasonable bill for services involved".[4] He suggested that a range of party and party costs between two-thirds and three-quarters of solicitor and client costs might be reasonable. That would place costs in this case in the range of between $120,000 and $138,000, assuming the reasonableness of the $184,000 amount.

[17] That comment is not an invitation to throw certainty to the wind and award costs based on a percentage of the legal fees actually or reasonably incurred. If the standard is between two-thirds and three quarters of the reasonable legal bill, the tariff as set out the in the rules would be redundant. As Justice Hood noted in *Beaini v. APENS et al.*, the recovery of between two thirds and three quarters is not an absolute rule. "If it were, it would fetter the court's discretion and, in my view, it is clear that the court should look at the circumstances of each case to determine the appropriate costs award."[5]

[18] As with many things, there is a tension between the sometimes apparent arbitrariness of certainty on the one hand and the sometimes apparent arbitrariness of flexibility on the other. The tariff, even with the multiplier, provides some degree of predictability. That predictability comes at the cost of at times substantially underestimating the real costs that a party has incurred. The approach that relates the costs to a percentage of the reasonable legal bill allows for a better approximation of real litigation costs. Parties then have to assess their litigation risks based on their best assessment of what a judge will consider reasonable in terms of legal fees. But then, as Justice Hood observed, setting costs based on a

[4] para. 25

[5] 2003 NSSC 231, at para. 10

percentage of legal fees could also have the effect of limiting a judge's discretion to take into account other factors.

Principles and Rules Guiding Discretion

[19] The exercise of judicial discretion in awarding costs is not an exercise of arbitrary authority potentially influenced by ingrained, unacknowledged prejudices. It is guided by rules and principles. That guided discretion navigates between the "Chancellor's foot" of individual conscience on one side and the narrow application of rules that insist on pounding round pegs into square holes on the other.

[20] The first principle, which is codified in the Civil Procedure Rules as Rule 77.03(3) is that "the costs of the proceeding follow the result", unless another rule provides for something else or a judge orders something else. That means that in most cases the successful party will be awarded costs. Costs are the reward for success. The refusal to award costs to a successful party can be, but is not necessarily a penalty.

[21] Historically the reason for the "loser pays" rule was to compensate the winner. The idea was that the successful party should be compensated for some or all of its litigation costs because the other party should be deemed to have been at fault. That fault would arise from either its conduct of the litigation or the cause of the action itself. Costs are seen as a form of remedial damages. Where a fault-based analysis was tenuous, a spoils-based rationale was invoked. Costs presumptively flow to the winner as a form of just desert. The concern is fairness

to the winner. Other factors relating to the nature of the case or the circumstances of the unsuccessful party, were considered to be irrelevant.[6]

[22] That rule or principle is a starting point. The rationale for awarding costs to a successful party does not apply in every case.

[23] The second guiding principle is the application of the tariff amount set out in the rules to provide some kind of predictability. The amount may fall well short of the actual costs of litigation but there is some benefit in the certainty and predictability that comes from having an amount, set by a rule.

[24] The third rule to be considered is the multiplier contained in the tariff itself to account for higher costs involved in more complicated, more important or more time consuming matters. It is intended to modify the strict application of the basic tariff amount to prevent a manifestly unfair result. The multiplier is available to do justice between the parties in matters that are more complicated, important and time consuming than most. While it provides for flexibility it does so within the constraints of the rule itself.

[25] The fourth guiding principle is that of substantial contribution without complete indemnity. A fifth and related principle or consideration is the interpretation that often, but not always, substantial contribution can be achieved by an award of between two-thirds and three quarters of the reasonable costs incurred.

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[6] Chris Tollefson "Costs in Public Interest Litigation Revisited" (2011) 39 Adv. Q. 197, 204

[26] Those principles, rules or considerations are in tension with each other. The certainty of the tariff, the moderating influence of the multiplier, and substantial contribution can't each be applied to achieve a result.

[27] There is yet another principle that has to be considered here. The NSBS says that it should not be required to pay any of TWU's costs because of the public interest nature of these proceedings. There are times when the unsuccessful party should not be exposed to an award of costs. Some issues have to be adjudicated and it is in the interest of the public that they be resolved in court. Weaker and less resourced litigants should not be discouraged from taking claims against more powerful interests. Public interest litigation raises special policy considerations that may mean that the other principles have to give way.

[28] It is not entirely clear what makes a litigant a public interest litigant or litigation public interest litigation. The Ontario Court of Appeal adopted a number of factors to guide courts' discretion considering the issue. In *St. James Preservation Society v. Toronto (City)* [7] the court adopted the criteria established by the applications judge in determining whether a departure from the typical costs order would be justified based on the public interest nature of the proceedings. Those criteria were, the nature of the unsuccessful litigant, the nature of the successful litigant, the nature of the legal matter and whether it was in the public interest, whether the litigation had any adverse impact on the public interest and the financial consequences to the parties.

[7] 2007 ONCA 601

The Unsuccessful Litigant

[29] The NSBS is the governing body of a self-regulating profession. It is a regulator and a government actor as that phrase is used in the constitutional sense. Its regulations are what gave rise to these proceedings. It is not challenging government action. It is defending its own. It is entirely true that the NSBS has nothing to gain financially from these proceedings. It doesn't have a proprietary interest or a pecuniary interest in the outcome. Governments or public bodies that take a broader interpretation of their statutory mandates rarely do have a pecuniary interest at stake. What is at stake is the scope of its jurisdiction.

[30] In that regard the NSBS was not in the position of a regulator or tribunal that did not participate in the matter beyond filing its decision. Costs are not usually awarded against statutory tribunals and decision makers. In those cases the tribunal often doesn't take an active part in the judicial review. The parties involved in the dispute argue whether the body overstepped its jurisdiction. Here the NSBS was one of the two primary partisan participants. It was defending what it believed to be its jurisdiction or perhaps more accurately, actively asserting what it believed to be its jurisdiction.

[31] The NSBS argues that the case of *Association of Professional Engineers of Ontario v. Ontario (Minister of Municipal Affairs and Housing)* [8] confirms its public interest litigant status. In that case the Association (PEO) made a successful application seeking to have certain provisions of the *Building Code Act 1992* declared to be beyond the jurisdiction of the province and contrary to the exclusive

[8] [2007] OJ No 3440 (Ont. SCJ)

regulatory jurisdiction of the PEO. The PEO was, in that case, defending its jurisdiction against the province. While some public interest litigants may be adequately described by a definition that requires the absence of a personal, proprietary or pecuniary interest in the outcome which affects public policy, the definition might be too limited. Lane J. said, "It does not include organizations like the PEO which have a legislative mandate to regulate a profession in the public interest and which are required to litigate in the course of that mandate".[9]

[32] The NSBS argues that like the PEO it has a statutory mandate to regulate and is required to litigate in situations like this to protect that mandate. It might equally be said though that the PEO was challenging an incursion on its jurisdiction while the NSBS was asserting its jurisdiction. TWU argues that a regulatory body should not be insulated from the cost consequences of its own invalid regulations.

[33] The result of this matter, for now at least, was that the NSBS was found not to have had the legislative authority to have taken the action it did in changing its regulations to respond to TWU's community covenant. That does not change the fact that it was acting in good faith to establish the limits of that mandate.

[34] Access to justice is a "highly valued social good in itself".[10] Costs and the risk of costs should not discourage advocacy groups from participating. The Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan*

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[9] para. 5

[10] Chris Tollefson ,"When The Public Interest Loses: The Liability of Public Interest Litigants for Adverse Cost Awards", (1995), 29 U.B.C. Law Review 303, 319

Indian Band[11] established that courts should consider the power to award costs to be an "instrument of policy". It should be used in a way that "helps to insure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole."[12]

[35] The NSBS is not the same as an impecunious citizen advocacy group. There is no access to justice issue here. The NSBS does not represent a disadvantage or marginalized group seeking to have its voice heard in the judicial process. They are lawyers after all.

[36] The NSBS is not the LGBT community. It has identified the issue of LGBT equality rights as the reason for it actions. Its motives in that sense are entirely high minded. It is however a government actor seeking to justify its own interpretation of its own authority.

[37] Justice Robert Sharpe of the Ontario Court of Appeal in an article entitled "Access to Charter Justice", noted how the traditional costs regime, if applied without moderation to public interest litigants, represents a significant impediment.

> Public interest litigants tend to be poorly funded. They are often dependent upon the efforts of pro bono or poorly paid counsel and rarely have any prospect of a monetary award from which a contingency fee can be paid, even if successful. Their opponents, in contrast, are usually, well-funded and determined governments. If the lack of means to start the suit is not enough, the threat of an adverse costs award if the case fails can be a powerful disincentive to launch the case in the first place.[13]

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[11] [2003] S.C.J. No. 76

[12] para. 27

[13] (2013), 63 S.C.L.R. (2d) at p. 6

[38] That was not a definition of a public interest litigant. As a general description however, intended to frame the issue, it suggests that the entities involved as public interest litigants are usually quite different from the NSBS. The NSBS is not an under-funded advocacy group taking on an opponent with much deeper pockets to bring a public policy matter to the court.

[39] That does not suggest that a more affluent and influential group cannot be characterized as a public interest litigant. As Perell J. noted in *Incredible Electronics Inc. v. Canada (Attorney General)*[14],

> A few public interest litigants may be affluent and prepared to use their wealth to be a litigant in public interest litigation. A few public interest litigants may be subsidized by government programs or lawyers willing to provide their services pro bono. It seems to me the point is not so much whether the public interest litigant is affluent or impecunious but whether having regard to the benefit of ensuring their participation, they ought to be immunized from an adverse costs consequence.[15]

[40] Justice Perell suggested that there is a "certain *je ne sais quoi* quality to the nature of a public interest litigant" but having reviewed the case law and literature in the area it did seem that a relevant feature is that the public interest litigant is,

> "the"other", a marginalized, powerless, or underprivileged member of society or the public interest litigant speaks for the disadvantaged in society even if he or she has his or her own selfish reasons for litigating."

[41] Public interest litigants are characterized by their representation of marginalized groups but they are not necessarily defined by that. The NSBS in this matter would be a non-typical public interest litigant. It is not a powerless or marginalized group. It does have some of the characteristics of a public interest

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[14] (2006), [2006] O.J. No. 2155

[15] para. 100

litigant. While it cannot be said to be representing the LGBT community, and does not purport to speak for that community, its position is one taken in solidarity, if perhaps symbolically, with that community.

[42] So, the unsuccessful litigant here is involved in litigation with no pecuniary interest, but a jurisdictional one. It is the regulatory and governing body of a profession, but is also a partisan participant. It is not the representative of a marginalized group, but it has taken a position which it asserts is for the benefit of the rights of a marginalized group. It is not a citizen advocacy group but it is advocating a position on a point of principle.

The Successful Litigant

[43] The successful litigant, TWU, is a private entity. Like the NSBS it is not a representative of a disadvantaged or marginalized group. It is not a government entity against which a less powerful group has been required to take its case.

[44] Both of these parties have taken on litigation that they knew would be costly. Both presumably also knew that this would be but the first stage of it. They are both highly sophisticated. It is after all a university facing off against a barristers' society on a point of principle. Both would be well aware of the potential for an award of costs to made against them if they were not successful at this stage.

The Nature of the Case

[45] The issue of the scope of the authority of the NSBS and the balancing of the Charter rights as they manifested themselves in this context are of significance

beyond the immediate interests of the parties. Equality rights and freedom of religion were involved.

[46] It might also be said that the issues involved are not such that they would leave the law in a state of uncertainty if they were not resolved in the context of this specific matter. This case provided a factual scenario within which to consider how equality and freedom of religion can be reconciled in Nova Scotia. Whether the NSBS had authority to regulate a university is of interest to these parties and possibly to legal and other regulators. Other law societies are involved in testing both of these issues as they relate to TWU's community covenant. The NSBS has taken on this point of principle and the costs that are inevitably associated with proving points of principle.

[47] It was evident from the argument in this matter that the NSBS believed that it was important for it to join with other law societies in taking on TWU and its community covenant. The more resistance from regulators, the more likely that TWU would back down. Each provincial law society that stood up to TWU would put another road block in its way. The result is that in each jurisdiction TWU has to fund litigation. The issue did not have to be resolved in Nova Scotia, and will not be resolved in Nova Scotia but the action here is part of the bigger picture.

[48] A purpose of costs awards is to discourage frivolous claims and sanction inappropriate behaviour on the part of litigants and their counsel. There is no question whatsoever of the high degree of professionalism shown by all counsel in this matter. The issues were meticulously canvassed and in no sense whatsoever could the actions of the NSBS in arguing and presenting the case be considered frivolous or irresponsible.

Financial Consequences

[49] Neither party has an unlimited source of funding but at the same time, they are both able to pay their own legal bills. The financial consequences are similar in that sense.

[50] TWU is dealing with similar litigation elsewhere in an effort to be recognized by law societies across the country. NSBS is dealing only with the Nova Scotia part of that larger picture by which legal regulators are exerting pressure on TWU in each jurisdiction.

[51] In order to establish a law school TWU will need to have broad approval from legal regulators across the country. While their efforts may not be coordinated, the effect is that as individual organizations acting in similar ways, they make the economics of proceeding a more questionable proposition for TWU.

Conclusion

[52] The starting principle is that costs are awarded to a successful party, normally according to the tariff. The amount of costs can be increased to do justice between the parties or the parties can each be required to bear their own costs.

[53] There are competing considerations. TWU has reasonably spent well in excess of what the tariff would provide. The tariff amount would not reflect substantial indemnity for legal costs short of complete recovery.

[54] At the same time, there are public interest elements to this matter. The position taken by the NSBS was motived by a concern for the equality rights of the

LGBT community. The issues to be resolved are of significance beyond the parties.

[55] Those public interest elements are not the same as they would be if the NSBS were an advocacy group for the marginalized or disadvantaged seeking access to the justice system. There is no "lack of symmetry of resources"[16] as between the NSBS and TWU and certainly not in the sense that the NSBS is a financial underdog. The NSBS is a government actor acting to assert its jurisdiction not a party seeking to assert a right against a government policy.

[56] The issue is part of a bigger constitutional litigation picture, in which TWU is involved. The NSBS chose to become part of it.

[57] Both TWU and NSBS had a point of principle on which they stood and for which they felt they could do no other. As sophisticated litigants both would have reasonably contemplated that they might not be successful and be responsible for their own costs with some contribution to the costs of the other.

[58] The public interest considerations are not such that they justify the refusal to award costs. They do justify a reduction in the amount of costs that would otherwise be awarded.

[59] The tariff amount using the multiplier of 4 would result in an award of $32,000. That is very short of the claim of $120,000 made by TWU.

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[16] Sharpe, p. 7

[60] In order to do justice between the parties and having regard to the public interest elements involved, a lump sum amount of $70,000 is set. That is intended to include taxes and disbursements. The amount is somewhat more than double what the tariff would provide with the highest multiplier and somewhat less than 40% recovery of fees and disbursements incurred.

J.