SUPREME COURT OF NOVA SCOTIA
Citation: A.B. v. Bragg Communications Inc., 2010 NSSC 356

Date: 20100928
Docket: Hfx. No. 329542
Registry: Halifax

Between:

A.B., C.D.

Applicants

v.

Bragg Communications Incorporated, Halifax Herald Limited

Respondents

DECISION ON COSTS

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	May 26, 27, 28, 2010, in Halifax, Nova Scotia
Counsel:	Michelle Awad, Jane O'Neill and Daniel Wallace, for the applicants Nancy Rubin, for the The Halifax Herald Limited Alan Parish, Q.C., for Global Television No one appeared for Bragg Communications

By the Court:

[1] This is an application for costs by the Chronicle Herald and Global Television in respect of an application by the applicants for a publicity ban and the right to use a pseudonym. The applicants also sought an abridgment of time and an order directing the respondent to produce the internet protocol address of a certain account holder. The respondent did not oppose the application, but the Chronicle Herald and Global Television, as Intervenors, opposed the part of the application dealing with publicity ban and the use of pseudonym.

[2] The applicants were successful in their application for an order for abridgment of time and disclosure of the electronic address. However, it was necessary to adjourn the application as the applicants had not provided any submissions on the aspect of the application dealing with the publicity interest.

[3] Only the Chronicle Herald was present with counsel at the initial hearing. Global Television appeared in opposition to the application at the adjourned hearing.

[4] The matter was heard over two half days. The decision was rendered on May 28, 2010, and several additional appearances were required to deal with the continuation of the stay until the applicants had an opportunity to appear before the Nova Scotia Court of Appeal to seek a continuation of the stay.

[5] The Chronicle Herald relies on *Bennett v. Bennett* [1981] 45 N.S.R. (2d) 683 (T.D.) for the proposition that costs follow the result unless there is a very good reason to deviate from the standard practice. The Herald contends that the underlying application did not raise any new point of law and therefore there is no basis to argue that the court should deviate from the general rule. Furthermore, the Herald claims that the Court should award costs on the trial Tariff, namely Tariff A, on the basis that an application in chambers is equivalent to an application in Court and that the matter before the Court was not an interlocutory motion but rather an originating application. The Herald relies on Rule 77.07(2)(e), arguing that the tariff should be increased because the applicant failed to justify her failure to file in accordance with the rules and, secondly, because the applicant was ill-prepared to argue the confidentiality issues, thereby requiring an adjournment. The Herald argues that costs in the amount of $6250 would be appropriate, based on an "amount involved" of $30,000, on the scale of Tariff 2. As an alternative,

the Herald request $5000 in costs under Tariff C for cumulative appearances amounting to more than one day multiplied by two. Finally, the Herald requests that costs should be awarded either against the litigation guardian or against the applicants' counsel.

[6] Global Television maintains that it is entitled to costs because it was successful in the application and submits that, as there are no unusual circumstances, the Court should not deviate from an award of costs. Global maintains that the applicant should not have sought an abridgement of time and that an adjournment would not have been necessary if the applicants had been prepared to address the portion of her application dealing with the publicity interest on the merits from the outset. There was no basis to request an abridgment of time because the Facebook page had already been removed. Both the abridgement of time and adjournment added to the inconvenience of counsel, requiring them to make themselves available on short order. Global seeks costs an amount similar to the Herald.

[7] The applicants argue that intervenors usually are not awarded costs, as they are not successful parties. They are simply intervenors that participated in the

application and hearing. The applicants cite *Tauber v. Tauber* (2004), 10 R.F.L. (6th) 19, where court refused to award costs to the intervenors.

[8] The applicants also argue that since it was successful in the principal part of the application, namely the production of the internet protocol address, and that the applicant had no control over the intervenors' decision to intervene, the court should not depart from the general rule on cost to intervenors. Furthermore, the applicants argue that there is no authority to support the Herald's calculation of the time and effort expended on this application Alternatively, should the court decide to award costs, it is submitted that such an award should be based on Tariff C, for an appearance of less than one half day.

Analysis

[9] Although the applicants were successful in the principal part of the application, they were unsuccessful in the aspects of the application that were opposed by the Chronicle Herald and Global Television.

[10] It is noteworthy that the Chronicle Herald and Global Television were not parties to the principal application. They only appeared as intervenors in respect of the publicity interest application.

[11] The general rule with respect to costs and intervenors is "that the intervenors are not awarded costs, nor are costs awarded against them": see *Toronto Police Association v. Toronto (Metropolitan) Police Services Board*, [2000] O.J. No. 2236 at para. 7; *Tauber*, *supra* at para. 11; *Evans Forest Products Ltd. v. British Columbia (Chief Forester)*, [1995] B.C.J. No. 1515 at para. 6; *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832* (1990), 70 Man R. (2d) 59. "The Court has power to award costs for, or against, intervenors..., however, it appears that it is not the usual practice of the court to award such costs,": *University of British Columbia Faculty Association v. University of British Columbia*, 2009 BCCA 56 at para. 4.

[12] The rationale or underlying principle for this general rule was precisely stated by Ferg, J. in *Metropolitan Stores* at para. 11: "A private party should be permitted to have a constitutional determination without being exposed to very substantial costs of another strange, albeit, interested party which chooses

voluntarily to stick its nose into the fray". A similar conclusion was reached in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General*), [2001] O.J. No. 1110 at para. 18, where the Court recognized that the intervenors' interest were clearly affected by the litigation but that they were not a mandatory party to the proceedings, and were therefore not entitled to a deviation from the normal rules on costs for or against intervenors.

[13] Justice Davison stated in *Hines v. Nova Scotia(Registrar of Motor Vehicles)* (1990), 105 NSR (2d) 240:

> Undoubtedly there are situations where a party is added as amicus curiae where the awarding of costs both for or against the intervenor would be inappropriate. Undoubtedly there are some situations where the intervenor is added as a party where costs should not be awarded. These will depend upon the discretion of the court which will consider all of the circumstances including whether the interest of the intervenor is private or public.
>
> Again, it is significant to note that the function of the courts have changed and they are being asked to broaden their role. The extent to which parties directly involved in the litigation, who may have no control over the intervention, should bear the costs of the intervenor will depend on the circumstances in each case.

[14] Although the Herald and Global argue that the principle that costs should follow the results also applies to them as intervenors, I find no general rule of law that suggests that to be the case. It appears to me that the general rule that applies

to the intervenors should not be an award of costs in their favour, nor should costs be awarded against them unless there is very good reason to deviate from this practice. Therefore, the issues that must be addressed are whether the nature of this application modifies the general rule regarding costs and intervenors, and whether the Herald and Global Television have demonstrated a very good reason to deviate from the general rule, modified or otherwise.

[15] It must be remembered that the respondent in this application did not oppose any of the orders sought. With respect to the application for the use of pseudonyms and the publicity ban, this had no effect on the respondent because the respondent was being asked to disclose an internet protocol address. However, the request for a publicity ban and the use of pseudonyms directly affected the interests of the news media. The *Nova Scotia Civil Procedure Rules* recognize the interest of the media on such issues, such that there was a need to give the media notice of the application. It is important to remember that the media has both a public and a private interest in such an application. As I indicated in my decision, it is important for the public to be mindful of how social networking programs work and how they can be destructive to the public and particularly to young persons. Therefore, publication serves to protect the open court principle.

[16] It is clearly understood that the news media also has a private interests, namely that they are in the business of selling stories which, unfortunately, is made much easier the more salacious and outrageous details. Even though the media is good gatekeeper for the open court principle, that is not to say that their attendance was absolutely necessary, as it is likely that without their participation in the hearing, the Court would be mindful of the various interests at play before making a final decision as to whether or not to grant the application in question.

[17] It is important to underline the fact that this application was initiated for the benefit of a child. This does not mean that every application on behalf of a child should not result in an order of costs if the application is denied. However, children should not be dissuaded by the threat of costs from making a request for their protection of the privacy. If costs are awarded against the applicant, this could have a chilling effect in circumstances such as this, where a litigant is attempting to protect their private interests. That is not to say that the child is always immunized from an award of costs, but the fact that the applicant is a child is an important factor to weigh in determining whether costs children should not be

awarded. In other words, the burden on the Intervenors becomes heavier to displace a deviation from the general rule of the costs and Intervenors.

[18] It is my view that the position of the Herald and Global that costs should follow the result should not be observed in this case. Nonetheless, it is important to consider whether in any event costs should be awarded to them nonetheless..

[19] The Herald and Global claim that given the lack of proper notice and the need for an adjournment, it was necessary for them to spend a considerable amount of effort to prepare for the hearing with an abridged time period. The applicants did not provide any explanation or justification for abridging time. Secondly, the intervenors point out that the application had to be adjourned as the applicants did not provide proper brief of the law as required by the Rules. As a result, the applicants were permitted to file a supplementary brief which necessarily resulted in the intervenor, the Herald, filing a supplementary brief of its own. As a result of the adjournment, Global had an opportunity to file its own brief, which had not been filed earlier because Global had not appeared at the initial hearing.

[20] Although I did permit the application to be heard within the abridged time period, there was no adequate explanation as to the need for counsel to be granted an adjournment to prepare and file a supplementary brief dealing with the privacy issue. The fact that there was a need for an adjournment to allow the applicants' counsel to provide a supplementary brief dealing with the privacy issues, in my opinion, takes these circumstances outside of the general rule that costs should not be awarded to intervenors.

[21] Although I am prepared to agree with the contention that this application was more in the form of a trial rather than a motion where Tariff C applies, in the circumstances it is my view that an award of $1500 to the Herald and $750 to Global Television would be appropriate. I award the costs primarily on account of the need for an adjournment to allow the applicants to file a supplementary brief, requiring the Herald to file a supplementary brief in reply. But for this absence of any meaningful material from the outset there would be no need for an adjournment, thereby avoiding a further half day of court time to dispose of the application.

[22] However, I am declining to award costs against counsel in the circumstances of this case. Rule 77.12(2) permits the Court to award costs against counsel where there is improper or negligent conduct. There is no basis for me to make a finding of either improper or negligent conduct in the matter before me.

J.