IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General), 2008 NSSC 322

Date: 20080318
Docket: SH 184701
Registry: Halifax

Between:

Cherubini Metal Works Limited, a body corporate

Plaintiff

v.

The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia, The United Steel Workers of America and The United Steel Workers of America, Local 4122

Defendants

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	March 18, 2008 in Halifax, Nova Scotia
Decision:	March 18, 2008 (Orally) (Re Costs)
Written Release of Decision:	November 21, 2008
Counsel:	Michelle C. Awad, for the plaintiff, Cherubini Metal Works Limited Bettina Quistgaard, for the defendants, United Steel Workers of America and the United Steel Workers of America, Local 4122

Coughlan, J.: (Orally)

[1] Cherubini Metal Works Limited sued the United Steel Workers of America and the United Steel Workers of America, Local 4122 for negligence, conspiracy and intentional interference with economic interests. Cherubini also sued the Attorney General of Nova Scotia, claiming the Attorney General conspired with the Unions to harm Cherubini's business interests and inferred with its economic interests. It was a complicated proceeding involving disclosure of numerous documents and discovery of twenty-seven witnesses during the period May 10, 2004 to December 7, 2005. The plaintiff amended its statement of claim on two occasions. The proceeding involved novel claims. It was subject to case management.

[2] I heard a number of Chamber applications.

[3] Cherubini applied for an order at the time of his discovery, Cal Luedee, was an officer, director or manager of a party that is a corporation, partnership or association and that part or all of his discovery evidence, as far as admissible under the rules of evidence, may be used by Cherubini, pursuant to Civil Procedure Rule

18.14(1)(b). The defendant Unions opposed the application. The application was dismissed. The application took approximately one half day to argue.

[4] Cherubini issued notices of examination for discovery of two members of the Board of Examiners appointed pursuant to the *Stationary Engineers Act*, R.S.N.S. 1989, c. 440. The Attorney General applied to have the notices of examination struck. The application was allowed and the notices struck. The Unions did not make submissions. The application took approximately one half day to argue.

[5] The Attorney General applied for an order that Cherubini, by reasons of issue estoppel, was estopped from relitigating matters and issues already determined or decided by various orders or decisions issued by the Department of Environment and Labour or the Minister of that Department. The Unions supported the application, making written and oral submissions. The application took approximately one day to argue. The application was dismissed.

[6] The Unions applied for summary judgment of Cherubini's claims against them. The application took two days to argue. There was no cross-examination on

the affidavits filed in the application. The Unions submitted Cherubini's claim against them should be dismissed as the matters in dispute arose from the collective agreement between Cherubini and the Local Union, and were within the exclusive jurisdiction of the grievance and arbitration process established under the agreement. The application was dismissed. On appeal, it was held Cherubini's actions against the Unions were within the exclusive jurisdiction of the grievance and arbitration process provided for in the collective agreement, and Cherubini's action against the Unions was dismissed.

[7] The order of the Court of Appeal provided, concerning costs:

> AND IT IS FURTHER ORDERED THAT the respondent shall pay to the appellants their costs of the application before the chambers judge in the amount of $6,000.00 as fixed by him and that any costs paid by the appellants under the judge's order should be refunded;
>
> AND IT IS FURTHER ORDERED THAT the issue of the costs of the action is referred to Coughlan, J. to be dealt with as if he had granted the appellants' summary judgment application and dismissed the action.

[8] In addressing the issue of costs, the Unions say Tariff A, "Tariff of Fees for Solicitors' Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding" should be used and Tariff A applies to applications, including

applications for summary judgment. They submit both the old Tariff (for proceedings commenced on or after January 1, 1989) and the new Tariff (effective September 21, 2004) are relevant to costs in this case. The action was commenced August 20, 2002. While the old Tariff was in force, defences were filed, documents were disclosed and almost half of the oral discoveries were conducted. However, after the new Tariff came into force, Cherubini made very significant amendments to its claim, including new causes of action and factual allegations, necessitating further discoveries and adding to the complexity of the proceeding. In the circumstances, the Unions submit it is appropriate to "split the difference" between the old and new Tariff.

[9] The Unions say the amount involved should be set at $5,000,000.00. The Unions say the damages claimed were at least $5,000,000.00. The action involved numerous complex and serious issues which increased the costs of defending the action. The claims against the Unions were unprecedented and of utmost importance to the Unions as the claims, if successful, would have broadened liability of Unions.

[10] The Unions say Scale 5 under old Tariff A, and Scale 3 under new Tariff A should be used. When costs are calculated and the difference split, it results in a figure of $322,125.00 after subtracting the $6,000.00 already awarded.

[11] Fees incurred by the Unions in the action, excluding fees associated with the appeal and application for leave to appeal to the Supreme Court of Canada, are $510,387.25 plus HST of $76,169.57 for a total of $586,556.82. No issue as to the reasonableness of the fees was raised.

[12] Cherubini says the old Tariff applies to this proceeding. It was not substantive success which brought the Supreme Court action to an end, but rather a determination of the forum for the issues to be heard. Cherubini submits the Unions should not receive any additional costs; but if additional costs are awarded, they should be in the range of $7,500.00 to $10,000.00.

[13] The Unions reply there are no remaining tort claims, the Arbitrator has no jurisdiction to entertain independent tort claims, and the Arbitrator does not have jurisdiction to award legal costs.

[14] I am to make an award of costs appropriate under all of the circumstances of this proceeding. In making my decision, I consider all of the circumstances of the proceeding including:

[15] Cherubini's claims against the Unions in the Supreme Court ended with the determination the claims arose out of the collective agreement and were in the exclusive jurisdiction of the grievance and arbitration process provided for in the collective agreement.

[16] The proceeding in the Supreme Court ended as a result of a summary judgment application, not a trial. If this proceeding had gone to trial, it had been set down for a trial of 31 days.

[17] The summary judgment application was determinative of Cherubini's claims against the Unions in the Supreme Court. Cherubini's claims against the Unions in the Supreme Court ended as a result of the determination the Supreme Court was not the appropriate forum to hear the claims.

[18] In making the summary judgment application, the Unions submitted it was not an application for summary judgment on the merits of Cherubini's actions, stating the application only engaged facts not in dispute but material for the preliminary issues of law.

[19] Although the Supreme Court action is ended, the grievance and arbitration process provided for in the collective agreement is being used.

[20] The grievance and arbitration process will deal with the dispute between Cherubini and the Unions. The documents produced by the parties can be used in the arbitration process pursuant to the collective agreement. The discoveries held provide information that can be used in the arbitration. The dispute between Cherubini and the Unions continues in the grievance and arbitration process, and the product of the discoveries and production of documents will be used in that process.

[21] I have considered both the old and new Tariffs.

[22] I was referred to the case of *Smith v. Michelin North America (Canada) Inc.*, (2008) N.S.S.C. 66, which dealt with an application to have Michelin pay $268 million into the Michelin pension fund. Hood, J. awarded costs of $500,000.00, plus disbursements. *Smith v. Michelin North America (Canada) Inc., supra,* is different from this case. Commenced by an originating notice (application inter partes) it was the final hearing of the application. It was unlike the present case, which is a summary judgment application decided on the basis the Supreme Court did not have jurisdiction to hear the matter, and the dispute between the parties continues in another forum.

[23] The Unions submit the "amount involved" in this proceeding is at least $5,000,000.00. The amount claimed is not always the amount used by the court when determining costs after a trial. However, it is clear the amount involved here is substantial. In the particular circumstances of this proceeding, dealing with costs on the basis of "amount involved" and Tariff A is not appropriate as although the Supreme Court action is finished, the dispute between the parties continues, and the evidence from the discoveries and documents produced will be used in the hearing of the merits of the dispute between Cherubini and the Unions in the arbitration process.

[24] The application which ended Cherubini's claims in the Supreme Court was a chambers application. The application falls within the type of proceeding dealt with by Tariff C of the new Tariff. Tariff C of the new Tariff addresses how a court is to deal with chambers applications, and in particular, applications in chambers which are determinative of the proceeding. The action having commenced August, 2002, the old Tariff applies. However, the new Tariff gives guidance as to taxation of costs in chambers applications. Tariff C provides:

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 1/2 day	$750 - $1000
More than 1/2 day but less than 1 day	$1000-$2000
1 day or more	$2000 per full day

[25] The summary judgment application was determinative of Cherubini's claims against the Unions in the Supreme Court. The action was of the highest importance to the Unions. The issues in the application were complex and extensive material was filed in support of the application. The application was at the high end of the scale of the factors to be considered in cl. 4 of Tariff C. The summary judgment application took place over two days, and the highest end of Tariff C, four times $2,000.00 per day for two days is $16,000.00.

[26] In addition, I have to consider the other applications made in the proceeding as set out earlier in this decision, and under all the circumstances of the case what award of costs is just and appropriate. Besides the applications I heard, there would have been some steps taken by the Unions which relate solely to the Supreme Court action and are not referable to the grievance and arbitration process. These have not been detailed. Considering all of the circumstances, I award the Unions costs in the amount of $40,000.00. The $6,000.00 already awarded by the Court of Appeal is to be deducted from the $40,000.00.

[27] I received a list of disbursements claimed by the Unions. The particulars of the disbursements do not break the disbursements down into disbursements the product of which may be used in the grievance and arbitration process, and disbursements solely incurred in connection with the Supreme Court action. The Unions will recover their disbursements which are incurred in connection with the Supreme Court action and which cannot be used in the grievance and arbitration process. If the parties cannot agree on the amount of such disbursements, I will receive submissions from them on the issue.

Coughlan, J.