SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Foster-Jacques v. Jacques, 2011 NSSC 405

Date: 20111101
Docket: 1201-064463, SFHD-069582
Registry: Halifax

Between:

Sharon Foster-Jacques

Petitioner

v.

Hector Jacques

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Written Submissions:	From Sharon Foster-Jacques dated September 30, 2011, Hector Jacques dated October 18, 2011, Coltsfoot Publishing Limited dated October 12, 2011 and October 19, 2011
Counsel:	Gordon R. Kelly, for Sharon Foster-Jacques; William L. Ryan, Q.C., for Hector Jacques; Alan V. Parish, Q.C., for Coltsfoot Publishing Limited

By the Court:

[1] On February 18, 2011, Coltsfoot Publishing Limited, doing business as Frank Magazine, filed a notice pursuant to Civil Procedure Rule 59.60(4) to obtain access to the Court file in this proceeding.

[2] On March 2, 2011 Hector Jacques filed a Notice of Motion seeking an Order to seal the court file. On March 15, 2011 Sharon Foster-Jacques filed a similar motion. On April 13, 2011, at my request, a conference call was arranged with the parties and the counsel representing Coltsfoot Publishing Limited to discuss whether Rule 85.04 applied to this proceeding and whether notice was to be given to the media pursuant to Civil Procedure Rule 85.05. That phone conference lasted 45 minutes. The formal motion that resulted from this conference was prepared after by counsel for Sharon Foster-Jacques as was the form of notice to be provided to the media about that motion. Counsel for Hector Jacques was consulted about the form of that motion and notice.

[3] A motion was heard on April 28, 2011 to determine whether the provisions of Civil Procedure Rule 85.04 and 85.05 applied to the Motions to Seal filed by the parties. Counsel for the parties and for Coltsfoot Publishing Limited provided written briefs. On April 28, 2011, counsel appeared on behalf of Coltsfoot Publishing Limited to argue in favour of the application of Civil Procedure Rule 85.04 and 85.05. Counsel for the parties

argued these provisions did not apply. This motion hearing lasted 1 hour and 15 minutes. I provided a written decision on May 4, 2011. I decided Rules 85.04 and 85.05 did apply to proceedings in the Supreme Court (Family Division).

[4] On June 28, 2011 I heard counsel for all participants in respect to the Motion to Seal the court file. Counsel for the parties argued in favour of the Motion to Seal the Court file. Counsel for Coltsfoot Publishing Limited took the opposite position. All counsel filed briefs. Counsel for Sharon Foster-Jacques prepared the required notice to the media about the Motions and the date for the hearing. The motion hearing lasted 2 hours and 20 minutes. I provided my written decision on July 13, 2011. I granted the Motion to Seal the Court file.

[5] Counsel for the parties are requesting costs against Coltsfoot Publishing Limited. Coltsfoot Publishing Limited argues that because success on these motions was divided there should be no costs awarded to either party.

[6] All participants agree I am governed in this decision by Rule 77. All participants agree that these motions and the hearings are “chambers matters” to which Tariff “C” would normally be applied.

[7] I have reviewed the Civil Procedure Rules and several decisions commenting on costs, including *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (T.D.*); Campbell v. Jones et al.* (2001), 197 N.S.R. (2d) 212 (T.D.); *Grant v. Grant* (2000), 200 N.S.R. (2d) 173 (T.D.); *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.); *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (T.D.); *Kennedy-Dowell v. Dowell* 2002 CarswellNS 487; *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.); *Jachimowicz v. Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.D.).

[8] Several principles emerge from the Rules and the case law that are relevant to this costs request:

1. Costs are in the discretion of the Court. In particular Rule 77 provides in Tariff C the following text " 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 an appropriate in the circumstances of the application."
2. A successful party is generally entitled to a cost award;
3. A decision not to award costs must be for a "very good reason" and be based on principle;
4. The tariff of costs and fees is the first guide used by the court in determining the appropriate quantum of the cost award;

5. The cost award does not provide a complete indemnity but should contribute significantly towards a parties representation expense.

[9] Counsel for the parties have suggested that my decision, following the hearing held on June 28, 2011, was “determinative of the entire matter at issue in the proceeding” and therefore would justify, under provision (4) of Tariff C a doubling of the range of costs set out in that Tariff. However, proceeding is defined in Rule 94.10:

> In these Rules, unless the context requires a different meaning: “proceeding”, means the entire process by which a claim is started in, and determined by, the court, such as an action, application, judicial review, or appeal;

In reference to applications that may be determinative of a proceeding a note to Tariff C states:

> (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)

[10] I expect the provisions and commentary in Tariff C were made in contemplation of an action or application between the parties. The motions before me did not end this divorce proceeding. However, Rule 94.10 does say “unless the context requires a different meaning”. The motions before me would not have been required if Coltsfoot

Publishing Limited had not requested access to the parties court file. Certainly, it could request to view the file; Rule 59.60(4) provided that opportunity. My decision completely concluded the matters at issue between the parties and Coltsfoot Publishing Limited. In this context it may not be unreasonable to decide that my decision on the Motion to Seal was determinative of the entire issue between those participants. However, in applying the multiplier I also am to consider:

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.

[11] The first motion involving media notice was not complex. It involved an interpretation of the Civil Procedure Rules. The effort involved should not have been more extensive than what is required by motions prepared by counsel in other proceedings.

[12] Applying the principles developed by the Supreme Court of Canada to the particular situation facing the parties in respect to the Motion to Seal, required some thoughtful consideration. The open courts principles have, in the majority of cases, resulted in failure for those who seek to prevent exposure. Understanding how those principles could be applied without completely opening the court file to media scrutiny would require considerable review and analysis. The “effort involved” would primarily be

to read the cases, apply insightful reflection to their lessons and impact, and then write the brief that would bring this information and analysis to the attention of the court. This would have taken time but should not have been an overly burdensome task. This motion cannot be categorized as complex.

[13] Having personal identifier information protected was of importance to the parties as members of the concerned public about whom I took judicial notice in my decision; however, I do not consider it of such importance for it alone to justify the application of a multiplier to the Tariff.

[14] The second motion lasted just short of half day. I will apply Tariff C at the $1,000.00 range for each party. I do not consider the first motion to have been incorporated into the second for the purposes of costs. Coltsfoot Publishing Limited can be considered to be the successful party to that motion although it was brought by the parties to determine the necessity to provide notice to the media. Coltsfoot Publishing Limited engaged counsel to provide the court with an alternate perspective that would not have been available otherwise than from the court's own deliberation. It thus incurred a financial cost that should be recognized. I award Coltsfoot Publishing Limited costs in the amount of $300.00. When these are deducted from the each party's cost award the result is that Coltsfoot Publishing Limited is to pay each party the sum of $850.00.

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Beryl MacDonald, J.