

SUPREME COURT OF NOVA SCOTIA

Citation: *Laushway v. Messervey*, 2013 NSSC 203

Date: 20130627

Docket: Hfx No. 284264

Registry: Halifax

Between:

Peter Laushway

Plaintiff

v.

Albert Messervey and Sobeys Group Inc.

Defendants

DECISION ON COSTS

Relating to 2013 NSSC 47

Judge: The Honourable Justice M. Heather Robertson

Written Submissions: March 27, 2013 and April 5, 8 and 12, 2013

Decision: June 27, 2013

Counsel: Nicolle A. Snow, for the plaintiff
C. Patricia Mitchell, Nancy I. Murray, Q.C.,
and Tipper McEwan, for the defendants

Robertson, J.:

[1] The plaintiff commenced an action for personal injury seeking various heads of damage, including loss of income, in circumstances where he claims his internet-based business had been adversely affected by his inability to sit at his computer for significant periods of time, due to his injuries.

[2] The defendants successfully made a motion for the production of the plaintiff's hard drive for the purpose of analysis of meta data, which could shed light on the plaintiff's actual computer usage, as it relates to the loss of income claim.

[3] The defendants now seek costs and disbursements as follows:

Costs

<u>Costs on Tariff C for 1.5 days times a multiplier of 2</u>	\$6,000
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Disbursements

ESI invoice no. 152658	\$2,300.63
ESI invoice no. 600114	\$308.00
ESI invoice no. 600109	\$1,163.77
ESI invoice no. 600099	\$385.00
Premier Verbatim Reporting Ltd. (Serving as commissioner for video evidence)	\$532.00
Sharp's Audio Visual	\$504.00
Verbatim Inc (out of court cross examination)	\$644.87
Disbursements for copying, filing fees, legal research, couriers, postage, etc.	\$382.53
<u>Subtotal for Disbursements</u>	<u>\$6,220.80</u>
TOTAL	\$12,220.80

[4] The defendants suggest to the court that this is a discrete matter for which they should be granted the immediate award of their costs.

[5] They rely on *King v. RBC Dominion*, 2012 NSSC 259. In *King, supra*, the court reviewed several recent authorities before awarding costs in any event of the cause.

[13] The Respondents have relied heavily on several recent authorities in support of an immediate award of costs. I have particularly noted the approach of Warner, J., in *Merks Poultry Farms Ltd. v. Wittenberg*, 2010 NSSC 395, citing an earlier decision in *National Bank Financial Ltd. v. Potter*, 2008 NSSC 213, where he comments as follows:

While at one time it may have been usual to defer costs of interlocutory applications to the end of the case, the length and complexity of modern litigation has led to a reversal of that trend except in those circumstances where the primary issue in the interim application is the same as that intended in the ultimate hearing, or where to award costs at an interim stage may prevent the matter from being determined on its merits at a later date. Generally, the parties are better able to argue and the Court is better able to make the appropriate costs determination at the time of the application. Unless the costs award may be improved with the benefit of hindsight (after trial), the award should be paid when ordered.

[14] The same approach has been recently applied by Wright, J. in *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2011 NSSC 3. There, the Court rejected the proposition that an immediate award of costs should only be triggered where the Court is expressing disapproval of a party's conduct. Wright, J. states as follows:

The Court recognizes that the most common basis in the case law for an award of costs to be payable forthwith is the situation where the court thereby reflects its disapproval of some conduct on the part of the unsuccessful party. However, in light of the wide discretion that the Court has when it comes to costs, it is my view that that is not the sole situation in which an award of costs payable forthwith can be justified. The *Salvage Association* case, in my view, does not stand for such a broad proposition.

[6] They also rely on *Rule 77.06* which states:

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.

[7] Costs awarded on a motion in chambers are governed by Tariff C of the *Civil Procedure Rules*, Part 4 which provides:

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

- (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.

(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.)

Length of Hearing of Application	Range of Costs
Less than 1 hour	\$250 - \$500
More than 1 hour but less than ½ day	\$750 - \$1,000
More than ½ day but less than 1 day	\$1000-\$2000
1 day or more	\$2000 per full day

[8] Counsel for the defendant also ask for a multiplier of 3 to the \$2000 full day rate.

[9] The disbursements include the costs related to the defendant's expert, Ms. Megan Ritchie, who travelled to Halifax and gave evidence on the motion.

[10] The plaintiff requests a ruling of the court saying in the circumstances of this case, costs should follow the cause and that the court should use its discretion, to this effect, under *Rule 77.03*.

77.03 (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.

(2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.

(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

(4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:

- (a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;
- (b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
- (c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;
- (d) any other way the judge sees fit.

[11] Counsel for the plaintiff argues that the motion did not result in a “final determination” of the issue. As well, they say that in the circumstance of the proposed methodology for analysing meta data, there are many unknowns, which they enumerate as follows:

1. Whether the data can be compiled in accordance with order.

2. Whether the resulting reports will assist the court at trial.
3. Whether the trial judge will in fact find the resulting reports admissible at trial.
4. The uncertainty about the weight and prohibitive value of the information obtained, which can only be determined after the evidence has been created, tested, and applied.

[12] I agree that notwithstanding the order for production being granted, there are issues of admissibility and evidentiary value that remain for a trial judge to determine. Indeed, defence counsel acknowledged that they bore a certain risk of this expensive inquiry, that would ultimately be ruled on by the trial judge.

[13] In my view, the matter of the award of costs for this motion is best left to the trial judge, who can weigh the benefit of the defendants' expert report, in the court's overall assessment of damages.

[14] At trial, counsel can then argue the issue of disbursements incurred for internal use of solicitor-client communications, the merit of out-of-court cross examination costs, and the claim for costs disbursements, in the event the court does not rely on the report or any portion of the report the defendant produce after analysis of this hard drive.

[15] Accordingly, costs of the motion will follow the cause.

Justice M. Heather Robertson