IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Armour Group Ltd. v. Halifax (Regional Municipality), 2008 NSSC 123

Date: 20080703
Docket: S.H. 288775
Registry: Halifax

Between:

The Armour Group Limited

Plaintiff

and

Halifax Regional Municipality, a body corporate

Defendant

Judge:	The Honourable Justice Walter R.E. Goodfellow
Heard:	Written representations. Post-hearing held March 17, 2008, in Halifax, Nova Scotia
Written Decision:	July 3, 2008 *(re costs)*
Counsel:	Jane E. O'Neill and Jennifer J. Biernaskie, counsel for plaintiff Karen L. Brown and Sara J. Knight, counsel for defendant

Goodfellow, J.:

BACKGROUND

[1] Armour Group sought and obtained a declaration that the building located at current civic address, 1870 Lower Water Street, Halifax was not designated as a Heritage Property under the *Heritage Property Act*, R.S.N.S. 1989, c. 199.

[2] The application was a half day Chambers Hearing involving briefs, argument and cross-examination on affidavits. Armour Group seeks party and party costs of $27000 plus disbursements indicating it's total legal fees for the application were of approximately $35000.

[3] Failing agreement on the appropriate level of costs, the court addressed the issue herein.

NEW TARIFF "C" CHAMBERS COSTS

[4] Prior to September 29, 2004 the *Cost and Fees Act*, R.S.N.S. 1989, c. 104, did not contain a specific tariff relating to Chambers applications. There was a series of decisions by this court, many of which were approved of by the court of

appeal, addressing party and party costs of a half day chambers application in the range of two hundred and fifty to seven hundred and fifty dollars ($250-$750) and in exceptional and extraordinary circumstances, resort to the Tariff A, the Trial Tariff. Resort generally occurred where the chambers application turned out to be complex, lengthy and approximated a trial. Saunders, J. (as he then was) in **Landymore v. Hardy**, 1992 CarswellNS 90, 112 N.S.R. (2d) 410. See also **Keating v. Bragg** (1997), 158 N.S.R. (2d) 242, [1997] N.S.J. No. 312 (Q.L.) (N.S.C.A.). The preamble to the 1989 tariff of party and party costs stated in determining the amount involved the court was to consider (i) the complexity of the proceeding, and (ii)the importance of the issues.

[5] The headnote in **Landymore v. Hardy** (above) accurately reflects that the new tariff (1989) was intended to facilitate agreement on costs between the parties and that the recovery of costs was to represent a substantial contribution towards the party's reasonable expenses in presenting or defending a proceeding but it was not intended to be a complete indemnity. Costs were intended to reward success. Their deprivation would also penalize the unsuccessful litigant. Settlement was encouraged. Saunders, J. noted the statement by the Statutory Costs and Fees Committee "the recovery of costs should represent a substantial contribution

towards the parties reasonable expenses in presenting or defending a proceeding, but should not amount to a complete indemnity".

[6] This application was commenced November 23, 2007 and, therefore, the new Tariff on costs applies. **Little v. Chignecto Central Regional School Board**, 2004 NSSC 204. What I said earlier applies as it commenced post-September 29, 2004. We now have, for the first time, a Tariff giving clear direction for the exercise of discretion in relation to costs as it relates to Chambers applications.

[7] Justice Arthur J. LeBlanc in his recent decision, **Brenda Miller v. Royal Bank of Canada**, 2008 NSSC 139, traced the background and authority of the statutory process in adopting a new Tariff relating to party and party costs including for Chambers. Justice John D. Murphy, of this court, chaired a committee which over an extensive period of time consulted broadly and conducted considerable research before bringing forward the recommendation and subsequent adoption of the specific chambers Tariff C which is as follows:

TARIFF C

Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia

For applications heard in Chambers the following guidelines shall apply:

(1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(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:

(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.

(Such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	Range of Costs
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1000
More than ½ day but less than 1 day	$1000 - $2000
1 day or more	$2000 per full day

CASES ADVANCED BY ARMOUR

[8] **Smith v. Michelin North America (Canada) Inc.**, 2008 NSSC 66, 2008 CarswellNS 102. This is one of the cases relied upon by the solicitors for the Armour Group and, with respect, it has little in common with the cost issue in the case before me.

[9] To start with, it dealt with a determination of pension funds of the magnitude of two hundred and sixty-eight million dollars ($268,000,000) and questions of whether or not costs should be paid out of the pension funds and, if so, at what tariff. The case indicates that the parties spent substantial sums, retained experts and had counsel from Nova Scotia and Ontario experienced in pension litigation. The applicant's bill of costs was in excess of nine hundred and forty-thousands ($940,000) and the respondent's bill of costs was in excess of one point two million dollars ($1,200,000). The case considered case law dealing with a line of pension fund cases. There is no issue before me of entitlement to payment out of any fund or any consideration of **Civil Procedure Rule** 53.12 which deals with

costs of a trustee or **Civil Procedure Rule** 63.24 which deals with costs payable out of trust funds.

[10] The decision of Hood, J. is of assistance in determining the issue raised by Armour's solicitors as to whether Tariff A should be applied and Hood, J. at p. 12 stated:

> 50 In *Keating v. Bragg*, [1997] N.S.J. No. 312 (N.S.C.A.), Hallett, J.A. said in para. 11:
>
> > 11 The appellants' application, which was commenced by an originating notice, is a proceeding within the meaning of the Civil Procedure Rules. Every application to court is not a proceeding within the meaning of that term in Tariff A but where an application involved several days of hearing, including the adducing of evidence, it is not an error by the presiding judge to consider it a proceeding for the purpose of awarding party and party costs. It is a matter within the discretion of the presiding judge, taking into account the extent to which the proceeding mirrors a trial proceeding.
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> 51 Subsequently, in *Murray Estate, Re*, [2000] N.S.J. No. 255 (N.S.S.C.), Goodfellow, J. at para. 13 said that Tariff A is "only to be used when the chambers application is complex, lengthy and approximates a trial."
>
> 52 Similar to *Keating*, this application involved three days of hearing and the filing of extensive affidavits. It was a complex and lengthy matter similar to a trial. The hearing which was held is the very hearing contemplated by the issuance of an originating notice (application inter parties), which commenced this proceeding.

[11] I was the trial justice in **Keating v. Bragg**, [1997] N.S.J. No. 312 (Q.L.), 158 N.S.C. (2d) (N.S.C.A.), and from recollection that case involved approximately ten lawyers over an extended period of time and certainly had all the trappings of a moderate to lengthy trial. None of the features considered in the **Smith** case exist in the case at bar except for the conclusion that the normal course for costs is to follow the event and Armour, being successful, is entitled to some costs.

[12] Armour advances the case of **Trim v. Beaudet** , [2003] NSJ No. 473 (Q.L.), 2003 NSSC 238, which was a decision on costs after trial. The situation in the **Trim v. Beaudet** case is entirely different to the case at bar. Wright, J.'s comments as follows clearly indicate that to be the case.

> 13 Although the conduct of the corporate defendant was not so egregious as to attract an award of aggravated or punitive damages, I have concluded that the court's disapproval of that conduct should sound in costs. The court's disapproval finds expression in two respects.
>
> 14 First, it is engaged in a manifestly poor business practice by using misleading documentation when negotiating the deal and holding back the Vehicle Lease Agreement which the customer was ultimately expected to sign before taking delivery of the car. As I wrote in my earlier decision (at para. 35), the failure of the transaction can be laid squarely at the feet of the defendant dealership because of that poor practice which lead to this litigation. On top of that, the defendants neglected to produce a copy of the Vehicle Lease Agreement

> to their solicitor for inclusion in a Rule 20 List of Documents, which was only forthcoming after repeated demands for its production after discovery.
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> 15. Secondly, the defendant dealership acted in a careless and irresponsible manner in responding to the demand letter from plaintiff's counsel for the return of the deposit....

[13] In addition to noting that this was a trial with pre-trial procedures, such as discoveries, the court's disapproval of the defendant's conduct resulted in a gross sum of ten thousand dollars ($10,000) in lieu of tax costs which represented a substantial portion of the plaintiff's legal fees in the nature of approximately two-thirds. As I have indicated, this case does not have any factual relationship to the half day Chambers application before me and predates new specific Chambers Tariff of September 29, 2004.

[14] Armour also advances the case of **Beaini v. Assn. of Professional Engineers of Nova Scotia**, 2003 NSSC 231, [2003] N.S.J. No. 539. This was not a Chambers application but rather an appeal from a discipline decision of the Council of Association of Professional Engineers of Nova Scotia. It involved, amongst other things, an interpretation of the cost direction in the *Engineering Profession Act* and a determination that the statutory provision did not override the judicial discretion to award costs. Justice Hood does comment on the principle that

cost awards should constitute: “a substantial contribution but not a complete indemnity”.

[15] There was also consideration of a separate application to admit fresh evidence. In addition there was a half-day in court dealing with the issue of costs. Overall, the court time was substantially greater than that in the case at bar. The solicitors sought costs in the amount of two-thirds of his actual costs which exceeded thirty-seven thousand dollars ($37,000) and, in the totality of the circumstances, Justice Hood departed from the Tariff and provided an award of fifteen thousand dollars ($15,000). Once again, I conclude that this case has no application to the cost determination of the chambers application that is before the court and it also predates the guidance given by the new Tariff for Chambers matters.

[16] The final case relied upon by the solicitors for Armour is **Landymore v Hardy,** 1992 CarswellNS 90, 112 N.S.R. (2d) 410. Once again, it is not a cost determination in a Chambers matter but rather costs dealing with a trial where the plaintiff successfully sued for specific performance of a parcel of land and the land value was two hundred and nine thousand, two hundred and fifty dollars

($209,250). This case was decided in 1992 by Saunders, J. (as he then was). The conduct of the defendants was a factor because Saunders J. determined that they had attempted to re-sell the property without first applying to the court and the defendants had also advanced defences and allegations of bad faith which were abandoned on the eve of trial, therefore, overall Saunders, J. used a value or amount involved "of three hundred and fifty thousand dollars" which applying the Trial Tariff and the maximum Trial Scale permitted for party and party costs of twenty thousand dollars ($20,000). Once again this case, with all respect, does not have any real guidance for the determination before me dealing with the cost issue on the half day Chambers application for which we now have a specific Chambers Tariff.

CASES ADVANCED BY HRM

[17] **Okoro v. Nova Scotia (Human Rights Commission)**, [2006] N.S.J. No. 340, 2006 NSSC 257. This was a half day chambers application to which Tariff C applied (application commenced post-September 24, 2004). Okoro filed a complaint against Cape Breton Health Care (Hospital). A review was conducted and a recommendation that the complaint not be proceeded with. Okoro applied

initially for *mandamus* but limited his application to *certiorari* seeking to quash the decision of the Human Rights Commission. The application was dismissed and the solicitor for the hospital sought chambers costs of $3000 plus disbursements of $709 for a one-half day chambers application. Okoro's solicitor's position was that the majority of the preparation and return required by *certiorari* was generated by the Commission and that this was a matter of public interest and, therefore, no costs should be awarded. **The starting point of costs follow the event should always prevail unless there are circumstances warranting deviation. Parties ought to know when they enter litigation that there are cost consequences and the general likelihood of the amount of costs that they are exposed to in the event of being unsuccessful.** Counsel for Dr. Okoro is correct that the court has, on occasion, departed from CPR 63.02 entirely or reduced costs when there is a matter of public interest. Public interest, however, requires that the litigation be of some public benefit. For example, when you have an ambiguous section in a Statute, an application that clarifies it for the general benefit of the public **might** call for a denial of costs or a reduction of costs. In the case before me, there is no discernable public benefit. Result - costs, taxes allowed in accordance with Tariff C $1000 plus disbursements of $709.

[18] The adoption of Tariff C took into account the necessity of having a Tariff that provided a substantial and reasonable contribution of party and party costs.

[19] The new Chambers Tariff C must, of itself, be taken for some time to be a reflection of what is a reasonable contribution to legal fees and party and party to be ordered otherwise the integrity of the Chambers Tariff will be rendered virtually meaningless.

[20] In my view to go beyond the Tariff C in Chambers matters requires **special** circumstances such as the following or a combination of some of the following:

1) **Complexity**. Complexity may relate to questions of law or questions of fact or of mixed law and fact. Rarely does a half-day, let alone a day long Chambers Application, have the degree of complexity by itself that would amount to a factor warranting abandoning the new Tariff C or Chambers costs.

2) **Public interest**. For a case where it was determined public interest did not exist see **Okoro v. Nova Scotia** (Human Rights Commission et al.), [2006] N.S.J. No. 340. The Court stated:

> 7 Counsel for Dr. Okoro is correct that the Court has, on occasion, departed from *Rule* 63.02 entirely or reduced costs when there is a matter of public interest. Public interest, however, requires that the litigation be of some public benefit. For example, when you have an ambiguous section in a Statute, an application that clarifies it for the general benefit of the public might call for a denial of costs or a reduction of costs. In the case before me, there is no discernable public benefit result.

For a case where public interest called for the conclusion that no costs should be awarded, see **Newfoundland and Labrador (Consumer Advocate) v. Newfoundland and Labrador (Public Utilities Board)**, [2005] N.J. No. 83. To quote R.M. Hall, J. at para. 37:

> Therefore, the application of the Consumer Advocate is dismissed in its entirety. In light of the nature of the proceeding and a general review of public policy in which all of the parties to this proceeding have a direct interest, costs are not appropriate in the circumstances.

3) **Pre-chambers process**. This generally relates to areas of disclosure or non-disclosure, interrogatories, exceptional documentation, review etc. etc.

4) **Questions of law that are unsettled, i.e. diversity of decisions by lower or appeal courts or represent a unique area of law. Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410. This was one of the considerations of Saunders, J. (as he then was).

5) **Conduct or misconduct of a party and/or solicitor.** For an example, in a **trial** setting see **Landymore v. Hardy**, above. See also **Gilfoy et al. v. Kelloway et al.** (2000), 184 N.S.R. (2d) 226 (S.C.).

6) **Settlement/alternatives**. It is not unusual in chambers applications for there to be an alternative process or time frame etc. etc. that more appropriately provides a less costly determination of the matters/issues advanced in the chambers application. Failure to advance such or failure to accept such that are reasonable is a factor that should be taken into account in the exercise of discretion relating to costs. Often the determination may only relate to the application of the tariff limits, however, the factual situation on any application will determine the weight to be attached to this factor.

7. **Associate counsel** - prior to the adoption of the initial trial Tariff scheme in 1989, the *Costs and Fees Act* provided party and party costs on an item by item basis. For example, recovery was limited to $5 for one letter sent prior to commencement of the action and post the commencement of the action. Five dollars for every necessary letter required thereafter. In addition, counsel fee was set at the rate of $300 per day with a specific associate counsel fee of $150 per day. The change from an item base to a Tariff base resulted in the items being subsumed in the Tariff and the presence of associate counsel is not, by itself, a factor giving rise to a departure from the new Tariff C on Chambers costs. The determination to have associate counsel is a contractual determination between a solicitor and a client. The onus on a party advancing the utilization of associate counsel as a factor for consideration of special circumstances is on the person seeking a departure from the Tariff scale. The necessity for additional counsel for one party must be clear. By way of example, it most often arises in a multi-witness hearing. Although there is always lead counsel, it happens that associate counsel may, in such circumstances, actively participate usually in the direct and cross-examination of witnesses etc.

8. **Multi Counsel.** The presence of multi counsel usually reflects the number of parties interested in the issue(s) before the court but most often it is, at best, confirmatory that there are factors warranting the determination of special circumstances. Often there is a multitude of counsel whose clients have some interest in the issue(s) but do not participate or participate on such a limited basis that such existence of multi-counsel does not bring the circumstances anywhere near the "special circumstances" required to depart from the Tariff. For an example of where the existence of multi counsel was confirmatory, see **Keating v. Bragg** , February 27, 1997 (unreported) S.H. 133691, where, in this application, there were 10 solicitors involved and although there were lead counsel for the parties, all counsel did have a part to play in what I concluded was really an application clearly related to the requirements of a several day trial.

9. **Expert witnesses.** The presence of expert evidence is not a usual occurrence in a Chambers Application, however, it does occur, for example, in an application seeking a second medical examination or a speciality medical examination of a party seeking damages. Whether or not it becomes a factor depends often on whether or not the expert evidence is disputed,

> contrary expert evidence advanced, cross-examination required etc. The mere existence of an expert report rarely by itself suffices.

[21] The foregoing is by no means exhaustive and is only indicative of the kinds of situations and factors that are likely to give rise to the possible consideration of an exercise of discretion in the area of chamber's party and party costs.

[22] One should also consider the new Tariff of costs that relate to a trial. The trail Tariff is normally determinative of the entire action absent chamber's matters for which a specific order for costs have been awarded. It is normal in a trial to have a level of correspondence, pre-trial procedures including notices to produce, filing lists of documents and other pleadings etc. and the court should exercise some caution in the requests we're seeing such as in this application and many others for costs that would relate to a trial of some length. Using the basic trial Tariff the request for $27,000 party and party costs of this one-half day chamber's application equates to a ten and one-half day trial if the amount involved were under $25000 and a ten day trial if the amount involved was between $25000 and $40000. By no stretch does a half day Chambers matter approximate a trial of such length.

[23] The speed of escalation of legal fees is not one that the court can or should try and keep pace with. Solicitors and clients are in the market place and set their own contractual fee and service conditions. The court through its establishing of Tariffs is meant to provide a reasonable level of recovery of party and party costs. It should be remembered that party and party costs are not legal fees but rather the property of the party. See **Roose v. Hollett et al.** (1996), 147 N.S.R. (2d) 295 (C.A.). In the vast majority of situations recently I find that the requests for increased costs in chamber's applications are tantamount to a request for a high portion of costs on a solicitor and client basis and the law is very clear as to what is required before a court ought to exercise its discretion in awarding solicitor and client costs. The court should not take the position of approving of the escalation of legal fees and should adhere in almost every case to the new Tariffs which are meant to provide a high level of certainty to litigants as to the degree of recovery they can reasonably anticipate should they be the recipient of an award of costs or as to the costs the party may be called to pay if unsuccessful.

[24] Circumstances of each chamber's matter will dictate whether or not there should be consideration of an exercise of discretion beyond the chamber's Tariff

Scale. For example, the complexity of the matter must be of some magnitude because one would reasonably anticipate that there is some level of complexity to a chamber's application, either in law and, or, fact, otherwise the matter ought to have been one capable of resolution.

[25] The mere existence of one or more of the factors noted does not, of itself, warrant departure from the updated Tariff or chamber's party and party costs. It is the level of exceptional services required that will result first in whether or not there should be exercise of discretion to depart from the chamber's Tariff and, secondly, the degree to which any judicial discretion should depart from the chamber's Tariff.

CONCLUSION

[26] This was a Chambers Application of importance to all parties, nevertheless it commenced at 9:30 a.m. and completed at 12:12 p.m. It was commenced by an originating application inter parties November 23, 2007. The parties filed briefs and there were affidavits filed upon which cross-examination took place. There was nothing unusual with respect to this half day Chambers Application. I would

comment that when counsel seek to establish special circumstances warranting a departure from the Tariffs, it is almost always advisable that a clear record of the time, experience, hourly rates and services performed be provided to the court. I am satisfied in this particular case that, even if I had such, my determination would not be any different than the conclusion it was a Chambers Application within the Tariff and I tax and allow the Armour Group Limited party and party costs in the amount of $950 plus disbursements.

J.