SUPREME COURT OF NOVA SCOTIA
Citation: *Devlin v. Canada (Attorney General)*, 2020 NSSC 390

Date: 20201123
Docket: SAM No. 499447
Registry: Amherst

Between:

Michael Devlin

Applicant

v.

The Attorney General for Canada, in right of Her Majesty the Queen and Superintendent of the Springhill Institution

Respondents

COSTS ENDORSEMENT

Judge:	The Honourable Justice Jeffrey R. Hunt
Submissions:	November 13, 2020
C**osts Decision:**	November 23, 2020
W**ritten Release:**	January 29, 2021
Counsel:	Lisa Teryl, Solicitor for the Applicant Kaitlin Duggan, Solicitor for the Respondents

By the Court:

[1] Before the Court is a request by the Applicant, Michael Devlin, seeking an award of costs arising from certain preliminary aspects of a *habeas corpus* proceeding which was dismissed.

[2] He argues that although the application he advanced was ultimately dismissed on the merits, the Court ought to exercise its discretion to make an order for costs in his favour in respect of two aspects of the matter. These are as follows:

1. With respect to the original emergency transfer decision. The Applicant asserts this was "settled". He seeks $2,000.00 in costs payable to his counsel.

2. Motion for injunction enjoining transfer while *habeas corpus* was pending. Motion granted by Justice Campbell. Applicant seeks $500.00 in costs payable to his counsel.

[3] The Respondents strongly opposes any such award. With respect to the first issue listed above, they disagree with the factual assertions of the Applicant. They say that the issue of the emergency transfer was not settled as part of a litigation proceeding. They further argue that the Applicant's attempt to categorize the emergency transfer process as a "settled issue" would be at odds

with the Applicant's approach throughout the proceeding. They submit the evidence demonstrates the decision was withdrawn by institutional decision makers due to the mental health signs being exhibited by Mr. Devlin.

[4] Most importantly, the Respondents state the Applicant continued to argue all circumstances connected to the aborted emergency transfer as a component of the hearing proper. It is submitted this is clear from a review of the record.

[5] Ultimately the *habeas* claim was dismissed on a without costs basis. The Respondents assert there are no grounds for the awarding of costs with respect to this component of the matter.

[6] As to the Applicant's second claim, the Respondents say that while the injunction was granted, given that the overall Application was dismissed on a no costs basis, fairness between the parties requires that all parties ought to bear their own costs.

Law in Brief

[7] The relevant costs principles are not really controversial or in dispute.

[8] Rule 77 gives the Court discretion to make any order of costs that will do justice between the parties. The discretion is not to be exercised arbitrarily, nor

is it unlimited. It gives some flexibility in the application of the principles set out in the Rules and the case law.

General discretion (party and party costs)

77.02 **(1)** A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

Liability for costs

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.

Assessment of costs under tariff at end of proceeding

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.

(2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with **TARIFF A** as if the hearing were a trial.

(3) 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**.

Discussion – Issue 1

[9] I have reviewed the position advanced by Counsel for the Applicant. They argue there was a settlement of the emergency transfer issue which entitles the Applicant to an award of costs. They further submit that the matter ought to be treated for costs purposes under Tariff F. In other words, they argue it should be considered an Application in Court treated, for costs purposes, as a trial.

[10] In the *habeas* hearing the Court accepted that the emergency transfer decision was rescinded by the decision maker on mental health grounds following Mr. Devlin's efforts toward self-harm. For this reason, the position

of the Crown is well taken. There are very real impediments to considering the matter as "settled" in any sense contemplated in the *Civil Procedure Rules*.

[11] The Respondents also point out that when the Applicant did subsequently argue and advance his *habeas*, he continued to rely on the emergency transfer decision as a component of his argument. I appreciate that the Applicant might now suggest that this was by way of context or narrative. A review of the record suggests it was not quite that limited.

[12] I have considered the arguments advanced by both sides. There are significant concerns with the position of the Applicant. The decision was rescinded on mental health grounds. The record reveals that the Applicant did continue to rely on these circumstances as a component of his argument within the eventually dismissed Application. When the Application was dismissed it was on a no cost basis and this decision took into account all the circumstances of the matter. This point is going to be discussed further by the Court in the discussion of Issue 2 below.

[13] Accordingly, this component of the costs request is dismissed.

[14] I also observe in passing that, if adopted, the use of the Tariff on which the Applicant was hoping to have costs assessed might result in unintended consequences for many applicants.

[15] In this province, unlike a number of others, courts have largely tended to avoid making costs orders in *habeas* matters. There are circumstances when these might be warranted but, generally speaking, there has been a practice of having parties bear their own costs.

[16] To be clear, this does not mean costs should not be granted where warranted. I am simply providing some context as to the general practice.

[17] In the limited instances where costs have been awarded, it has been on the basis of (generally nominal) lump sums, which are closer to those seen for contested motions. It would be out of keeping with the prior practice in this province to make Tariff F awards.

[18] If courts were to begin to assess costs on Tariff F, as urged by Counsel for the Applicant, I am concerned that in general it would be the prisoner advanced *habeas* applications which would suffer. A review of reported cases, and the experience of the Court, suggests that the majority of *habeas corpus* applications are unsuccessful. Thus, if awards were made under Tariff F

(subject of course to CPR 77.04 and the Court's overall discretion) it could disproportionally impact the unsuccessful self-represented prisoner.

Discussion – Issue 2

[19] With respect to the second request advanced by Counsel for the Applicant, the Court has considered these circumstances. The Applicant's claim is based on the consideration that he was successful in the discrete issue of the injunction. The Court at that time was silent on the issue of costs. This effectively deferred any cost question to the conclusion of the matter.

[20] When this Court dismissed the *habeas* application on its merits, and without costs, it was fully aware of the entire history of the matter. The Respondents being the successful parties were, prima facie, entitled to argue for costs but the Court effectively truncated this at the conclusion of its reasons as follows:

> With respect to costs, it is not my practice to award costs in *habeas corpus* matters. There may be a set of facts where they would be appropriate however this matter would not fall into that category. Accordingly, the dismissal will be without costs.

[21] Any costs for the injunction motion (which was brief and took place on the phone) would have been dwarfed by the costs for the main proceeding (which

took place in person and was longer and required a separate phone attendance for decision).

[22] When the Court ruled the Respondents would not receive costs, part of the consideration process included the role of the injunction motion and its outcome within the context of the entire proceeding. It obviously would have raised litigation fairness issues to award costs to the Applicant for the injunction motion, but nothing to the Respondents for successfully responding to the overall *habeas* application.

[23] The Court engaged in an overall weighing process and determined that fairness to both sides is best achieved in all the circumstances by having each side bear its own costs.

Conclusion

[24] Accordingly, the request for costs is denied.

[25] I thank both sides for their submissions in this matter.

J.