SUPREME COURT OF NOVA SCOTIA

Citation: Morrison Estate v. Nova Scotia (Attorney General), 2012 NSSC 386

Date: 20121106
Docket: Hfx. No. 230887
Registry: Halifax

Between:

The Estate of Elmer Stanislaus Morrison, by his Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, by his Legal Guardian Elizabeth Lee and Elizabeth Lee

Plaintiffs

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), The Minister of Health for the Province of Nova Scotia at the relevant time and The Executive Director of Continuing Care for the Province of Nova Scotia

Defendants

Judge:	The Honourable Justice A. David MacAdam
Heard:	July 20, 2012, in Halifax, Nova Scotia
Final Written Submissions:	July 6, 2012
Written Decision:	November 6, 2012
Counsel:	Raymond F. Wagner and Michael Dull, for the plaintiffs Edward Gores, Q.C., Aleta Cromwell and Alison Campbell, for the defendants

By the Court:

Background

[1] This costs decision arises from a certification decision in a proposed class proceeding. The plaintiffs claim against the Attorney General, alleging various torts and breaches of legislation by officials of the Department of Health, as well as the Minister, in administering policies governing admission to nursing homes. Certification was initially granted in respect of an allegation of breach of fiduciary duty by the Minister of Health. The Attorney General conceded that class proceeding claims were valid for the torts of fraudulent misrepresentation and deceit, waiver of tort, and unjust enrichment After an appeal, the matter was remitted for a determination of whether all of the plaintiffs' claims raised causes of action, and a further cause of action under s. 15(1) of the *Charter of Rights and Freedoms* was also certified: see decisions at 2010 NSSC 196, 2011 NSCA 68, and 2011 NSSC 479.

[2] The plaintiffs are entitled to costs on their successful motion to have this proceeding certified as a class proceeding pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28.

Argument and Analysis

[3] The unique character of this motion has been addressed in a number of the Ontario cases referenced by the plaintiffs. Regardless of the specific rules applicable on a certification costs application, the statements as to the character and effects of certification motions, as well as the general comments as to the time and effort necessary, made by the Ontario Superior Court of Justice and Court of Appeal, are also applicable to certification motions in Nova Scotia. Among the cases cited is *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 (Ont. S.C.J.) where Winkler J. observed, at para. 28

> The defendants submit that a costs disposition in a class proceeding is no different from that in any other proceeding. I disagree. In no other court proceeding is it necessary for a plaintiff to obtain the sanction of the court in the form of certification of the proceeding in order to go forward with the action. A class

> proceeding is not merely a normal action up to the time of certification. Rather, it is an intended class proceeding and subject to the full range of the CPA.

[4] There are, however reasons for differences between Ontario and Nova Scotia in respect to quantification of the appropriate costs, arising from differences in legislation as well as the *Civil Procedure Rules* relating to the awarding of costs.

[5] Section 40 of the *Class Proceedings Act* provides, in respect of any proceeding under the Act, that costs may be awarded in accordance with the *Civil Procedure Rules*. In addition, however, the court may take into consideration whether a costs award would further "judicial economy, access to justice or behaviour modification"(ss.40(1) and 40(2)(b). Other factors set out in section 40 would not appear applicable in the present instance.

[6] Party-and-party costs are governed by Rule 77. A judge has a general discretion to "make any order about costs as the judge is satisfied will do justice between the parties": Rule 77.02. This includes ordering disbursements: Rule 77.10(1). Costs will generally follow the result, unless the court orders otherwise: Rule 77.03(3). Where the matter for which costs are being determined does not result in the final determination of the proceeding, costs may be in the cause, to a party in the cause, or in any event of the cause payable immediately or at the end of the proceeding: Rule 77.03(4). Party-and-party costs will be determined in accordance with the applicable tariffs unless the court decides otherwise: Rule 77.06. More specifically, a judge "may award lump sum costs instead of tariff costs": Rule 77.08.

[7] It is well known that party-and-party costs "should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity": *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (S.C.T.D.) at para. 17; *Williamson v. Williams* (1998), 223 N.S.R. (2d) 78 (C.A.), at para. 24. Where the tariffs fail to meet this standard, a lump sum award of costs may be substituted. The plaintiffs argue that the "unique and important" nature of class proceeding certification hearings suggests a preference for lump sum costs awards, to the extent that it is "extremely atypical" to assess costs according to the tariffs on such motions. The plaintiffs submit that in awarding costs in a class proceeding, the court should assess costs so as to reflect the actual cost of the work done and so as to be comparable to

awards made in similar cases. Counsel's submission recognizes that each case, of course, turns on its own facts. The plaintiffs cite *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, 208 O.A.C. 10 (Ont. Sup. Ct. J. (Div. Ct.)), at paras 22 and 40-42; *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 4724 (Ont. Sup. Ct. J. (Div. Ct.)), reversed on other grounds, 2012 ONCA 444; *Lambert v. Guidant Corp.*, 2009 CarswellOnt 8759 (Ont. Sup. Ct. J.); *Andersen v. St. Jude Medical Inc.* (2004), 28 C.P.C. (6th) 199 (Ont. Sup. Ct. J.), affirmed 264 D.L.R. (4th) 557 (Ont. Sup. Ct. J. (Div. Ct.)).

[8] Extensive submissions were made by plaintiffs' counsel on the subject of time and effort expended by the plaintiffs in advancing the certification motion. The plaintiffs claim that more than 1000 hours was worked by three lawyers. Because the time is not broken down as between activities in relation to the litigation, there is no way to determine, with any degree of accuracy, how much of this time related to preparation and conduct of the certification hearing, as opposed to other functions undertaken in this matter. In addition to lawyers' time, there is time claimed for the work of paralegals and assistants.

[9] The plaintiffs say that in the circumstances the recorded time can be adjusted and suggest that the value of the time spent on the file be halved before determining a reasonable award of lump-sum costs. There is, however, also the matter of the hourly rate for the plaintiffs' three solicitors. The defendants cite caselaw referencing hourly rates for counsel in Nova Scotia with experience similar to that of the three counsel who were primarily involved in this matter. The defendants suggest that a review of the cases suggests an hourly rate of approximately half of that sought to be charged by plaintiffs' counsel in this matter. According to the defendants, senior lawyers in Nova Scotia typically charge about $350 per hour, while junior lawyers typically bill in the range of $165: see, for instance, *Cherny v. Downie*, 2009 NSSM 54, at para. 30; *Wade (Litigation Guardian of) v. Burrell*, 2011 NSSC 429, at para. 16; *McInnis v. Warnock*, 2010 NSSM 50, at para. 6. As such, the Attorney General says the plaintiffs' costs claim is unreasonable, resting, as it allegedly does, on hourly rates charging twice the average in Nova Scotia.

[10] Additionally the defendants cite guidelines under the Ontario *Rules of Civil Procedure* relating to the maximum amount allocated for party and party rates for paralegals, lawyers of less than 10 years, lawyers of 10 or more but less than 20

years, and lawyers of 20 years or more. In each case the proposed hourly rates by plaintiff's counsel far exceeds the amount suggested in the Ontario Guidelines.

[11] A further complication in assessing the appropriate quantum of costs is the fact that the plaintiffs were not successful in respect to all the claims and in some instances were required to redraft portions of the pleadings to meet objections by the defendants which were upheld by the court. In so noting I am aware that in Ontario, in particular, the courts have determined costs primarily on the basis that the plaintiff was successful overall in obtaining certification with apparently little deduction, if any, for any duplication of time spent in revising pleadings: see *Pearson v. Inco Ltd.*, 2006 CarswellOnt 1527 at para. 5; *McCracken v. Canadian National Railway Company*, 2010 ONSC 6026, paras 21 -24. Also there is the time spent by counsel in respect to pleadings that were subsequently withdrawn following objection by the defendants. In this respect I note that a claim by the spousal class for *Charter* relief was withdrawn by the plaintiffs voluntarily, as a result of submissions made by the defendants.

[12] The plaintiffs submit that the hearing itself spanned six days over a period of two years. They say they have incurred docketed time in the approximate amount of $478,000.00 and that, while certainly more than half of this time was expended by class counsel in matters related to certification, they only seek partial indemnification based on half of that amount. While that would constitute an adjustment for the amount of time from the total allocated to the certification application, it would not appear to account for any adjustment in the hourly rates to reflect the comments on hourly rates noted in recent Nova Scotia jurisprudence.

[13] The plaintiffs' say they are seeking costs of two thirds of one half of $478,000.00 or therefore the sum of $160,000.00 and in their brief state $10,265.04 for disbursements plus applicable taxes. However in schedule A to their written submission, the disbursements are calculated at $4,662.34 and together with taxes, they claim disbursements of $5,300.75.

[14] The defendants submit that the court should award costs based on Tariff C, which the Attorney General calculates on the basis of 3.5 days (rather than 6) at $2,000.00 per day, for a total of $7,000.00 (The defendants note that several of the 6 days involved brief hearings of less than half a day). Alternatively, in the event the court decides to award lump-sum costs, the defendants suggest that the Tariff

C calculation be multiplied by two, three or four, as provided in the Tariff at subsection (4), resulting in an award of between $14,000.00 and $28,000.00.

[15] The plaintiffs having failed to file an affidavit in support of the disbursements, the defendants say that nothing should be awarded for disbursements.

[16] Section 40 of the *Class Proceedings Act* stipulates that costs, and this would include costs on this motion, may be awarded pursuant to the *Civil Procedure Rules*. In addition to the costs calculated under the tariff itself, subsections 40(3) and (4) are, in my view, both relevant in these circumstances. As already observed, a certification hearing is not a typical motion in chambers. It involves considerably more preparation, and has implications that, although not unique, are not present in most motions. The hearing determines whether a number of plaintiffs may join together in bringing a proceeding, where for a number of reasons they may not have individually been able to do so. Although financial means may be the most apparent reason, there are no doubt others, such as access to resources to maintain a proceeding where potential individual awards of damages would not economically justify such a proceeding.

[17] This is not an instance where the award of costs should simply be a mathematical calculation of the number of days by the amount prescribed for each day. Even though the court is not in a position to determine what would have been reasonable preparation time and effort to put forward on this claim, such calculation being pure speculation, it is nevertheless obvious that it far exceeds the time and effort involved in most chambers applications. A Tariff C calculation itself is not an appropriate method for determining the costs to be awarded.

[18] In arriving at this conclusion I have considered the defendant's reference to the decision of Goodfellow J. in *Summer Groups Ltd. v. Halifax (Regional Municipality)*, 2008 NSSC 123, where he emphasized that the Tariffs will generally apply.

[19] As already noted, a class certification hearing is not a typical chambers motion, and in determining the appropriate award for costs, it is necessary to recognize this difference.

[20] Notwithstanding my comments concerning issues of duplication, hourly rates, unsuccessful applications, and time spent in redrafting pleadings, I am nevertheless satisfied that this is an appropriate circumstance for a lump-sum award. However, bearing in mind the provisions of Tariff C, subsection (4), and the reference to the chambers application being determinative of the entire matter at issue, it is obvious that a certification hearing is not so determinative other than as providing the plaintiffs with the form of proceeding in pursuing the lawsuit.

[21] Although not advanced in any detail by the plaintiffs I am also particularly mindful of the provisions of section 40(2)(b) in that the court may consider whether the proceeding would further judicial economy and access to justice. Clearly class proceedings are designed to effect those purposes and in the present instance, the effect of the certification is indeed to further judicial economy. If not for the certification, each of the plantiffs would be entitled to maintain separate proceedings.

[22] There is also the issue of access to justice, noted earlier in these reasons, which is one of the hallmarks of class proceedings. If the certification did not advance judicial economy because the plaintiffs would have been unable to otherwise pursue their proceeding, then this only serves to emphasize the effect on access to justice as a result of this proceeding.

[23] In *Ayrton v. PRL Financial (Alta.) Ltd.*, 2006 ABCA 88, the Alberta Court of Appeal considered an appeal from decision by a case management judge certifying a proceeding as a class proceeding. The plaintiff, Mr. Ayrton, had also sought a no costs regime. The certification judge deferred the question of a no costs regime. The observations of the court are therefore made in the context of the potential liability for costs having a negative or chilling effect on possible plaintiffs in a class proceeding. Nevertheless the comments are relevant in considering the issue of costs and how they relate to class proceedings. At paras. 27-35 the court addressed this question:

> In British Columbia and most provinces with class proceedings legislation, the general rule is that no costs will be awarded to either party if an action is certified as a class action.
>
> The policy behind such a rule is to increase access to justice. Class actions are a procedure intended to redress the problem of the expense of conducting litigation

when the amount of money recovered by an individual, if successful, is small. In this case, for example, Mr. Ayrton could potentially recover only the amount he paid to Payroll and PRL Financial, $606.32. Such a potentially small recovery is vastly outweighed by the expenses incurred in taking a claim to court. Through a class action, the expense of conducting an action is spread over the many members of the class. But class action plaintiffs face an additional risk to a class action should they lose. A normal costs regime requires an unsuccessful party to pay the successful party's costs. In a class action, it would be ordered against the representative plaintiff alone. Any costs order would be significantly higher than the individual's claim and thus, the risk of a costs order also discourages litigation of class actions. A no costs regime avoids the chilling effect of a traditional costs order by providing that neither party will be required to pay the other's costs.

In Alberta, there is no general rule for a no costs regime. Section 37 of the *Alberta Class Proceedings Act* reads:

> With respect to any proceeding or other matter under this Act, the Court may award costs as provided for under the Rules of Court.

Section 37 must be seen as a policy choice by the Alberta Legislature. In Ontario, a normal costs regime applies, but where the matter is a test case, raises a novel point of law or involves matters of public interest, then, the general rule that costs follow the event may not apply. However, in Ontario, there is also a fund to assist prospective class action litigants. There is no such fund in Alberta.

As a result, in Alberta, class action litigants can only avoid the risk of costs to be paid by a representative plaintiff by applying for an order for no costs in the proceedings and relying upon common law principles for public interest litigation. There is nothing in the *Class Proceedings Act* that expressly prohibits such an order.

Mr. Ayrton submits that a no costs order is required in this class action to encourage access to justice through class actions and to promote public interest by protecting the public from abusive loan practices. He concedes he cannot demonstrate that the certification judge erred in exercising his discretion to decline to make such an order at this time, but he invited this Court to apply the reasons in *Pauli v. Ace INA Insurance Co.*, [2004] A.J. No. 883, 2004 ABCA 253, and order no costs for these proceedings.

Pauli was a proposed class action. It involved interpretation of a section of the *Alberta Insurance Act* that could have potentially affected the many owners of vehicles who make insurance claims for damages to their vehicles. The action was

> dismissed prior to certification proceedings and the chambers judge imposed party and party costs against the plaintiffs.
>
> On appeal, the award of costs for the chambers application determining the merits was overturned and no costs were ordered. This Court discussed the four criteria to be considered when departing from the normal rule that costs follow the event: public interest, novel point of law, test case and access to justice. This Court found that the proposed class action matter was one of public interest, raised a novel point of law, was a test case, and that access to justice was a live concern, stating at para. 17:
>
> > As noted by the chambers judge, the general principles of costs under the ARC apply to class actions both before and after the proclamation of the *Class Proceedings Act*, which provides in s. 37 that the court "may award costs as provided for under the Rules of Court"
>
> And continuing at para. 19:
>
> > A judge exercising discretion must give some weight to all legally relevant factors: Metz at para 15. It is not disputed that the four criteria considered by the chambers judge are legally relevant factors in the exercise of discretion ...
>
> The reasons in *Pauli* set out the basis for a court to order no costs in any event for a class action. In *Vriend v. Alberta* (1996), 184 A.R. 351, cited in *Pauli*, this Court also observed that the discretion to depart from the normal rule that costs follow the event may be exercised when the case is one of public interest. Similarly, in Friends of the *Calgary General Hospital Society v. Canada et al* (2001), 286 A.R. 128, where the plaintiff had unsuccessfully challenged the demolition of the Calgary General Hospital, this Court set aside a costs award on the basis of public interest.

[24] In Nova Scotia the *Class Proceedings Act* provides for costs and does not differentiate between plaintiffs and defendants.

[25] All litigants, whether participating in class proceedings or pursuing relief individually, would certainly be well advised to consider the potential financial implications. Costs are part of the judicial process in this country. Access to justice by way of a class proceeding makes it possible for persons who feel aggrieved to come together and seek relief when the amounts involved make it

otherwise financially unjustifiable. However, the matter of costs is still part of the equation whether it is a class or individual proceeding.

[26] Nevertheless, whether it be costs against a plaintiff or defendant, access to justice and the public interest will not be served by awarding costs that have a chilling effect on seeking redress in the courts.

[27] As in other provinces, in Nova Scotia provision is made for any party to apply for an order to be exempted from paying costs. *Civil Procedure Rule* 77.04 states:

> 77.04 (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
>
> (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
>
> (a) the party is notified of a proceeding the party wishes to defend or contest;
>
> (b) a claim made by the party is defended or contested.
>
> ...

[28] Nevertheless, in the absence of a no costs order, costs on a certification hearing, although recognizing the atypical nature of the hearing, should not be so extravagant as to negatively affect access to justice by any party.

[29] The defendants say that Tariff C, subsection (4), provides that the chambers judge, when the chambers application is determinative of the entire matter, may calculate costs by multiplying the Tariff C calculation by two, three or four times depending on the complexity, the importance of the matter to the parties and the amount of effort involved in preparing for and conducting the application. Not included in the listing, but obviously of substantial importance, at least in my view, are the previously noted issues of "access to justice" and "public interest".

[30] In respect to disbursements, the plaintiffs have not filed an affidavit substantiating the disbursements and identifying the disbursements relating to the

certification as opposed to other matters involved in this proceeding. Such an affidavit is particularly necessary in this circumstance, where some disbursements are being compensated for while compensation for the others remains to be determined in the litigation itself. The plaintiffs shall file an affidavit outlining the disbursements they maintain were incurred in respect to the certification. The defendants will, of course, have the right to object and if the parties are unable to agree I will hear them as to the appropriate amount of disbursements to be added to the award of costs on this application.

[31] A further issue raised by the defendants is whether the costs should depend on the results of the litigation itself or should be awarded in any event of the cause, but only at the time of the conclusion of the litigation. Although, there are instances where the costs have not been ordered to be paid forthwith, I am satisfied that this is a circumstance where they should. The final determination of the entitlement, if any, of the plaintiffs to remedies against the defendants does not affect the right of the plaintiffs to be certified in order to advance the proceeding. These are separate issues. The plaintiffs have been successful and is entitled to its costs, to be paid forthwith and in any event of the cause.

[32] Having considered Tariff C, section 40 of the *Class Proceedings Act*, and the submissions of counsel, I award lump sum costs in the amount of $40,000.00, together with disbursements to be determined.

MacAdam, J.