

SUPREME COURT OF NOVA SCOTIA

Citation: *Cape Breton Ski Club v. Ben Eoin Golf Club Limited*, 2019 NSSC 284

Date: 2019-09-17

Docket: 485757

Registry: Sydney

Between:

Cape Breton Ski Club

Applicant

v.

Ben Eoin Golf Club Limited

Respondent

And

Ben Eoin Development Group

Intervenor

DECISION ON COSTS

Judge: The Honourable Justice Frank C. Edwards

Heard: May 16, 17, 21, 22, 2019, in Sydney, Nova Scotia

Last Written

Submissions on

Costs Received: July 5, 2019

Counsel: Michelle Kelly, for the Applicant
Christopher Conohan, for the Respondent
Tony Mozvik, QC, for the Intervenor

By the Court:

- [1] I have detailed the factual background in my May 31, 2019 decision. In response to my decision, I have received Counsel's written briefs on costs. I have carefully read and considered those submissions.
- [2] A few preliminary observations. Counsel for the Golf Club seeks full reimbursement for his client's legal fees (solicitor/client costs). Such an award is only available in rare and exceptional cases. This is not such a case.
- [3] Counsel for the Golf Club cites legal fees incurred at more than \$50,000.00 plus disbursements bringing the total to just under \$64,000.00. Given the volume of the affidavit evidence, legal research, and court time, the legal fees may be reasonable. But it is not sufficient to merely state the ultimate fee and expect the Court to deem that amount appropriate. Details of the time expended and the hourly rate are required before the Court can make use of the total figure. This is particularly so if the Court is asked for costs that substantially contribute to the fees charged.
- [4] Counsel for the Golf Club included a charge of \$10,315.50 as a disbursement. That figure was the amount lawyer Robert Sampson, Q.C. charged the Golf Club for the preparation of an affidavit detailing the history of

the formation of the Golf Club including Mr. Sampson's knowledge of the disputed memorandum of understanding/first right of refusal and subsequent comprehensive lease.

[5] As one of the original golf club promoters, Mr. Sampson was well positioned to provide the history in question. His evidence was comprehensive and helpful to the Court in reaching its determination. Mr. Sampson would have had to spend many hours compiling the evidence required to put together the affidavit and attached exhibits. The evidence was essential for the Golf Club's case.

[6] As Counsel for the Ski Club points out, Mr. Sampson was a lay witness, not an expert witness. His evidence was solely on factual matters. As such, Mr. Sampson's fee does not qualify as a disbursement. It is qualitatively different than (for example) an expert opinion report provided by a medical specialist. Mr. Sampson's evidence was chronological; he gave no opinion evidence.

[7] At the same time, I do not accept Counsel for the Ski Club's contention that the Golf Club could have avoided the expense by simply issuing a subpoena for Mr. Sampson. In that situation, it would be unreasonable to expect that the same level of detailed evidence would have been the result. The Golf Club needed the evidence and Mr. Sampson was probably the best source of it.

[8] The Golf Club is not entitled to a dollar for dollar reimbursement of Mr. Sampson's fee. It is entitled to have the amount considered as part of its overall legal costs. (I note that Mr. Sampson did provide a detailed invoice with a breakdown of the time charged.)

[9] Counsel for the Ski Club argues that my decision is not determinative of the entire matter at issue in the proceeding. Strictly speaking, she is correct. My decision was on an interlocutory motion for an injunction. The underlying application still remains. As a practical matter, however, this litigation is effectively over. It is inconceivable that the Ski Club would choose to continue. In any event, CPR 77.03 (4)(c) enables me to award costs "in any event of the cause and to be paid immediately..." That is what I intend to do.

[10] Our rules contain a number of Tariffs to assist the Court in arriving at an appropriate costs figure. The tariff costs can be increased in the particular circumstances of a proceeding. In that instance the Court will look at (1) the complexity of the matter; (2) the importance of the matter to the parties; and (3) the amount of effort involved in preparing for and conducting the motion.

[11] This matter was not particularly complex. It was essentially a matter setting out a factual chronology. The outcome was obviously very important to the

parties involved including the Intervenor. Give the voluminous affidavits, there was substantial effort required to prepare for and conduct the motion.

[12] The hearing lasted 3.5 days. Under Tariff C the successful parties would be entitled to \$2000.00 per day or \$7000.00 each. I have the discretion to increase that amount and award a lump sum.

[13] The Ski Club is a not-for-profit entity. That fact weighs heavily upon my determination of an appropriate costs award. Had this been a dispute among commercial “for profit” enterprises, my costs award would be much higher.

[14] Here the Ski Club general membership had no say in the commencement of this litigation by the present Board of Directors. Seven Board members resigned over the decision to go to Court. That likely reflects the position of a high percentage of the general membership. It would not be fair to treat them in the same manner as the shareholders of a commercial enterprise.

[15] To some extent, the Ski Club membership will have to shoulder the consequences of the actions of their legally constituted Board. As noted earlier, the Respondent Golf Club incurred significant legal fees. The Intervenor Development Group did not disclose its legal fees. It requests costs of \$24,000.00 plus disbursements.

[16] The Golf Club did the heavy lifting on the motion. Its legal costs were therefore substantially greater than those of the Development Group.

[17] After considering all of the circumstances and the submissions of Counsel, I award the following amounts in any event of the cause payable forthwith:

Golf Club: \$20,000.00 inclusive of disbursements

Development Group: \$10,000.00 inclusive of disbursements

Total Costs Award: \$30,000.00

Order accordingly,

Edwards, J.