SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Attorney General) v. Jacques Home Town Dry Cleaners*, 2012 NSSC 42

Date: 20120216
Docket: Hfx No. 343066
Registry: Halifax

Between:

The Attorney General of Nova Scotia,
representing Her Majesty the Queen in right of the Province of Nova Scotia
Applicant

v.

Jacques Home Town Dry Cleaners
Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	August 31, 2011, in Halifax, Nova Scotia
Written Decision:	February 16, 2012
Counsel:	Duane Eddy, for the applicant Michael P. Scott, for the respondent

Robertson J.:

[1] On October 24, 2008, the respondent Jacques Home Town Dry Cleaners was involved in a motor vehicle accident that damaged a culvert owned by the applicant Her Majesty the Queen in the Right of the Province of Nova Scotia.

[2] Upon completion of the repairs to the culvert, the applicant sent the invoice to the respondent's insurer Wawanesa Mutual Insurance Company.

[3] The invoice purported to represent the direct costs incurred by the Department of Transportation and Infrastructure Renewal in repairing the culvert in the amount of $669.40 as well as a 10% administration fee in the amount of $66.94 for a total of $736.34.

[4] The respondent's insurer declined to pay the administration fee and the respondent now defends the Crown's application for recovery of the $66.94.

[5] In support of its application the Crown has filed the affidavit of Jane Fraser-Coutts dated July 18, 2011.

[6] The law is straightforward. The plaintiff can recover only those damages that arise naturally from the act complained of. However, reasonable "overhead" costs incurred in the process of repairing one's property are also recoverable, with the burden of satisfying the trial judge that these costs are a proper recovery, falling on the party making the claim.

[7] The plaintiff who seeks the recovery of overhead costs also has the positive burden of demonstrating on the evidence that the qualification of the damages claimed is not arbitrary or artificial. *Ontario Hydro Electric Power Commission v. Mather,* [1954] O.W.N. 382 relying on *Hi-Speed Tools Limited v. Empire Tool Works* (1923), 25 O.W.N. 172 at para. 13:

> 13 . . . "Overhead" was undoubtedly a proper part of the plaintiffs' claim, payment being on a "cost plus" basis; but the items of overhead chargeable against the defendants in such a case are not all the items which the fancy of an accountant may place under that heading, varying with different systems of accounting; only such items as under the contract bear some. definite relation to the particular work to be performed by the plaintiffs for the defendants should be allowed - they could not be ascertained by an estimated or customary percentage

> on the annual turn-over of the business. The onus was on the plaintiffs to establish the claim; and, unless the overhead expense claimed was shewn to have some relation to the fulfilment of the contract, it could not be charged against the defendants. Champ's salary, coming under "labour," should not be included in the overhead. Travellers' commissions and expenses, advertising, shipping expenses, bank interest and exchange, and discounts allowed for prepayment, ought all to be eliminated as having no relation to the matters in question. Depreciation in machinery, shafting, jigs, etc., should be practically nominal because the articles were largely manufactured by tools and machines specially constructed for this job, the full cost of which had been properly charged to the defendants, the machines being retained by the defendants.

[8] *British Columbia Telephone Co. v. Shell Canada Ltd.*, [1987] B.C.J. No. 1055 and *Tucker v. Edmonton (City)*, 2011 ABQB 55 also adopted this approach to overhead charges.

[9] In *Tucker*, *supra,* the Court found that the method of calculation of the overhead was arbitrary and artificial. At. paras. 12 and 13:

> 12 The essence of this case and thus, the essence of the learned Provincial Court judge's decision is contained earlier, where he says, at para. 6:
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> ... [T]he allowance of a percentage of relevant costs for supervision, superintendence, office expenses, and overhead charges is a proper head of damage where such costs arise naturally from the act complained of and are proven to the satisfaction of the court. A fixed percentage without other evidence in support is "altogether too arbitrary and artificial". The onus is on the Plaintiff to show that both the costs and the percentage have "some reasonable foundation". The calculation must be more than the "fancy of an accountant" and must be based upon only such expenses as have some definite relation to the particular work in question, in this case, the repair of the City"s vehicle. [Emphasis added.]
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> 13 The calculation of the Overhead Charge on the basis of a percentage of the salaries of the two employees who are employed to do the very task of managing this department of the City is "arbitrary and artificial" and are the "fancy of an accountant." The City's calculation of the Overhead Charge was a convenient and simplistic way of arriving at a number. The costs do not arise naturally from the act complained of.

[10] In *British Columbia Telephone* the Court also address the method of calculation of overhead where the plaintiff was attempting to collect a percentage of its total administration costs. At para. 35 the Court stated:

> In *C.P.R. v. Canadian Freightways Ltd.* and *O'Bray*, Tysoe, J.A. quoted with approval the comments of Hope, J.A. in *Hydro Electric Power Commissioners of Ont. v. Mather* at p. 384:
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> > While the items in controversy in this appeal are, in my opinion, properly included in the computation, nevertheless such items of alleged damage must be proved to the satisfaction of the trial judge in the same manner as any other damages. To add a fixed percentage to cover such items, without other evidence in support thereof, would be altogether too arbitrary and artificial. In the present case evidence was adduced to support the reasonableness of the percentage allowed by the trial judge. In the final analysis, regardless of what the additional percentage may be, that is 15 per cent, 35 per cent, or otherwise, the onus is upon the plaintiff to satisfy the trial judge that the percentage added has some reasonable foundation.

[11] The Court dismissed a portion of the plaintiff's claim as these general administrative costs claimed which captured items such as accounting, security and payroll, were not sufficiently connected to the act complained of.

[12] The claiming party must also show the trial judge that there is no element of profit in the collection of an overhead charge. *Sun Toyota Ltd. v. Mitha,* 2001 ABPC 81.

[13] In *Canadian Pacific Railway v. Canada Freightways Ltd.*, 39 W.W.R. 191, 1962 CarswellBC 83 (BCCA) Norris J.A. described the task of calculation as follows at para. 19:

> . . . The question is purely and simply as to whether or not the appellant discharged the burden of proof on it to demonstrate its loss, whether by proving a system of cost-accounting and damages on the basis of a proportion of overall cost applied to the particular loss in this case, or otherwise.

[14] It is the respondent's position that with respect to 10% "Administration" fee, the applicant has not discharged the burden of demonstrating:

1. the fees are not arbitrary and artificial

2. that the fee does not capture costs not naturally arising from the act complained of (the damaged culvert) and

3. does not include an element of profit

[15] The applicant in meeting the burden asserts:

> DTIR has a long standing policy most recently revised in 2006 to charge a 10% administration fee above direct department internal expenses for labour and benefits, equipment, and materials from inventory. The fee is to reflect overhead costs associated with the repair of department assets damaged in motor vehicle accidents by third party's.
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> The 10% administration fee is not a markup for profit. DTIR's policy for third party recoverables states "*...do not charge the administration fee on Supplier and Contractor invoices on Motor Vehicle Accidents.*" This means that the administration fee is only applied to direct internal department charges and invoices - which do not contain any markup or profit.
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> DTIR's overhead costs that are associated with repairing department assets damaged in motor vehicle accidents include the following: staff must process transactions in the Province's financial system (SAP) such as invoices and purchase orders, setup job numbers, track job costs and coordinate with operational staff. These functions are in direct support of the repair activities related to the damaged property.
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> Overhead expenditures associated with repairing department property damaged in motor vehicle accidents by third party's represents an additional expense to DTIR because such expenditures are not provided for when DTIR's operational budget is set. The overhead expenditures at issue are not provided for in DTIR's annual budget because they are incurred only as a result of the actions of third party's and not from any government related activity.
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> The Crown submits that the money which the Government receives from taxpayers is not unlimited and is allocated for the purposes of sustaining activities directly related to Government operations.
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> When DTIR employees carry out the tasks outlined above it detracts from their time which would otherwise be used to carry out their normal duties and responsibilities as government employees.

> The Crown argues that there is an additional cost associated with resources being diverted away from day to day departmental operations. These costs are subsumed withing the 10% administration fee and ought to be recoverable as a head of damage.

[16] And relying on *British Columbia Telephone* at para. 27:

> In a large operation with work carried on in many locations there are bound to be costs incurred in a global rather than a localized manner in order to take advantage of scales of efficiencies, which costs cannot be easily allocated to local operations except as a global rate applied to direct cost.

[17] The applicant says:

> DTIR is responsible for maintaining and carrying out numerous and complex operations related to infrastructure throughout the entire Province of Nova Scotia. The Crown argues that DTIR's operations are sufficiently large such that DTIR is entitled to charge a general overhead rate of 10% in order to take advantage of scales of efficiencies. Moreover, based on the scale of DTIR's operations, overhead costs would likely increase if DTIR were required to prepare individual calculations in order to allocate overhead to each repair operation that DTIR completes.
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> CONCLUSION
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> DTIR's overhead charge associated with repairing the damaged culvert was a natural consequence of the actions of the Defendant and out to be recoverable. Moreover, there is a reasonable foundation for DTIR's overhead charge such that the 10% administrative fee is not too remote to fall into the category of costs which is not compensable as a head of damage. The Crown argues that the taxpayer should not bear the responsibility of paying for additional overhead costs that are unrelated to government activity but result solely from the actions of third party's.

[18] In the circumstance of this case the 10% administrative fee of $66.94 can be said to be a reasonable overhead charge, that is in fact related to the particular claim. The Crown has satisfied me that this charge has a reasonable foundation for the purpose of recovering costs associated with staff processing this transaction through the Province's financial system ("SAP"), dealing with invoices and purchase orders, set up of job numbers, tracking repair costs, and a certain amount of coordination with operational staff. These are administrative tasks, not

otherwise budgeted for by the department and which can be said to arise directly from the act complained of. I am also satisfied that this modest percentage contains no element of profit.

[19] In my view, it would be unreasonable to expect the Province to institute any more detailed an overhead recapture, and to do so would likely result in higher overhead cost in recovering these third party additional expense items.

[20] I find the 10% charge reasonable and not in the circumstances arbitrary or artificial.

[21] In the result, the application is allowed. I will sign an order compelling the respondent to pay the sum of $66.94 to the Province.

[22] If the parties cannot agree on costs, I will be happy to receive written submissions.

Justice M. Heather Robertson