SUPREME COURT OF NOVA SCOTIA
Citation: Taylor v. Dairy Farmers of Nova Scotia, 2011 NSSC 160

Date: 20110421
Docket: Tru 314398
Registry: Truro

Between:

Paul Taylor, Doug Bacon and Bacon Farms Limited

Applicants

v.

Dairy Farmers of Nova Scotia, a body corporate, and
Attorney General of Nova Scotia, representing Her Majesty
The Queen in right of the Province of Nova Scotia

Respondents

DECISION ON COSTS

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	By written Submissions
Final Written Submissions:	March 23, 2011
Counsel:	Douglas A. Caldwell, Q. C. , and Ellen Sampson for the Applicants Charles A. Thompson, for the respondent, Dairy Farmers of Nova Scotia Agnes E. MacNeil, for the respondent Attorney General of Nova Scotia

By the Court:

Background

[1] The applicants are Nova Scotia dairy producers who brought an Application in Court to challenge regulations enacted on the direction of their governing body, the respondent Dairy Farmers of Nova Scotia (DFNS). Those regulations provide mechanisms to adjust a producer's non saleable and saleable milk quota. They also create a capped price for the exchange of saleable milk quota. The capped price is being phased in over a period that commenced in August 2009. At the end of the phase in period, July 2012, there will be a maximum value established that is below the value currently being obtained in trading on the quota exchange. The applicants argued that these changes would cause a significant negative financial impact on them, equivalent to a $410,000 loss of value in their quota price.

[2] The Attorney General of Nova Scotia joined in as a respondent. The matter proceeded on the basis of affidavit evidence and was heard over a period of two days.

[3] In my decision, reported as *Taylor v. Dairy Farmers of Nova Scotia* 2010 NSSC 436, I identified the issue posed by the application as follows:

Issue

> 23 Are Regulations 12(2)(c) ,12(2)(d) and 21 of the **Total Production Quota Regulations** N.S. Reg 255/2009 (July 21, 2009), made under clause 14(1)(e) of the **Dairy Industry Act** S.N.S. 2000, c. 24 (DIA) *ultra vires* and so invalid?

[4] I concluded that the regulations were valid and the application was dismissed. The parties were invited to provide written submissions as to costs, in the event that they were unable to agree among themselves. The applicants and the Attorney General were successful in that endeavour, however the applicants and respondent DFNS cannot agree on the quantum, or the mechanism, to establish an appropriate costs result.

Applicable Rules

[5] The court has a general discretion with respect to the payment of costs and may make any order that satisfies the court that will do justice as between the parties. *see,* **Nova Scotia Civil Procedure Rule 77.02**

[6] The court has a number of options available to it in exercising this general discretion. **Rule 77.03** provides that the court may make an order directing the parties to bear their own costs, pay costs to another on a party and party basis or on a solicitor and client basis. **Rule 77.06** directs that party and party costs must, unless otherwise ordered, be fixed in accordance with the tariffs determined under the **Costs and Fees Act** R.S. c. 104. **Rule 77.08** provides a discretion to the court to award lump-sum costs instead of tariff costs. Of these various provisions it is **Rule 77.06** that provides the starting point for assessing the costs payable. It reads, in part:

> Assessment of costs under tariff at end of proceeding
>
> 77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the Costs and Fees Act, a copy of which is reproduced at the end of this Rule 77.
>
> **(2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.**

(Emphasis added)

[7] The positions taken by the parties trigger a consideration of the following parts of **Tariff A**:

> TARIFF A
>
> Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding.
>
> In applying this Schedule the “length of trial” is to be fixed by a Trial Judge. The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

Amount Involved	Scale 1(-25%)	Scale 2 (Basic)	Scale 3 (+25%)
$25,000-$40,000	4,688	6,250	7,813
$300,001-$500,000	26,063	34,750	43,438

[8] The debate between the parties is in the calculation of the “amount involved”. Their divergence stems from the following preface to the Tariffs:

> TARIFFS OF COSTS AND FEES DETERMINED BY THE COSTS AND FEES COMMITTEE TO BE USED IN DETERMINING PARTY AND PARTY COSTS
>
> In these Tariffs unless otherwise prescribed, the “amount involved” shall be

(a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to

(i) the amount allowed,

(ii) the complexity of the proceeding, and

(iii) the importance of the issues;

(b) where the main issue is **a monetary claim which is dismissed,** an amount determined having regard to

(i) the amount of damages provisionally assessed by the court, if any,

(ii) the amount claimed, if any,

(iii) the complexity of the proceeding, and

(iv) the importance of the issues;

(c) where there is a **substantial non-monetary issue** involved and whether or not the proceeding is contested, an amount determined having regard to

(i) the complexity of the proceeding, and

(ii) the importance of the issues;

(Emphasis added)

[9] The applicants say that the application involved " a substantial non-monetary issue".

[10] DFNS submits that the main issue was "a monetary claim" totalling $410,000, being the amount alleged by the applicants as the anticipated loss of value that would be generated by the imposition of the price cap. The respondents rely upon the evidence of Messrs. Taylor and Bacon that speaks to this. For ease of reference, I include the following from my decision which explains that evidence more fully:

> 20 The applicants are licenced milk producers in Nova Scotia, members of the DFNS, and holders of substantial amounts of quota that has been acquired over decades spent working in the dairy industry. They claim that the effects of TPQ Regulations 12 and 21 generate very substantial losses to producers like them, and that there is no provision to compensate them for those losses.
>
> 21 Mr. Bacon's evidence, for example, is that by reducing the price cap from $30,000 to $25,000 per kg, Bacon Farms Ltd. stands to lose $240,000 based on his 48 kg of quota. This is a notional loss, since the price per kg has been less than $30,000 for some time.
>
> 22 It is fair to say, however, that there has been a financial consequence to those producers who in past years paid the higher quota prices. Again, by way of example, the evidence is that Bacon Farms Ltd. made purchases of quota in 2004-2006 at prices over $33,000 per kg. thus demonstrating the negative consequences that the cap can generate. The evidence shows that, because of the longevity of that enterprise, the overall average price for quota paid by Bacon Farms has been not greater than an average of $18,248 per kg.
>
> ...

> Quota as "property"
>
> 44 What, the applicants argue, is being lost is not the actual quota but the theoretical loss of a portion of value of the quota. There is an assumption that quota prices, in an unregulated market will only rise, not fall. That notional value is an intangible asset. It is not determinative of my conclusion whether the alleged "property" is the actual quota, or the notional value of the quota. The analysis is the same.
>
> ...
>
> 84 I am asked to say that the "opportunity" to achieve a price that is higher than the maximum cap price is property and which is being taken away without compensation. Even if true, it does not put that opportunity, or any notional value attached to that opportunity into the pocket of the state. The state acquires nothing. The impugned quota regulations are an exercise of regulatory authority and not an act of expropriation.

[11] I conclude that the “amount involved” would properly be fixed in accordance with paragraph (c) of the Preface to the Tariffs. i.e., “ a substantial non-monetary issue”

[12] Irrespective of the result of the application, the consequences of the decision are likely to contribute to a significant economic impact on the dairy production industry as a whole, and on the individual producers.

[13] Evidence as to potential financial losses was adduced in the context of assessing whether quota could be considered “property” that was capable of expropriation. To that end it was relevant and material, but it could not form the basis of a damage assessment that was not pleaded.

[14] Paragraphs (a) and (b) of the Preface apply where there was a “monetary claim”. There was no such “claim” in this application. Further, these paragraphs presuppose that the court had the authority to quantify a claim in damages. That was not possible nor sought in this case. The issue before the court was solely one of legislative interpretation.

[15] For these reasons costs will be assessed on the basis of “an amount determined having regard to (i) the complexity of the proceeding, and (ii) the importance of the issues.”

Positions of the Parties

[16] The applicants submit that costs should be calculated in accordance with a line of authorities that outline a “rule of thumb” for determining costs. The concept was discussed by Dellapinna J., in *Urquhart v. LeBlanc* 2009 NSSC 324:

> 12 This case involved a non-monetary issue i.e. the relocation of the children. In *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (S.C.N.S.) Goodfellow J. suggested that in cases such as this when determining "the amount involved" proved difficult or impossible one could turn to a "rule of thumb" by equating each day of trial to the sum of $15,000.00 in order to determine the amount involved (para. 79). Justice Lynch of this Court in *Jachimowicz v. Jachimowicz* (2007), 258 N.S.R. (2d) 304 considered it appropriate to raise the daily rate to $20,000.00 to reflect the increased cost of litigation since the *Urquhart* decision (para. 26). That approach results in a cost figure ranging from $9,188.00 under Scale 1 up to $15,313.00 under Scale 3 before considering any other factors.

[17] Relying on this “rule” the applicants submit that the “ amount involved” is $40,000 (two court days at $20,000 per day), resulting in costs on **Tariff A** at Scale 2 (Basic) of $6,250 plus $2,000 for each day of hearing for a total of $10,250.

[18] The respondent DFNS rejects the application of this “rule” as inappropriate. It says that it has been specifically rejected by the court in *Chisolm v Nova Scotia* 2009 NSSC 29 where Murphy J., stated:

> 16 ... However, I do not subscribe to the Defendants' theory that amount in issue should be a per diem value based on trial length - that factor is addressed in the $2,000.00 daily costs component in the tariff and its' use to determine "amount involved" would be artificial. ...

[19] DFNS submits that the "rule of thumb" fails to adequately recognize the costs incurred when the matter proceeds by an application in court under **Rule 5,** instead of as a trial.

[20] In the context of this case, there were three days of discoveries, the transcripts of which were tendered in part on the application as a means of limiting the necessity for cross examination in the hearing. The preparation of affidavits for five witnesses with a number of exhibits attached was as time consuming, or moreso, for counsel preparing for the application as it would have been if presenting that same evidence in a trial. Counsel submits that a trial would have taken four or five days which would, I infer, generate a calculation of costs more consistent with the work required.

[21] The further evidence of the flaw in the "rule of thumb" approach, says the respondent, is that the actual legal costs of DFNS for the period July 29, 2009 to

December 31, 2010 is $33,559 plus HST. The amount proposed by the applicants would be less than a third of the actual costs. This result would be contrary to judicial statements that a successful party should recover a “substantial contribution” toward their reasonable expenses, though not amounting to a complete indemnity. *see, Williamson v. Williams* 223 N.S.R. (2d) 78, at para. 24; *and see* para 25, where Freeman J.A., writes:

> 25 In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable.

[22] Warner J., writing in *Geophysical Services Inc. v. Sable Mary Services Inc.* 2010 NSSC 357, at para. 19 adopted this position. The court, in that case went on to conclude that a lump sum award of costs was another means by which the court could arrive at an appropriate award of costs. The authority for this approach was set out as follows:

> 20 As illustrations of the exercise of discretion in support of lump sum awards, GSI refers the Court to:
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> * *Wall v. Horn Abbot Ltd*, 2008 NSSC 4

* *Campbell v. Jones*, 2001 NSSC 139

* *Conrad v. Snair*, [1996] N.S.J. No. 164, 1996 CarswellNS 170 (N.S.C.A.)

* *D W Matheson & Sons Contracting v. Canada*, [1999] N.S.J. No. 163, 1999 CarswellNS 139 (N.S.S.C.)

* *Founders Square Limited v. Nova Scotia (Attorney General)*, [2000] N.S.J. No. 220

* *Newfoundland Processing Ltd v. DGH Construction Ltd*, [1994] N.J. No. 156, 1994 CarswellNfld 311 (Nfld. S.C.).

[23] DFNS concludes that an appropriate award of costs, having regard to the complexity of the matter, the conduct of the parties, the importance of the issues, the $410,000 amount involved and the actual legal expenses incurred should result in an award of $25,169, or 75% of the actual legal costs. In saying this DFNS acknowledges that an award of costs on Tariff A, using an “amount involved” of $410,000 would be excessive.

Analysis

[24] I have concluded that the applicants are correct in that this application involved a non monetary issue. I do not agree that the calculation of costs on the basis they propose results in justice as between the parties.

[25] The application involved complex matters of legislative interpretation that had to be assessed against a detailed factual and legal history of supply management and quota systems in Canada, and more particularly the dairy production industry in Canada and Nova Scotia. The respondents were successful in their arguments as to each of the questions raised which may be summarized as:

- whether Regulations 12 and 21 of the **TPQ Regulations** are *intra vires* and valid as being a lawful exercise of legislative authority delegated to the DFNS by the Natural Products Marketing Council pursuant to the Dairy Industry Act and the Delegation of Powers to Dairy Farmers of Nova Scotia Regulations.

- whether quota, for the purposes of interpreting Regulations 12 and 21 of the **TPQ Regulations** is "property", capable of expropriation by "de facto taking".

- whether there was an acquisition of “property” by the state;

- whether the statute intended to cap the quota price, without compensating the quota holders for any loss of value.

[26] The parties agree that the issues were important.

[27] Evidence and submissions of the parties emphasized that the quota system and how it is administered is seen as a cornerstone of the supply management system in the industry. The parties disagree as to whether quota price caps will help or hurt the sustainability of the industry. The dispute aired out in this application was a reflection of that philosophical and economic debate. It has been suggested by the DFNS that as much as $80 million was at stake for the producers of Nova Scotia.

[28] The determination, in the decision, of whether producers "own" and the extent to which they control quota, impacts on the ability of the producers to use quota as a financing vehicle.

[29] A number of other provinces have implemented quota price caps. The decision in this case was represented by the parties to be an important precedent for

other provincial regulatory regimes, some of which act in cooperation with the Nova Scotia industry under pooling agreements.

[30] Even if I were to award costs on Scale 3 of Tariff A for a sum of $40,000 it would result in an amount of $7,813 plus $4,000 for a total of $11, 813. That is not an adequate contribution to the reasonable costs of the respondent.

[31] I have concluded that a lump sum award provides the most just result having regard to the facts as I have set them out.

[32] I award costs payable by the applicants to the respondent DFNS in the lump sum amount of $17,000.

Previous Costs Award

[33] After ruling in a pretrial motion, Moir J. awarded costs in the amount of $1,000 payable by the applicants to the respondent DFNS. The parties agree that this amount is in addition to the amount of costs awarded for the hearing of the application.

Disbursements

[34] DFNS seek an order for the payment of disbursements in the amount of $1,781.76. The applicants do not take issue with this claim.

Conclusion

[35] The applicants will pay costs to DFNS in the amount of $18,000 plus disbursements of $1,781.76 for a total of $19,781.76.

[36] Order Accordingly.

Duncan J.