SUPREME COURT OF NOVA SCOTIA

Citation: Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Company Ltd., 2011 NSSC 423

Date: 20111116
Docket: Hfx 347087
Registry: Halifax

Between:

The Communications, Energy and Paperworkers Union of Canada, Local 141

Applicant

v.

Bowater Mersey Paper Company Ltd.

Respondent

Revised judgment:	The text of the original decision has been corrected according to the erratum dated November 22, 2011. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Patrick J. Duncan
Heard:	November 8, 2011, in Halifax, Nova Scotia
Counsel:	Raymond F. Larkin, Q.C., for the applicant
	G. Grant Machum, for the respondent

By the Court:

INTRODUCTION

[1] The Communications, Energy and Paperworkers Union of Canada, Local 141 (applicant/union) represents some of the unionized employees of the Bowater Mersey Paper Company plant located in Queens County, Nova Scotia. Bowater (respondent/company/employer) encountered financial difficulties that resulted in it seeking creditor protection under the provisions of the **Companies' Creditor Arrangement Act** R.S.C., 1985, c. C-36. To come out from under that protection a mandatory reduction of labour costs by 4%, valued at annual savings of $721,000 was required. This was not negotiable. What was negotiable, as between the employer and its unionized employees, was how that saving was to be achieved.

[2] A joint management - union committee, the Local Joint Committee, was struck and a Costs Reduction Plan was agreed to. The union leadership submitted the Plan to its membership who rejected it. The employer took the position that the Plan did not need to be ratified by the general membership and began to implement its' terms.

[3] The union held the opposite view and filed a grievance on April 8, 2011, in accordance with the terms of the Collective Agreement. That grievance alleged that the company was implementing the terms of " a tentative agreement" that was rejected by the membership and so were acting in contravention of the Collective Agreement. The union sought that the company refrain from further implementing the plan and that negotiations be re-opened. The union's objective was to re-negotiate the mechanism by which the necessary cost reductions could be met.

[4] The relationship between the parties was and is governed by the **Trade Union Act** R.S.N.S. 1989, c. 475. At the time of this dispute there was no authority, outside of the courts, by which the Union could attempt to prohibit the employer from proceeding with the implementation of the Plan. In an effort to maintain the *status quo* until the grievance was resolved, the Union filed an application in chambers before this court on April 14, 2011, seeking an injunction, pursuant to section 43(9) of the **Judicature Act**, R.S.N.S. 1989, c. 240. The application was supported by an affidavit of a union Local head, Corey Wentzell, and an Undertaking to indemnify the respondent:

> ... for losses caused by the interlocutory injunction if an arbitrator who finally determines the claim is satisfied that the injunction is not justified in light of the findings on final determination.

The hearing of the injunction application was set for November 1, 2011 which was seen by the Union as too long a delay, so it gave verbal notice to the employer of an intention to make a motion for an interim injunction.

[5] Counsel participated in a Date Assignment Conference with Justice LeBlanc on May 20, 2011 at which time August 2nd was agreed to for the interim injunction motion hearing.

[6] The respondent filed a Notice of Contest on June 2, 2011, but no further documentation. The Notice states that the deadline for the respondent to file an affidavit was "waived" by Justice LeBlanc. The deadline for filing of motion materials by the respondent was July 15.

[7] Other events overtook the court proceedings. The grievance went through the necessary stages in an expeditious fashion and the matter was referred to arbitration. On June 27, counsel for the applicant advised counsel for the respondent that the injunction application would not be proceeding and on July 11,

2011, the Union filed a Notice of Discontinuance of its application. There were no court appearances required of either party.

[8] The Arbitration was conducted on September 2, 2011 and a decision rendered on September 9, 2011. The decision provided a mixed result:

> 28 A proper interpretation of the Collective Agreement/MOA in these circumstances must lead to the conclusion that the Employer had the right to implement the March 3 Plan agreed to by the Local Joint Committee; however, it also agreed to a ratification process with the Union, the failure of which must lead to a re-opening of the Local Joint Committee discussion to determine whether consensus on a revised Plan can be achieved which meets the Union's concerns.

[9] The respondent employer now seeks an award of costs for responding to the injunction application.

POSITION OF THE RESPONDENT

[10] Bowater submits that it is entitled to costs, notwithstanding the discontinuance. Counsel argues that having regard to the circumstances a lump sum of $20,000 is appropriate.

[11] In the alternative, the respondent seeks costs calculated using **Tariff F** in **Rule 77** and that the "amount involved" for making the assessment is $721,000. Applying the formula in that rule would provide for a maximum costs award in the amount of $17,420, which it claims.

[12] The respondent submits that a significant costs award can be justified by considering the importance of the issue to the employer. i.e., its ability to continue operating was at risk; the complexity of the matter; and the actual legal costs incurred by Bowater to defend the application.

[13] Bowater also submits that the course of action taken by the Union was "extremely aggressive" and inappropriate in a dispute that is governed by a Collective Agreement and the **Trade Union Act**, and therefore that the costs award should reflect the court's disapproval of such a tactic.

[14] In describing the applicant's litigation strategy, the respondent criticizes the procedure employed by the applicant suggesting there were other ways to bring the request for an injunction to court that would not have generated so much cost to the parties. Bowater characterizes the outcome of the arbitration and the redrafted

Cost Reduction Plan arising from that process as essentially adopting the employer's position and so the application for an injunction was expensive and unnecessary.

[15] In summary, the respondent seeks costs of $20,000 as a lump sum, or in the alternative $17,420 pursuant to **Tariff F.** The company also seeks its disbursements in the amount of $1678.90 and costs of this motion.

POSITION OF THE APPLICANT

[16] The applicant agrees that costs are available to the respondent but disagrees with the quantum and the underlying reasons upon which the award should be calculated.

[17] The applicant submits that **Tariff C** not **Tariff F** is the basis upon which to calculate costs.

[18] It says that seeking an injunction by application was the only mechanism available to it to attempt to protect the employees' position until the grievance

could be concluded. It stands by its decision to proceed “in chambers” as filed, and not “in court” as the respondent says was more appropriate.

[19] The Union disagrees with the suggestion that an “amount involved” can be employed on the facts of this matter, and that even if one could be calculated it would be in the approximate amount of $75,000 only.

[20] The union agrees that the issue was an important one to both parties, but disagrees with the suggestion that the application was complex.

[21] The applicant takes issue with the completeness of the legal billing record offered by the respondent especially as to whether it can be said that the bill rendered to Bowater by its solicitors is confined only to the preparation of a response to the application and is not attributable to the arbitration instead. The union also compares the apparent work done by counsel for each side and notes that the applicant’s legal bill was a third of that charged by the respondent’s counsel and questions the necessity of the work billed. In this regard it invites the court to look at the record that is before the court in filings and appearances to assess the work done by the respondent’s counsel.

[22] Finally, the applicant submits that the respondent has not provided sufficient particulars of its disbursements upon which a determination of the amount payable can be made.

[23] In summary, the applicant says that costs in the amount of $500 is appropriate. The applicant is willing to pay reasonable disbursements and is prepared to review further particulars of disbursements directly with counsel for the respondent. If the parties are unable to agree then the matter will be returned for my further consideration and disposition.

ANALYSIS: COSTS

[24] The respondent is entitled to costs to be assessed in accordance with the provisions of **Rules 9.06:**

> **Costs**
>
> **9.06** **(1)** A party who files a notice of discontinuance, consent to judgment, or notice of withdrawal must, unless a judge orders otherwise, pay costs of the opposing party in an amount to be fixed under Rule 77 - Costs.

> **(2)** A judge or adjudicator who assesses costs must consider the stage of the proceedings at which the notice or consent was filed, among the other factors under Rule 77 - Costs.

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

[26] In **The Law of Costs** 2nd ed. (Orkin)(Toronto:Canada Law Book, looseleaf) the exercise of this discretion is discussed at page 2-11:

> The discretion is a judicial one to be exercised according to the circumstances of each particular case and based upon material before the court. ...
>
> The principles that should be observed in exercising discretion as to costs have been defined as follows:
>
> > First, the principle of indemnity is a paramount consideration.
> >
> > Secondly, the courts must approach the matter on the basis that encourages settlement of all actions from the outset.
> >
> > Thirdly, the court must discourage actions and defences which are frivolous.

> Fourthly, the court must discourage unnecessary steps in the litigation.
>
> The view has been expressed that costs should not be imposed as a matter of arbitrary or capricious practice by courts, but there should be a consistency of pattern.

[27] The court has a number of options available to it in exercising this general discretion. **Rules 77.03 (1) and (2)** provide 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.

[28] Party and party costs are the basis on which the respondent seeks costs in this case. **Rules 77.06** and **77.07** are relevant:

> **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) ...
>
> (3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with **Tariff C.**

[29] The amount otherwise determined by the Tariffs may be increased or decreased in accordance with the guiding factors set out in **Rule 77.07.**

[30] **Rule 77.08** which authorizes an award of a lump sum provides an alternative means to the Tariffs for assessing the quantum of costs. The respondent argues that this is an appropriate case to do so.

[31] Moir J. set out a very helpful summary of principles of assessing costs in his decision reported as *Bevis v. CTV Inc.* 2004 NSSC 209:

> 13 ... (1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula.

The applicable Tariff

[32] The applicant submits that **Tariff C** is a specific provision that applies to applications in chambers whereas **Tariff F** refers only to "Proceedings" generally. I am urged to conclude that the intention is to exclude an application in chambers from the application of **Tariff F.** *i.e.*, the specific provision should be preferred to the general provision. Certainly, **Rule 77.06(3)** is consistent with this approach.

[33] **Tariff F** would only be of assistance in the event that an "amount involved" can be determined. For reasons that follow, I have concluded that the issue in this matter was a substantial non-monetary issue, and that costs should be fixed by a lump sum award. To the extent that reference to the Tariffs may be helpful, my view is that **Tariff C** would be relevant.

Amount Involved

[34] The respondent submits that, if granted, the potential cost to it of an injunction was valued at $721,000 per year.

[35] The applicant says that the application in chambers sought only an injunction, not damages. Thus, the company was never at risk of losing money as a remedy in the application. It was common ground that the company would achieve a 4% labour costs reduction. What was at issue was how, not whether, the company would save that money. Further, the effect of the Undertaking was to indemnify against such a loss and therefore there was no risk to the company in the event that the company succeeded on the arbitration.

[36] In the alternative, the applicant says that the risk to the respondent, had an injunction been granted, existed only from the time at which an injunction could have been granted to the date of the arbitration. i.e., August 2 (scheduled date of interim injunction hearing) to September 9 (date of Arbitrator's decision). On this basis the risk existed for 38 days with a value of approximately $75,063. If that were so and **Tariff F** applied then the maximum recovery for the respondent would be $5,000.

[37] I am not satisfied that an "amount involved" has been established. I accept that a risk existed for the company but it would seem to have been related to the time at which it would achieve its costs savings, not whether it would do so.

Further, there is no evidence to support a conclusion that the applicant would not have honoured the terms of its Undertaking. To suggest otherwise is pure speculation. The terms of the Plan were implemented and there is no evidence of loss by the respondent even though the Plan became subject to re-negotiation as a result of the Arbitrator's ruling.

Lump Sum

[38] I have concluded that in the circumstances of this case, a lump sum award of costs is the most appropriate way to arrive at a conclusion that does justice as between the parties.

[39] The preface to the Tariffs specifies that where there is a substantial non-monetary issue involved then the court is to consider:

> (i) the complexity of the proceeding, and
>
> (ii) the importance of the issues;

[40] I do not take these to be an exclusive list of considerations and in the absence of an amount involved I take guidance from consideration of a number of factors, beginning with those found in **Tariff C**.

Tariff C

[41] **Tariff C** affirms that costs are to be "just and appropriate" (para. 3).

[42] The parties agree that a hearing would have involved one witness each and that it would have concluded in one day. That would have triggered a costs award of $2000.

[43] Under **Tariff C** paragraph (4) permits application of a multiplier that is determined having regard to:

> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties, and
>
> (c) the amount of effort involved in preparing for and conducting the application.

[44] Application of a multiplier is available where "... an application in Chambers is determinative of the entire matter at issue in the proceeding,".

[45] For reasons that follow, I would not have applied a multiplier in this case.

Complexity of the Proceedings

[46] I agree with the applicant that this was not an unusually complex matter.

[47] The core issue was one of disagreement over questions of contract interpretation. The underlying facts were not contentious except to the extent that the consequences of the interpretation impacted on the "irreparable harm" component of the injunction application. The law is well understood, particularly in the context of labour disputes.

[48] I do not see this factor as supporting an increased award of costs.

Importance of the issues

[49] The issue of the cost reduction was imperative to the financial viability of the plant, and so was as important to the company as to the employees who work there. The granting of an injunction had the potential impact of delaying the implementation of the necessary reduction of labour costs. The issue of an injunction was important to the parties.

Substantial Indemnity/ Amount of effort to prepare and conduct application

[50] Costs are intended to provide a substantial but not a complete indemnity against costs incurred by a successful litigant. Various formulae have been discussed but in general an award that reflects an amount equivalent to 50% but less that 100% has been discussed in the cases. *see, Landymore v. Hardy* (1992) N.S.R. (2d) 410 (N.S.S.C.Tr. D.) and *Williamson v. Williams* (1998) N.S.R.(2d) 78 (N.S.C.A.), at paras. 24-25.

[51] The respondent says that it incurred total legal fees of $62,206.60. It submits that the requested cost order, representing less than a third of that total,

falls within the range of costs awards as a percentage of the actual costs charged to the respondent.

[52] The evidence as to how this account was generated is minimal. The solicitor for the respondent provided affidavit evidence that the account was remitted in the following amounts for legal fees excluding HST and disbursements:

April ?? to April 27, 2011:	$36,469.00
April 27-May 30, 2011:	$20,645.50
May 30 to June 28, 2011:	$ 5,092.10
	$62,206.60

[53] There is no accounting for who did the work, at what hourly rate, when it was performed, or to what purpose.

[54] At paragraph 28 of his affidavit, counsel for the respondent says that:

> ... The work to which these fees pertained included extensive legal research, document review, drafting and revising of briefs and affidavits, with respect to both the original application and the proposed motion.

[55] In oral argument, counsel for the respondent could not assure me that the total was solely attributable to work performed in relation to the injunction application. Specifically, he could not rule out the possibility that a portion of the billing was attributable to the grievance and arbitration matter.

[56] The parties agree that the applicant, who one might say had the “labouring oar” in the application, generated an account for legal services of $22,000. This information is not determinative, but it is certainly instructive in assessing the reasonableness of the respondent’s legal account as a measure of what amounts to reasonable indemnification of costs.

[57] I suggested to Mr. Machum in oral argument that at a senior counsel’s hypothetical billable rate of $400 per hour and an average of 6 billable hours per day that the account rendered amounted to 26 full days by a senior lawyer devoted to nothing else but responding to the injunction application. This would have been incurred between April 14, 2011 (the date that an electronic copy of the Application documents were sent to counsel for the respondent) and June 28, 2011 (the date on which the applicant advised that they no longer intended to seek an injunction). Given that the only document filed with the court was a pro-forma

Notice of Contest, that there was only one telephone conference call with the court, and that the filed materials with the court on this motion for costs is largely correspondence that went to the issue of scheduling, I asked counsel to explain the basis of what appeared to be an extraordinary account.

[58] Counsel spoke to the importance of the issue to the respondent and provided an explanation that referenced the work necessary to reply to the affidavit of Corey Wentzell that was filed by the applicant with the injunction application.

[59] Mr. Wentzell's affidavit was not in the affidavit evidence before me nor was there any other evidence of what the solicitors' billed time was used for. When counsel for the applicant began to reply to Mr. Machum's arguments by making specific reference to Mr. Wentzell's affidavit, Mr. Machum objected saying that the affidavit had not formed part of the record on the costs motion. I accepted Mr. Machum's argument and ruled that any reliance, by either party, on the information in Mr. Wentzell's affidavit would not be considered.

[60] The result is that I am left with effectively no objective measure of the reasonableness of the respondent's account in circumstances where the amount

billed and claimed seems extraordinary when compared to the applicant's account, and when measured against the work that one might reasonably expect, and given the record before the court.

[61] I do accept the submission of counsel for the respondent that once the respondent became aware of the injunction application it immediately devoted considerable resources to preparing to respond to the application, but the evidentiary record before me is so inadequate that it would be speculative of me to say that the amount billed was reasonable or necessary.

[62] In consequence thereof, I am not prepared to place much weight on the evidence of the account rendered as a measure of the appropriate costs to be assessed.

Rule 77.07

[63] The respondent argues that **Rule 77.07(2)(e)** and **(f)** are factors that should support the increase of an award of costs. Specifically it is argued that the applicant should have pursued an action or an application in court which would

have, in the respondent's view, been more appropriate and would have permitted more time for a response, hence less pressure on the respondent to devote such a significant and immediate application of resources to prepare to respond. I do not agree that the choice of application in chambers contributed to greater costs than might otherwise have been warranted.

[64] The respondent also says that the applicant did not offer to waive or extend any notice periods which again necessitated the immediate application of significant resources to preparing a response. To some extent this is accurate, but the fact that the respondent was never put in the position of having to file an affidavit or other supporting materials would suggest that the need for a response may not have been as imminent as they initially assessed it to be.

[65] The respondent filed a Notice of Contest in early June and was not required to file reply materials for the interim injunction until mid July. Two and a half weeks before that date the respondent was made aware that the applicant would be discontinuing its application.

Stage of the proceedings

[66] The application was filed in April and notice of the intention to discontinue was provided at the end of June. Whatever work that was performed by the respondent's counsel in that time frame is not evidenced by the court record, or by the evidence submitted on the motion for costs, except to the extent of the legal fees charged to the respondent.

[67] Notice of the intention to discontinue the application was given over a month prior to the hearing date of the interim injunction motion and four months before the hearing date for the application for an injunction. It cannot be said that the applicant waited until the last moment. A review of the material filed on this motion shows that counsel for the applicant and counsel for the respondent that had carriage of the grievance matter (Mr. Petrie) were in regular contact and succeeded in moving that process to its conclusion in an expeditious fashion.

[68] There was no lack of diligence, or unnecessary steps taken, by the applicant. The outcome of the arbitration, while not supporting the basis on which an injunction could have been granted, did not support the company's position

entirely. The application for an injunction cannot therefore be said to have been frivolous or vexatious.

[69] I am satisfied that the applicant discontinued at a relatively early stage of the proceedings.

CONCLUSION: COSTS

[70] I am satisfied that the respondent did need to begin preparation for a diligent and timely response to the injunction application, but that the evidence on this motion does not support the amount claimed, which is substantially greater than one might have reasonably expected, even if the matter had gone to a hearing.

[71] I am not in a position to, acting judicially, say that there is an evidentiary basis to support a costs award in the magnitude sought by the respondent. Having regard to the factors I have considered and applying them to the evidence that I do accept I conclude that the appropriate amount of costs payable by the applicant to the respondent is a lump sum in the amount of $3,500, which is payable forthwith.

CONCLUSION: DISBURSEMENTS

[72] "Necessary and reasonable" disbursements may be made payable as part of the costs award. *see,* **Rule 77.10**

[73] The applicant, correctly, submits that the onus is on the respondent to establish that the cost of the disbursements are reasonable and necessary and related solely to the injunction application and not to the arbitration proceeding. *see, Cashen v Donovan* (1999) 174 NSR (2d) 320 at para. 7; and *see Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* 2008 NSSC 322, at para. 27.

[74] The respondent's counsel filed only his in house accounting summary sheet, without particulars. It has a client number but no identification of the matter that the total amounts were charged to. There is no way to distinguish what was billed or why.

[75] In oral submissions counsel for the respondent agreed to provide a detailed breakdown of the disbursements to counsel for the applicant, who would review them to see if agreement could be reached as to an amount.

[76] I am satisfied that the respondent is entitled to disbursements that were reasonable and necessary, and related to the injunction application. If the parties cannot agree on what that amount is, I will receive their further submissions in that regard. If the respondent offers no further detail than what was filed with the court on this motion then I would be unable to grant an order for the disbursements claimed, due to the insufficiency of the supporting information to assess whether they were necessary and reasonable.

COSTS ON THIS MOTION

[77] The respondent has been successful in its motion for costs and in an amount greater than that proposed by the applicant. The motions hearing was longer than an hour though less than a half day. The motion was supported by affidavit evidence and a written brief. Having regard to these circumstances I direct costs on this motion in the amount of $750 payable by the applicant to the respondent forthwith.

[78] Order accordingly.

Duncan. J.

Date: 20111116
Docket: Hfx. No. 347087
Registry: Halifax

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Citation: Communications, Energy and Paperworks Union of Canada, Local 141 v. Bowater Mersey Paper Company Ltd., 2011 NSS 423

BETWEEN:

The Communications Energy and Paperworkers Union of Canada, Local 141

Applicant

v.

Bowater Mersey Paper Company Ltd.

Respondent

ERRATUM

Revised judgment: The original judgment has been corrected according to this erratum dated **November 22, 2011**.

HEARD: November 8, 2011 in Halifax, Nova Scotia

DECISION: November 16, 2011

COUNSEL: Raymond F. Larkin, Q.C. for the applicant
G. Grant Machum, for the respondent

Erratum:

Paragraph 18 last line:

"applicant" should be replaced by "respondent".

Paragraph 46:

"respondent" should be replaced by "applicant".

Paragraph 68, first sentence:

“respondent” should be replaced by “applicant”.

Paragraph 69:

“respondent” should be replaced by “applicant”.

J.