SUPREME COURT OF NOVA SCOTIA

Citation: *Walsh v. Atlantic Lottery Corporation Inc.*, 2014 NSSC 157

Date: 20140501
Docket: Hfx No. 199763
Registry: Halifax

Between:

Bernard Patrick Joseph Walsh

Plaintiff

v.

Atlantic Lottery Corporation Inc., the Nova Scotia Gaming Corporation, the Nova Scotia Alcohol and Gaming Authority and the Attorney General of Nova Scotia

Defendants

DECISION ON COSTS

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	September 5, 2013
Final Written Submissions:	January 31, 2014
Counsel:	Bernard Patrick Joseph Walsh, self-represented Atlantic Lottery Corporation Inc., no representations Duane Eddy for the Defendants, Nova Scotia Gaming Corporation, Nova Scotia Alcohol and Gaming Authority and the Attorney General of Nova Scotia

By the Court:

Introduction

[1] This is a determination of costs arising from a motion by the Defendants for summary judgment on the pleadings. The Defendants were successful on the motion and the Plaintiff's claim was dismissed.

[2] Counsel for the Attorney General for Nova Scotia ("Province") and the Alcohol and Gaming Authority ("AGA") is seeking costs in accordance with Tariff C in the amount of $1,000.00. The Plaintiff, Bernard Walsh, takes the position that costs should not be awarded against him because his action involves public interest litigation. In the alternative, he submits that he is impecunious and an award of costs would be unduly punitive and prevent him from accessing justice.

[3] The Atlantic Lottery Corporation Inc. ("ALC") makes no representations on the matter.

The Rules

[4] The Court has broad discretion to award costs under *Civil Procedure Rule* 77.02. This discretion must be exercised judicially. The longstanding rule is that

the successful party is entitled to costs, and the Court will not depart from this rule unless it is necessary in the circumstances to do justice between the parties.

[5] Rule 77.06(3) says that party and party costs of a motion must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C. That being said, the judge may add an amount to, or subtract an amount from, the Tariff C costs: Rule 77.07(1).

[6] Tariff C sets the range of costs for a hearing of more than one hour but less than half a day in the amount of $750.00 to $1,000.00. For a motion that is determinative of the entire matter at issue, Tariff C allows for this figure to be multiplied 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 an conducting the application.

Although counsel for the Province and the AGA says that a multiplier is warranted in this case, he limits the claim to $1,000.00.

Public Interest Litigation

[7] Courts have been willing, on occasion, to award reduced costs or no costs against an unsuccessful litigant where an action involves issues of public importance: *Okoro v. Nova Scotia (Human Rights Commission)*, 2006 NSSC 257, at para. 7; *Farrell v. Casavant*, 2010 NSSC 46, at paras. 28-32. Raising issues of public importance, however, will not automatically entitle a litigant to preferential treatment regarding costs: *Little Sisters Book & Art Emporium v. Canada*, 2007 SCC 2 at para. 35. Each case must be considered on its merits.

[8] Mr. Walsh is a former gambling addict who says that video lottery terminals ("VLTs") are inherently dangerous and addictive. He claimed the Province's decision to introduce and regulate VLTs in Nova Scotia, and the manner in which that decision was carried out by the AGA and ALC, caused him significant losses and damages. Liability was framed in negligence, strict liability, and breach of fiduciary duty.

[9] According to Mr. Walsh, he should be considered a public interest litigant because his claim was "the first of its kind in Nova Scotia", and other VLT addicts stood to benefit if he had been successful.

[10] When an action or motion involves a new question of law or the interpretation of a new or ambiguous piece of legislation, the Court may decline to award costs: *Farrell v. Casavant, supra*, at para. 28; *Fortis Benefits Insurance Co. v. Nova Scotia (Registrar of Cemetery and Funeral Service)*, 2005 NSSC 125.

[11] In Mr. Walsh's case, the specific duty of care alleged against the Defendants had not been previously raised in Nova Scotia. However, our Court of Appeal has previously determined that the *Gaming Control Act* and *Regulations* are publicly oriented and do not create a private law duty of care to a gambling addict who has not been induced to continue gambling by individually targeted promotion: *Burrell v. Metropolitan Entertainment Group*, 2011 NSCA 108. The Court of Appeal's decision, while not dispositive of Mr. Walsh's entire claim, was a strong indicator of his chances of success.

[12] Further, while Mr. Walsh's success would have opened the door to litigation by other VLT gambling addicts in Nova Scotia, the same can be said of any case in which a new cause of action is recognized, however, simply because a new cause of action would be recognized by the Court is not synonymous to making Mr. Walsh a public interest litigant.

[13] In my view, although Mr. Walsh's claim involves public authorities and raises issues of importance to other VLT gambling addicts, the essential nature of

his litigation is one of self-interest. Had Mr. Walsh succeeded in his claim, his damages would have been substantial. The Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 noted that where a plaintiff is seeking a significant damage award, the public interest aspects of the action will not insulate him or her from a costs order:

> 76 Although circumstances might arise in which there are cogent arguments for departing from the normal cost rules, I have difficulty conceptualizing the plaintiffs in the present appeal as public interest litigants. In the plaintiffs' own submissions, there are typically two types of public interest litigants: (i) litigants who have no direct pecuniary or other material interest in the proceedings (e.g., a non-profit organization); and (ii) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the cost of the proceedings. The plaintiffs in the present case do not fit into either category -- and thus do not fit their own definition of a public interest litigant. Indeed, it is difficult to regard a plaintiff who is seeking several millions of dollars in damages as a public interest litigant. The fact that the actions involve public authorities and raise issues of public interest is insufficient to alter the essential nature of the litigation.
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> [Emphasis added]

Based on the foregoing, I am not satisfied that Mr. Walsh should be relieved from the duty to pay costs on the grounds that his action was public interest litigation.

Impecuniosity

[14] In the alternative, Mr. Walsh says that he should not have to pay costs because he is impecunious, and a costs order would prevent him from accessing justice.

[15] In his submissions, Mr. Walsh raises Rule 77.04, which permits a Plaintiff to apply for relief from liability for costs because of poverty:

> 77.04 (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
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> (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
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> (a) the party is notified of a proceeding the party wishes to defend or contest;
>
> (b) a claim made by the party is defended or contested.
>
> (3) An order against paying costs may be varied when the circumstances of the party change.
>
> (4) An order against paying costs does not apply to costs under Rule 88 - Abuse of Process, Rule 89 - Contempt, or Rule 90 - Civil Appeal.

[16] Mr. Walsh did not make a formal application as contemplated by Rule 77.04, but asks this Court to exempt him from paying costs despite this procedural irregularity.

[17] Justice Wright considered Rule 77.04 in *MacBurnie v. Halterm Container Terminal Limited Partnership*, 2011 NSSC 322. The Plaintiff in that case brought a formal application for an order against paying costs under Rule 77.04 after the close of pleadings in his wrongful dismissal action. Justice Wright wrote:

> 6 Costs are an important element of the litigation process. The purposes of costs can be summarized as follows (see Orkin on *The Law of Costs* (2 ed.) Vol. I at page 2-1):
>
> (a) As partial indemnity or, in some limited circumstances, full indemnity to the successful party for the legal costs it incurred;

(b) To encourage settlement;

(c) To deter frivolous actions or motions;

(d) To discourage unnecessary steps that unduly prolong the litigation; and

(e) To facilitate access to justice.

7 These purposes are undermined when a party has an exemption from costs exposure. In the words of Justice Gruchy in *Rafuse v. Zinck's Bus Co.* (1992), 122 N.S.R. (2d) 183 (when considering the predecessor Rule 5.17 under our 1972 Rules), "... when a party has such an exemption, it becomes a very significant tool. A party with such an exemption may then pursue an adversary with financial immunity."

8 Justice Gruchy concluded in that case that the exercise of judicial discretion in awarding costs was best left to the trial judge after the case had been fully exposed and the relative merits of both sides evaluated.

9 Because of the imbalance that a costs immunity order would create, the court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in Rule 77.04 should be stringently applied and only where there is a comprehensive body of evidence adduced in support.

10 Those two criteria are:

(1) That the party cannot afford to pay costs, and

(2) The risk of an award of costs is a serious impediment to litigating a claim.

11 In my view, the stringent application of these criteria requires that the court be satisfied that without an order granting immunity from costs, the applicant would not be able to pursue the claim because of impecuniosity and the action would have to be abandoned. This in turn requires that the court have a full picture of the applicant's financial situation, a requirement articulated and applied by the Ontario Superior Court of Justice in *Farlow v. Hospital for Sick Children*, [2009] O.J. No. 4847, 2009 CarswellOnt 7124.

[Emphasis added]

[18] Rule 77.04 was also considered by Justice Warner in *Canadian Residential Inspection Services Ltd. v. Swan*, 2013 NSSC 226. Like Mr. Walsh, the Defendants did not file a formal application within the timelines contemplated by

the Rule. Instead, they asked the Court to grant them a costs exemption after they were unsuccessful at trial. Justice Warner commented as follows:

> 26 The purposes of Rule 77.04 is not to afford a losing party the opportunity, post-trial, to seek exemption from a costs award.
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> 27 The Rules' policy is to provide access by the poor to the judicial system. Discretion to apply Rule 77.04 might be entertained where the financial imbalance between the parties may prevent a poor litigant with a legitimate and reasonable claim from receiving justice. The policy was not intended to give an unfair advantage to one party over another.
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> 28 I adopt entirely the analysis of my colleague Justice Wright in *MacBurnie v Haltern Container Terminal Limited Partnership*, 2011 NSSC 322. Justice Wright notes that costs are an important element of the litigation process. Their purpose is to indemnify a successful party, to encourage settlement, to stop frivolous actions, to discourage unnecessary steps and to facilitate access to justice. These purposes are undermined when a party has an exemption from costs exposure.
>
> 29 Because of the imbalance that a cost immunity order would create, the Court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in Rule 77.04 should be stringently applied and where there is a comprehensive body of evidence adduced in support.

Justice Warner noted that the Defendants filed no evidence as to their financial circumstances and therefore failed to meet the first of the two criteria listed in Rule 77.04. With respect to the second criteria that the risk of an award of costs is a serious impediment to litigating a claim, he observed:

> 31 The timing of the request for exemption affects the second criteria. The Plaintiff has been put through lengthy pre-trial processes and a six-day trial without notice that the Defendants may seek exemption from a costs award if the Defendants lost.

> 32 The case law outlines the requirement for full disclosure of the financial circumstances of the party who seeks an exemption under Rule 77.04. The Defendants have produced no evidence to support this criterion.

[19] I am satisfied, after reviewing these and other relevant authorities, that I have discretion to consider a request for a costs immunity order notwithstanding a failure to comply with the timelines set out in Rule 77.04: *Mader v. Hatfield*, 2011 NSSC 121 at para. 8; *Doncaster v. Field*, 2013 NSSC 110 at para. 22; *Slater v. Slater*, 2013 NSSC 17 at para. 42. However, I agree with Justice Wright and Justice Warner that the two criteria required for an order under Rule 77.04 should be stringently applied, and relief granted only where there is a comprehensive body of evidence adduced in support. I also note, as a matter of common sense, that it will be more difficult for a party who seeks a costs immunity order after a proceeding has concluded to satisfy the Court that a costs award will effectively deny that party's access to justice.

[20] Mr. Walsh has filed an affidavit with the Court detailing his financial circumstances. He states that he has not been employed since 1994. He has received social assistance payments since 1999 and a CPP Long Term Disability benefit since 2010. He currently receives $753.36 per month from the Nova Scotia Department of Community Services, and $288.65 per month from CPP Long Term Disability. Mr. Walsh has attached copies of his pay stubs from each of these

sources as exhibits to his affidavit. He says that he receives no additional income from any source, and has no savings account, RRSP or any type of investment income. He lives in a one bedroom apartment for which he pays rent in the amount of $735.00 per month. Mr. Walsh has attached a copy of a receipt provided by his landlord for his February 2014 rent cheque. Although Mr. Walsh does not outline his living expenses other than rent, I accept his evidence that these expenses exceed his monthly income.

[21] Based on the evidence before me, I find that Mr. Walsh meets the first criteria for a costs immunity order under Rule 77.04. I have no evidence, however, to satisfy the second criteria that an award of costs would effectively deny his access to justice. Mr. Walsh has filed an appeal of the summary judgment decision and intends to represent himself. He has provided no evidence as to any expenses associated with the appeal, nor does his affidavit explicitly state that he will be unable to proceed with the matter if costs are awarded against him.

[22] For many appellants, the most significant expense associated with an appeal is the cost of producing a transcript of the lower court proceeding. However, in cases such as Mr. Walsh's where the proceeding takes place in Chambers and no oral testimony is given before the judge, the transcript may not be required: *Li v.*

Jean, 2012 NSCA 63 at paras 23-25. In the absence of evidence on this point I am unable to grant a costs immunity award under Rule 77.04.

[23] Although Mr. Walsh does not meet the criteria for a costs immunity order under the Rules, this does not end the matter. The Court may, in exceptional circumstances, consider a party's financial situation in the calculation of costs. In *Windsor v. Adu Poku*, 2003 NSSC 95, Justice MacLellan considered the Plaintiff's impecuniosity:

> 13 The plaintiff's counsel in her submission to me suggests that I should consider the fact that the plaintiff is a retired senior citizen on a fixed income of Canada Pension and Old Age Security and has no major assets. She has provided an affidavit from the plaintiff in which she indicates this and also indicates that her husband's income is comprised of Old Age Pension, Canada Pension, Workman's Compensation and some income from an R.R.S.P.
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> . . .
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> 19 I conclude that here it is appropriate for me to consider the financial circumstances of the plaintiff in deciding an appropriate amount of costs.

[24] After considering the Plaintiff's financial situation, Justice MacLellan ordered costs in the amount of $10,000.

[25] The financial circumstances of the losing party were also considered by Justice MacAdam in *Hill v. Cobequid Housing Authority*, 2011 NSSC 219. Justice MacAdam canvassed various cases where a party's financial circumstances were taken into account in awarding costs and noted at para. 21 of his decision:

> 21 There have been other recent decisions in which the courts of Nova Scotia have taken account of financial considerations in determining whether to order costs, or in determining the quantum of costs. In *Gillan v, Mount Saint Vincent University*, 2007 NSSC 249, LeBlanc J., referred to *Kaye v. Campbell, supra*, and *Windsor v. Poku, supra*, and added that Warner J. had made similar comments in *Lockhart v. New Minas (Village),* 2005 NSSC 93. In that case, Warner J. said, at para. 45:
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> > A fairness concern is the inability of the average Canadian to access the civil justice system because of its complexities, delays and costs. The facts of this case appear to fit squarely within those that are put forward by proponents of change to our civil justice system. Ordinary persons have a right to have legitimate legal claims determined by an objective third party in an efficient and cost effective way. This fairness issue weighs heavily for the plaintiff and against the defendant, for whom (backed by an insurer) cost is not a barrier, and complexity and delay can be a tactical tool.

Justice MacAdam concluded as follows:

> 31 … Financial considerations are not listed as one of the factors to be considered in Rule 77.07(2), but I am satisfied it is a factor that can be taken into account. The defendants have calculated party and party costs, on Scale 2, at $11,548.56. Considering their entitlement to some costs, the financial circumstances of the plaintiff, the fact that although the plaintiff was unsuccessful, this was not a frivolous proceeding, I conclude that a fair award of costs and disbursements in this proceeding is a lump sum of $4000.00.
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> [Emphasis added]

In my view, this is an appropriate case for the Court to consider the financial circumstances of the Plaintiff when arriving at an appropriate costs award.

Conclusion

[26] In view of Mr. Walsh's financial circumstances, I exercise my discretion to subtract an amount from the range set out in Tariff C. Costs are awarded to the

jointly-represented Province and the AGA in the amount of $500.00. Since it made no representations with respect to costs, I decline to award costs to the ALC.

LeBlanc, J.