

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Power Inc. v. AMCI Export Corporation, 2007 NSSC 260

Date: 20070830

Docket: SH 219171

Registry: Halifax

Between:

Nova Scotia Power Incorporated,
a body corporate

Plaintiff

v.

AMCI Export Corporation,
a body corporate

Defendant

C O S T S D E C I S I O N

Judge: The Honourable Justice Glen G. McDougall

Heard: August 9, 2007, in Halifax, Nova Scotia

Counsel: David G. Coles, Q.C., for the plaintiff
Craig M. Garson, Q.C., for the defendant

By the Court:

[1] Nova Scotia Power Incorporated (“NSPI”) applied for summary judgment against AMCI Export Corporation (“AMCI”).

[2] NSPI alleged that AMCI failed to supply coal under a Coal Supply Agreement (“Agreement”). The Agreement contained four separate call options for the purchase

and delivery of South American Low Sulphur A Coal in quarterly instalments of up to 100,000 tonnes.

[3] NSPI sought summary judgment for AMCI's alleged failure to supply the requisite tonnage in quarters 2, 3 and 4 of 2004. In a decision released on May 14, 2007 the court granted summary judgment to NSPI for the 56,634.99 tonnes which AMCI failed to supply in quarter 2. It refused to grant summary judgment for either quarter 3 or quarter 4. The decision left it to counsel for the parties to try to reach an agreement on costs. Unfortunately they could not do so thus leaving it to the court to decide.

[4] In addition to costs of this application, the court has also been asked to rule on costs of another application brought by AMCI to compel production. The parties ultimately reached a compromise thereby avoiding the need for the hearing of this second application, but only after discovery of the affiant who had provided an affidavit in support of the application.

[5] The affiant was an expert retained by AMCI to provide an opinion with respect to the commercial reasonableness of the purchase of substitute coal by NSPI. The expert advised counsel for AMCI that he was unable to carry out the analysis due to the insufficiency of materials provided by NSPI. After discover of the expert was conducted in New York City, NSPI agreed to produce the documents that were being sought by AMCI. AMCI is now seeking costs of this application.

FIRST APPLICATION

[6] The application for summary judgment was originally scheduled for one day. In all it took the better part of two days to conclude. A brief court appearance and several telephone conference calls were also needed to discuss adjournment requests and other issues pertaining to disclosure.

[7] NSPI was successful in obtaining summary judgment for quarter 2 only. Damages have yet to be determined. This will require a further hearing depending on the results of the appeal of my decision on summary judgment.

[8] For now, counsel have asked me to decide costs pending the hearing of the appeal.

[9] The court has a wide discretion when it comes to awarding costs. **Civil Procedure Rule 63.02** states:

Costs in discretion of court

63.02. (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

- (a) award a gross sum in lieu of, or in addition to any taxed costs;
- (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
- (c) direct whether or not any costs are to be set off.

(2) The court in exercising its discretion as to costs may take into account,

- (a) any payment into court and the amount of the payment;
- (b) any offer of contribution.

(3) The court may deal with costs at any stage of a proceeding.

[10] **Rule 63.04** is also applicable to this situation. It states:

Party and party costs fixed by court

63.04.

(1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.

(2) In fixing costs, the court may also consider

- (a) the amount claimed;
- (b) the apportionment of liability;

- (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (d) the manner in which the proceeding was conducted;
- (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
- (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
- (g) the neglect or refusal of any party to make an admission which should have been made;
- (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;
- (i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and
- (j) any other matter relevant to the question of costs.

[11] Given the nature of the application, Tariff C pertaining to chambers matters must also be considered. NSPI was not completely successful in its application. It was, however, successful in respect to quarter 2. As such, it is entitled to costs for the two day application which has resolved the issue of liability for this quarter. AMCI's liability under the Agreement for the other three quarters has still to be determined but the issues should not be as involved as they would otherwise be based on the court's decision on the summary judgment application.

[12] The court is not persuaded to adopt NSPI's suggestion to increase costs by a factor of four as provided for in Tariff C, paragraph (4). Once damages have been determined, NSPI can seek further costs based on the amount involved. For now the court is of the opinion that costs should be awarded at the rate of \$2,000.00 per day for a total of \$4,000.00 together with taxable disbursements for filing and the like.

[13] Counsel for AMCI suggested that NSPI's costs should be reduced because of the time consumed in cross-examining NSPI's main witness on damages which are still to be determined. I do not accept this suggestion. It was up to AMCI's counsel to decide how to conduct his cross-examination but NSPI should not have its award of costs reduced even though damages have yet to be determined.

[14] NSPI is not precluded from seeking further costs after damages for quarter 2 have been finally determined. AMCI will also be able to make further submissions at that time.

SECOND APPLICATION

[15] The second application brought by AMCI was not heard in chambers. It was resolved prior to the hearing after discovery of AMCI's expert witness.

[16] The discovery hearing took place in New York City in order to reduce at least some of the inconvenience and costs of conducting it in Colorado, United States of America, where the witness resides. This was done at the suggestion of AMCI's counsel.

[17] After discovery NSPI agreed to produce the additional documents being sought. To reach this resolution the time which would have been consumed cross-examining the affiant at a chambers hearing was instead used up in discovery. Although still expensive, it would not have been as time-consuming or as expensive as a formal hearing in chambers. AMCI should be entitled to have costs, although not to the extent that it now seeks. I am prepared to award costs for a one-half day application which based on Tariff C is \$1000.00. In addition, NSPI shall pay the disbursements incurred by AMCI for filing its application; travel costs for AMCI's counsel to New York City; and, costs of preparation, travel, food and lodging for its expert witness to attend discovery in New York City.

[18] The costs for both applications are to be paid forthwith and are in any event of the cause.

McDougall, J.