SUPREME COURT OF NOVA SCOTIA
Citation: *Candelora v. Feser*, 2020 NSSC 267

Date: 20200929
Docket: 483401
Registry: Halifax

Between:

Dawna Candelora

Applicant

v.

Trevor Feser, Sonia Dadas

Respondents

Restriction on Publication:
Sections 5 and 8 *Intimate Images and Cyber-Protection Act*

DECISION ON COSTS

Judge:	The Honourable Justice Joshua Arnold
Heard:	July 22, 23, and 26, 2019, in Halifax, Nova Scotia
Final Written Submissions:	July 14, 2020
Decision:	September 29, 2020
Counsel:	William Leahey, for the Applicant Patrick Eagan, for the Respondents

By the Court:

Introduction

[1] This is a decision on costs arising from the decisions in *Candelora v. Feser*, 2019 NSSC 370, dealing with liability and remedies under the *Intimate Images and Cyber-Protection Act*, S.N.S. 2017, c. 7 (the Act), and 2020 NSSC 177, dealing with damages under the same Act.

[2] The facts are set out in the main decisions. In summary, the applicant, Ms. Candelora, was involved in a family law dispute with her former husband, the respondent, Mr. Feser, involving custody, access and child support. Mr. Feser was in a relationship with the other respondent, Ms. Dadas. The respondents posted many comments on Facebook about Ms. Candelora, who subsequently brought an application alleging cyber-bullying under the Act.

[3] In the first decision (2019 NSSC 370), I granted the application, finding the respondents liable for cyber-bullying. I concluded that the postings caused harm, or were likely to cause harm, to Ms. Candelora's health or well-being, and that the respondents maliciously caused such harm, or were reckless with regard to that risk (paras. 57-60). I determined that the respondents "were clearly attempting to intimidate Ms. Candelora to dissuade her from pursuing litigation in its proper course" (para. 63); that they "made postings that referenced Ms. Candelora in various offensive and degrading ways" (para. 64); and that their behaviour amounted to harassment (paras. 65-67). I also concluded that "the extent of the distribution was significant" (para. 76). I found, while some of the posts "may have referenced truthful information", they "were being used to harass and intimidate Ms. Candelora. Any actual truth or falsity to what was said was only incidental to the true purpose of the postings" (para. 78).

[4] The resulting order prohibited the respondents from further cyber-bullying; ordered them to take down the relevant posts, or otherwise disable access to them; prohibited them from communicating with the applicant; and ordered them to pay damages to the applicant. After additional submissions, I addressed damages in supplementary reasons: 2020 NSSC 177. I rejected the respondents' argument that damages under the Act should be essentially nominal or treated as a statutory penalty. Instead, I took guidance on damages from related areas of tort law, such as defamation, breach of privacy, and intentional infliction of mental suffering (paras.

9-29). I also rejected the respondents' argument that aggravated damages were redundant (paras. 34-35).

[5] The applicant sought general damages of $350,000, aggravated damages of $200,000, and punitive damages of $75,000, while the respondents maintained that there should be no more than a nominal award of general damages (paras. 68-69). I awarded general damages of $50,000, aggravated damages of $20,000 and punitive damages of $15,000 (paras. 70-82).

The Law of Costs

[6] Party-and-party costs are governed by Civil Procedure Rule 77. The presiding judge may "make any order about costs as the judge is satisfied will do justice between the parties" (Rule 77.02(1)). The general rule is that costs "follow the result, unless a judge orders or a Rule provides otherwise" (Rule 77.03(3)). Unless the judge orders otherwise, party and party costs at the end of a proceeding are determined in accordance with the Tariffs of Costs and Fees (Rule 77.06(1)). Costs of an application in court are presumptively determined in accordance with Tariff A, "as if the hearing were a trial" (Rule 77.06(2)). Application of the Tariffs requires the court to set an "amount involved" and determine which of three scales should apply.

[7] The guiding principle of party and party costs is that the amount ordered should provide "a 'substantial contribution' to the successful parties' reasonable expenses", though not a complete indemnity: *Landymore v. Hardy*, (1992), 112 N.S.R. (2d) 410, 1992 Carswell NS 90 (SCTD), at paras. 17-20. More recently, Justice Hood summarized the relevant law in *Sipekne'katik v. Nova Scotia (Environment)*, 2017 NSSC 254:

> [7] Costs are intended to provide a substantial but not a complete indemnity against the costs incurred by the successful party. In *Williamson v. Williams*, 1998 CanLII 3998 (NS CA) Freeman, J.A. referred to *Landymore v. Hardy* (1992), 1992 CanLII 2801 (NS SC), 112 N.S.R. (2d) 410, where Saunders, J. (as he then was) said:
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> > The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
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> > > " … the recovery of 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."

[8] Freeman, J.A. continued in *Williamson*:

> In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[8] Justice Hood went on to refer to the comments of Campbell J. in *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 100:

> [10] In *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 100, Campbell, J. referred to Justice Freeman's decision in *Williamson v. Williams* and continued in para. 17:
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> > That comment 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."
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> [11] He then went on to discuss principles and rules guiding the exercise of judicial discretion in awarding costs. He said the first principle is that "the costs of the proceeding follow the result" and he continued "That means that in most cases the successful party will be awarded costs." (para. 20)
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> [12] The second guiding principle Campbell, J. set out is that the application of the tariff amount set out in the Rules provides "some kind of predictability". (para. 23) He then referred to the third rule, which is the multiplier contained in the tariff. He said in para. 24:
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> > It is intended to modify the strict application of the basic tariff amount to prevent a manifestly unfair result. The multiplier is available to do justice between the parties in matters that are more complicated, important and time consuming than most. While it provides for flexibility it does so within the constraints of the rule itself.

> [13] Campbell, J. then referred to the principal of substantial contribution without complete indemnity. He said that "the interpretation that often, but not always, substantial contribution can be achieved by an award between two-thirds and three-quarters of the reasonable costs incurred" (para. 25). He then points out in para. 26:
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> > Those principles, rules or considerations are in tension with each other. The certainty of the tariff, the moderating influence of the multiplier, and substantial contribution can't each be applied to achieve a result.

[9] In certain circumstances, the court may depart from the tariffs and award costs in a lump sum (Rule 77.08). Further, the "judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law" (Rule 77.03(2)), thus compensating "a party fully for the expenses of litigation" (Rule 77.01(1)(b)).

Positions of the Parties

[10] Mr. Leahey, on behalf of the applicant, made submissions on costs in his January 10, 2020, brief, which was mainly concerned with damages. In the June 5, 2020, damages decision, I invited further submissions on costs. Mr. Eagen provided his own costs submissions on behalf of the respondents on July 6, which was followed by a new brief from Mr. Leahey on July 9, in which the applicant's position was changed from a request for 75 percent of his bill, to a request for "complete indemnity." Mr. Eagan provided a further brief on July 13, to which Mr. Leahey objects. I am satisfied that the respondents should be permitted to respond to the applicant's position as set out in the July 9 brief, and that in substance the July 13 respondents' brief amounts to a reply to the applicant's new position. Mr. Leahey claims that the July 13 brief contains "fresh evidence"; to the extent that it does, I have disregarded or placed no weight on that material.

[11] The applicant seeks a "full indemnity" costs award. Applicant's counsel argues that she was completely successful in the proceeding, with all of her requested relief being granted. Mr. Leahey filed an affidavit dated January 10, 2020, which refers to total fees and disbursements of $33,036.05. The affidavit does not distinguish legal fees from disbursements, referring only to an attached printout of his billing records. In his brief of the same date, he states that the affidavit "discloses disbursements totaling $918.19 plus legal fees ... of $27,844.09 and HST of $4,273.77." He does not say whether the HST amount applies to both disbursements and fees.

[12] In the January brief and affidavit, and in a supplementary brief of July 9, 2020, applicant's counsel says he gave his client a "courtesy discount" of $15,956.23, excluding HST, intended to offset not only the "substantial costs" of the present proceeding, but also on account of the costs incurred in obtaining a child support order against Mr. Feser. Mr. Leahey suggests that this results in a benefit to the respondents.

[13] This costs decision is concerned only with the cyber-bullying proceeding. I take no account of any costs or disbursements beyond those described in the affidavit as being incurred "in this matter", which I take to be $33,036.05. I agree with counsel for the respondents that the so-called "courtesy discount" is of no relevance.

[14] Applicant's counsel notes that when the application was brought for interim relief in January 2018, the respondents admitted none of the allegations and contested the claims. This position did not change through the course of the proceeding. Mr. Leahey submits that the respondents "not only committed the actions as found by this Court but they took advantage of every procedural limitation and opportunity to avoid the issuance of an Interim Order", which would have prohibited them from making further postings after the date of the interim application in January 2018. I place little weight on the issue of the "interim order." As counsel for the respondents points out, this is not a remedy spoken of in the Act, though the Act does preserve other rights and remedies available at common law or by statute (s. 10).

[15] The applicant submits that the circumstances call for "full indemnity", which I take to mean solicitor-client costs. Counsel offers no legal argument to explain why solicitor-client costs should be ordered here and, in fact, does not identify the relevant rule.

[16] The respondents do not dispute that the applicant was successful and is entitled to costs. Their position is that this was a "relatively uncomplicated proceeding" with "no monetary issue" involved, and that Tariff A, Scale 2 (the Basic scale) should be applied, based on the range of $25,000-$40,000. This would give a quantum of $6250, plus $2000 per day of the hearing, as mandated by the tariff. At three days of hearing time, this would give total costs of $12,250. Respondents' counsel adds several arguments – none of which I find convincing – to support a further reduction of costs and disbursements to $8000.

[17] The respondents point to a March 2019 offer to settle for $1000 and a commitment that internet postings "which might constitute cyberbullying" would stop. Mr. Eagan says the response from the applicant's counsel was to reject the offer, stating that damages were likely to be in the range of $60,000 or more, and that a court order was required for enforcement purposes. Mr. Eagan indicates that the issue of settlement was subsequently dropped (implicitly, by both sides), and "both parties embarked on a tremendously ill-conceived, expensive litigation project" which the respondents maintain was "unnecessarily driven by Ms. Candelora's desire to try to 'prove' that Ms. Dadas is or was a prostitute." This allegedly compelled the respondents to "mount a similarly expensive defence, given the implications such a finding could have had in the family court proceedings." At this point, I note that the parties agreed at the hearing that I did not need to make a finding on whether Ms. Dadas was involved in the sex trade (2019 NSSC 370 at para. 5). However, they also filed a "Partial Agreement of Fact", which stated, in part:

> The Respondents agree with the Applicant and do not challenge her assertion that she was acting reasonably and out of concern for the best interest of her son when she raised with Mr. Feser the possible involvement of Ms. Dadas in the sex trade.
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> ...
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> The parties further agree that the question of the truthfulness or otherwise of Ms. Dadas's possible involvement in the sex trade is not at issue in this proceeding...

[18] I am in no position to judge what effect a "finding" that Ms. Dadas had been a prostitute would have the family law proceeding – not that any such finding was ever a likely outcome of the cyberbullying application before me. (Given that their behaviour was partly motivated by the desire to intimidate Ms. Candelora in the context of the family law proceeding, it might also have occurred to the respondents that their cyber-bullying of the applicant could have implications in that matter.) Because of the concession at the hearing that Ms. Candelora was "acting reasonably", I put no weight on the suggestion that costs should be reduced in view of the prostitution issue.

[19] In a related submission in his supplemental brief, counsel for the respondents submits that "it is relevant that this incident took place in the confines of a highly antagonistic divorce proceeding where no doubt the parties were subject to tremendous stressors." He says that, although they were "misguided", the respondents "felt sincerely provoked and disrespected by Ms. Candelora's correspondence with the accusation of prostitution, however, this fact in no way

minimizes the impact of their conduct, for which they have apologized." These are matters that were extensively canvassed in the main hearing, and I am not satisfied that they add anything relevant to the determination of costs.

[20] The respondents further submit that costs should be reduced on account of the "overreaching ... in terms of the damages sought by her as compared to the amounts awarded, particularly in light of the fact that the original Application sought total damages of $10,000..." This was the first decision dealing with this new statutory cause of action. Determining appropriate damages proved to be a relatively challenging enterprise. Respondents' counsel agrees that "the novelty of the matter – and the absence of precedent – likely made it more difficult to see this matter resolved short of a hearing, particularly as regards the damages." I am not convinced that the amount damages sought is a factor that requires a reduction in the costs awarded.

[21] Counsel for the respondents submits – and this does not appear to be in evidence – that Mr. Feser was laid off from work on account of the effect of the COVID pandemic on the oil and gas industry, and further submits that Mr. Feser's child support obligations should take precedence over the costs award. Mr. Eagan also states that the respondents are expecting a child. I have no evidence on any of these points, and have not placed any weight on them.

Analysis

[22] The applicant seeks "full indemnity" for costs and disbursements incurred, totalling $33,036.05. The respondents submit that there should be an award of costs totalling $8000, including disbursements, payable over the next two years, based on a reduction of the Tariff amount. In effect, the respondents seek a lump sum costs order.

[23] Counsel for the applicant has not offered any compelling reason to move this award outside the usual rule of party and party costs. He requests "full indemnity" but does not point to any "exceptional circumstances recognized by law" that would justify solicitor-client costs under Rule 77.03(2). Nor has he identified an "amount involved" for the purpose of applying the tariff, other than the amount actually billed.

[24] While Mr. Eagan argues that there was "no monetary issue" in this proceeding, the application resulted in a substantial damages award. In the absence of any clear or convincing argument for a higher (or lower) amount, I am satisfied

that application of Tariff A, Scale 2 (Basic) is appropriate here. The proceeding was of some importance, being the first decision under a new piece of legislation. However, I am not convinced it was particularly complex from counsel's point of view. A good deal of the reasoning on the substantive issues (particularly damages) was based on the court's own research, rather than counsel's arguments. I conclude that the most appropriate figure for the "amount involved" is the amount of damages awarded, which totaled $85,000.

[25] Application of Tariff A, Scale 2, to an amount involved of $85,000 results in a Tariff figure of $9750, plus $6000 (three days of court time at $2000 per day), for total party and party costs of $15,750.

[26] While Mr. Leahey's affidavit refers generally to disbursements, the only evidence offered is a printout of his firm's billing records. This is not sufficient evidence to justify an order for disbursements: see *MacQueen v. Sydney Steel Corp.*, 2012 NSSC 461, at para. 48, and *Landry v. Kidlark*, 2019 NSSC 128, at paras. 29-32. Mr. Leahey is free to provide evidence of disbursements on behalf of the applicant for the court's consideration within two weeks of the release of this decision. Respondent's counsel may respond within one week of the receipt of any evidence provided.

Conclusion

[27] Costs of $15,750 are awarded to Ms. Candelora. Additionally, Mr. Leahey is free to provide evidence of disbursements on behalf of the applicant within two weeks of the release of this decision. Counsel for Mr. Feser and Ms. Dadas may respond within one week of the receipt of any evidence provided.

Arnold, J.