SUPREME COURT OF NOVA SCOTIA

Citation: *Cytozyme Laboratories Inc. v. Acadian Seaplants Limited,* 2018 NSSC 175

Date: 20180720
Docket: Hfx No. 474369
Registry: Halifax

Between:

Cytozyme Laboratories Inc.

Applicant

v.

Acadian Seaplants Limited, a body corporate, Jean-Paul Deveau, Ian Flinn, Ken MacDonald, and Jung Woo

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions, last written submission July 3, 2018
Counsel:	Victoria Crosbie, for the Applicant Carl Holm. Q.C. and Marc Dunning, for the Respondents

By the Court:

Background

[1] On May 17, 2018, the Applicant, Cytozyme Laboratories Inc. (hereinafter "Cytozyme") sought an order giving effect to the request for international judicial assistance in letters rogatory which had been issued by the Third District Court of Salt Lake City, Utah on February 27, 2018. For the reasons noted in *Cytozyme Laboratories Inc. v. Acadian Seaplants Limited,* 2018 NSSC 137, I dismissed Cytozyme's application. The parties have been unable to agree as to the costs which the Respondents shall receive as a result. Therefore, the object of these secondary reasons is to determine the quantity of that costs award.

Parties' Positions

[2] The Respondents point out that this is the first time in the Province of Nova Scotia that a decision involving the enforcement of letters rogatory, or indeed dealing with letters rogatory, has been handed down. On the other hand, they concede that the principles applicable to such a determination are "well settled elsewhere".

[3] They go on to point out that their bill of costs amounts to $30,110.09 "in respect of the within application up to and including attendance at the hearing" (*affidavit of Carl Holm, June 28, 2018, para. 5*). It does not include in excess of $6,000.00 in legal costs incurred by the Respondents in advance of the commencement of the application, which was expended in attempts to come to some sort of understanding or agreement with the Applicant and avoid the Court hearing.

[4] The Respondents remind me, in particular, of para. 65 of my decision in *Cytozyme* which follows:

> The sweeping nature of the lists embodied in the letters rogatory, predicated as they are upon such a slender factual foundation, is an example of what has been dubbed in various case authorities as a "fishing expedition". The demands which would be placed upon Acadian, if I were to grant the application , are expensive, excessive and, quite frankly, unfair.

[5] Cytozyme, on the other hand, reminds the court that the tariffs prescribed by *Civil Procedure Rule* 77 are presumptive. While conceding that there is a

discretion available to the court to depart from them, it argues that the exercise of the discretion ought to be reserved for unusual circumstances. Clearly (Cytozyme continues) an award of solicitor – client costs, which is what the Respondents seek, ought to be reserved for very "exceptional circumstances". It is further contended that there are no circumstances in this case, exceptional or otherwise, which would justify a departure from the ordinary tariffs specified in the *Rule.*

[6] Collaterally, Cytozyme points out that its own legal bill in bringing the application barely exceeded $20,000.00. They argue (among other things) that while the Respondents are not precluded from having more than one counsel appear on their behalf (even though only one counsel made oral submissions) it should not be assumed that the fact that the Respondents chose to do so should automatically mean that it is reasonable to foist the cost consequences of that decision upon the unsuccessful Applicant. In a nutshell, and in addition to its other submissions, the Applicant argues that the Respondents' bill is not reasonable.

Analysis

[7] First of all, I consider *Civil Procedure Rule* 77.06(3). It reads as follows:

> 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.

[8] I then proceed to a consideration of Tariff C:

> **TARIFF C**
> **Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia**
>
> For applications heard in Chambers the following guidelines shall apply:
>
> (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.
>
> (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause
> and either added to or subtracted from the costs calculated under Tariff A.
>
> (3) 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 and appropriate in the
> circumstances of the application.
>
> (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 |
>
> [Emphasis added]

[9] In this case, the proceeding consumed slightly less than two hours of court time in total. The two sides each filed affidavits and a brief.

[10] The case law is replete with cautions that the court should not routinely elect to depart from the specified Tariffs. Since their purpose is to promote predictability, this purpose is not achieved if the court sets the bar for the exercise of its discretion too low.

[11] This point was made in *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 100. Therein, Justice Campbell pointed out (at para. 17) that judicial discretion to depart from the Tariff:

> …is not an invitation to throw certainty to the wind and award costs based on a percentage of the legal fees actually or reasonably incurred. If the standard is between two-thirds and three quarters of the reasonable legal bill, the tariff as set out the in the rules would be redundant. As Justice Hood noted in *Beaini v. APENS et al.*, the recovery of between two thirds and three quarters is not an absolute rule. "If it were, it would fetter the court's discretion and, in my view, it is clear that the court should look at the circumstances of each case to determine the appropriate costs award."

[12] In *Keltic Transportation Inc. v. Montgomery*, 2014 NSSC 414, Justice Hood noted that a case must possess special circumstances leading to the requirement of "exceptional legal services" in order to justify a departure from Tariff C. At para. 18 she enumerated some of those circumstances in a non-exhaustive fashion. They include complexity, public interest, pre-chambers process, questions of law that are unsettled, conduct or misconduct of a party and/or a solicitor, settlement/alternatives, associate counsel, multi-counsel and experts.

[13] Counsel made reference to my decision in *Yates v. Nova Scotia Board of Examiners in Psychology*, 2018 NSSC 127, wherein I determined that it was appropriate to depart from Tariff C, exercise my discretion and award a successful Applicant $12,000.00 on the basis of an application which consumed one half day of court time. In *Yates* the total bill was comparable to that of the Respondent in this case. However, there are a number of points which distinguish this case and that in *Yates*.

[14] First, although this was the first time that an issue touching upon letters rogatory was determined in Nova Scotia, as the Applicant points out, the applicable principles were well settled in other jurisdictions. The factual matrix and the issues to be determined in this case were relatively straightforward. Moreover, *Yates* was an application for judicial review, and such applications, by their very nature, often tend to be more complex. (See, for example, *Brennan v. Nova Scotia (Minister of Agriculture)*, 2015 NSSC 237, at para. 10.)

[15] There is another factor which distinguishes *Yates* (*supra)* from the case at bar. In *Yates*, in addition to the complexity of the matter, the importance of the issues transcended those in this case, given that the Applicant's very ability to earn

a livelihood was at stake in that proceeding. Here, although the issue was certainly important to the parties, it did not rise to the same level of importance as in *Yates*.

[16] Another distinguishing feature is that (in *Yates*) the overall size of the Applicant's bill submitted by her counsel was not contended by the Respondent to be unreasonable in the circumstances of that case. In this case, the unsuccessful Applicant argues that the size of the bill rendered to the Respondents contains some features which makes it unreasonable for the entire bill to be considered, when the issue of the amount for which they are to be responsible is determined.

[17] For example, with respect to the Respondent's choice to have two counsel appear at the hearing, in *Armour Group Ltd. v. Halifax (Regional Municipality)*, 2008 NSSC 123, Justice Goodfellow pointed out at para. 20:

> …The necessity for additional counsel for one party must be clear. By way of example, it most often arises in a multi-witness hearing. Although there is always lead counsel, it happens that associate counsel may, in such circumstances, actively participate usually in the direct and cross-examination of witnesses etc.

[18] This matter proceeded on the basis of oral submissions. There were no witnesses called. On the other hand, I reiterate that the account presented by the Respondents represents no contribution toward the expense that was incurred by the Respondents in advance of this application in an attempt to avoid going to court at all.

[19] I referred to this application as a "fishing expedition" and I do not resile from that characterization now that I must consider the question of costs. I acknowledge that while there may have been a basis available to the Applicant for what it sought, it provided no foundation to this court upon which that conclusion could be drawn. The Applicant's counsel was unable to advise whether the only party named in the Utah proceedings, Mr. Tripathi, had even been discovered or interviewed, and no transcript of the proceedings in Utah which led to the issuance of the letters rogatory was provided to this court.

[20] As I stated in paras. 31 and 32 of *Cytozyme*:

> 31. Absent an assurance that the foundational work in Utah has been completed (i.e. discovery and/or deposition of Mr. Tripathi and other witnesses within that jurisdiction, and an indication of how that evidence leads to the necessity to obtain information from the Respondents in this jurisdiction) what we are left with is simply an assertion by the Applicant that the Respondents are in

> possession of relevant documents and/or information which would be of assistance to the Applicant at the trial of the matter in Utah.
>
> 32. On the basis of the above, the Applicant would have the Respondents incur the monumental task of undertaking extensive record searches in an attempt to comply with the requested disclosure, and also the production of some of its personnel for discovery examinations (more on which will be said when the "unduly burdensome" criterion is addressed).

[21] Given that this matter consumed approximately two hours worth of court time, the maximum amount which could be awarded under the Tariff would be $4,000.00 (i.e. $1000.00 x 4) in accordance with Tariff C(4). Having conducted a balancing of the factors present in this case, I have determined that an award to the Respondents premised upon Tariff C would not do justice between the parties, even if the multipliers are used. I have concluded that what will be necessary is to provide the Applicant with a lump sum of costs which more closely approximates an award that is "just and appropriate in the circumstances of the application".

[22] The Applicant's legal bill is the first frame of reference. The Respondents seek complete restitution. Certain factors are immediately apparent. First of all is the issue of two counsel. A decision to use two counsel is one between solicitor and client. It is not always the case that this decision should necessarily have potential cost consequences to the unsuccessful party. In this particular case I note that the global amount claimed by counsel for the Respondents consists of a number of interim bills which cumulatively total $30,110.09, including disbursements. Counsel for the Respondent, Carl Holm, billed his time at $425.00 per hour, that of Mr. Dunning was billed at $285.00 per hour, that of John Boudreau, Articled Clerk, was billed at $125.00 per hour and that of associate Naomi Veniot was charged at $185.00 per hour.

[23] As is relatively common in cases where multiple counsel are working on a file, there is some overlap in the work performed in some instances. I have concluded that the more appropriate frame of reference would be the legal costs incurred by the Applicant in bringing the application, which would ordinarily be a more labour intensive process than that involved in responding to it. I have therefore concluded that the Respondents' bill, when consideration is given as to the amount for which the Applicant is to be responsible, shall be treated as though it were $20,000.00 plus disbursements in these circumstances.

[24] The next issue which emerges is how much of that should the Respondent recover?

[25] I begin with the observation that the circumstances in this case do not rise to the level of "exceptional" so as to justify an award of costs on a full indemnity, or solicitor – client basis.

[26] "Exceptional circumstances", as the phrase implies, will arise on very rare occasions. When they do arise, it will often be in a context where the conduct of a party and/or counsel has been so egregious that the court feels compelled to censure it by an award of costs to the other party on a full indemnity basis. This is not one of those cases.

[27] Therefore, I must next consider what amount will provide the Respondents with substantial (albeit incomplete) indemnity, in an amount which would do justice between the parties?

[28] Having carefully reviewed Mr. Holm's affidavit, that of Mr. Mroz, the written submissions of the parties, the bill of costs and expenses and other factors earlier noted including the fact that this was what I have described as a "fishing expedition" on the part of the Applicant, I have concluded that an award of $9,000.00 plus disbursements would be "just and appropriate" and I award this amount to the Respondent.

[29] As to this motion (to settle the amount of costs) I note that success has been divided between the parties having regard to their respective positions, and I decline to award costs to either.

Gabriel, J.