SUPREME COURT OF NOVA SCOTIA
Citation: *Gillis v. BCE Inc., 2014* NSSC 336

Date: 20140919
Docket: Hfx No. 234376
Registry: Halifax

Between:

John Gillis et al

Plaintiffs

v.

BCE Inc. et al

Defendants

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	[By written submissions only]
Final Written Decision:	September 19, 2014
Counsel:	Evatt F.A. Merchant, and Casey Churko for the Plaintiffs James A. Bunting, co-counsel for Rogers Defendants S. Bruce Outhouse, Q.C., co-counsel for Rogers Defendants Kathryn Podrebarac, counsel for Bell Defendants

By the Court:

Introduction

[1] As a result of my decision to decline the Defendants' request for a permanent stay of proceedings of this action as an abuse of process [2014 NSSC 279 – presently under appeal –C.A. No. 430564], and the parties' inability to agree on costs, I will now address that issue.

[2] On August 15 and 18, 2014, I received from the Defendants and Plaintiffs respectively, their submissions on costs.

[3] In their two-page letter, the Defendants submit that the Court should be guided by Tariff C in Rule 77, and specifically that: "costs of the stay motion should be set at $2000 (based on a full day) and costs of the reopening motion should be set at $500 [based on a motion of a duration of less than one hour]. In respect of both motions, the award should be made in any event of the cause in favour of the Plaintiffs and payable forthwith [Civil Procedure Rule 77.03 (4)(c)].… The Bell and Rogers Defendants state that the collective costs award should be a total of $2,500 [inclusive of HST] against both sets of Defendants.… Subject to having an opportunity to review and consent to a portion or all of the

Plaintiffs' claim for disbursements, it is submitted that these amounts should be taxed".

[4] In their four-page letter, the Plaintiffs submit that: "if the case at Bar was not a class proceeding, it would be reasonable to set costs at $9,000 [based on Tariff C and a three times multiplier], but this Honourable Court may wish to forgo awarding costs, for policy reasons stated at the conclusion of this letter… The efforts of the Canadian Class Action Defence Bar in general to establish a trend of large costs awards being made in respect of their interlocutory pre-certification motions is not beneficial for Canadians' growing need for access to justice… In the case at Bar, declining to order costs against the Defendants, on a policy basis, will send a signal to class-action plaintiffs and defendants [as well as prospective plaintiffs] in other class actions, that the Nova Scotia courts encourage class action litigation where appropriate to serve the interests of access to justice, and that the courts should generally be disinclined to exercise discretion to order costs pursuant to section 40 (1) [of the *Class Proceedings Act*] which may, inter alia, reduce the growing frequency of pre-certification motions being brought by defendants in respect of actions filed as class proceedings."

[5] Section 40 of the *Class Proceedings Act* reads as follows:

> COSTS, FEES AND DISBURSEMENTS
>
> Costs
>
> 40 (1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Civil Procedure Rules.
>
> (2) When awarding costs pursuant to subsection (1), the court may consider whether
>
> (a) the class proceeding was a test case, raised a novel point of law or involved a matter of public interest; and
>
> (b) a cost award would further judicial economy, access to justice or behaviour modification.
>
> (3) The court may apportion costs against various parties in accordance with the extent of the parties' liability.
>
> (4) A class member, other than a representative party, is not liable for costs except with respect to the determination of the class member's own individual claims. *2007, c. 28, s. 40.*

[6] The legislation adds an additional dimension to costs awards considerations in class proceedings, but does not displace the supervening authority of *Rule 77*.

An examination of the background of this proceeding

[7] The details may be found in my decision, 2014 NSSC 279, between paragraphs 8 and 14. Effectively, the Defendants were economical throughout, as they have spoken with a united voice.

[8] They sought a permanent stay of proceedings of this Action as an abuse of process. In support of their motion, they filed affidavits which touched on the history of the proceedings in each of the Canadian jurisdictions in which parallel

proceedings have been commenced. Their legal arguments similarly reflected the intertwined and complex nature of the considerations in issue.

[9] The Defendants presented a comprehensive and vigorous factual and legal argument, amply supported by written materials, in their effort to establish an abuse of process by the Plaintiffs. This necessitated a proportionate response by the Plaintiffs. The Court was presented with an extraordinary amount of materials, and considerations beyond what would be the norm in a one day complex chambers matter. A review of the materials filed, and my decision support that conclusion.

[10] There were also significant arguments about the admissibility of the contents of the affidavits filed by the Plaintiffs and the Defendants. However, no cross examination thereon took place.

[11] The hearing on May 14, 2014, commenced at 9:30 AM and ended near 5 PM. Rather than have counsel return from outside the jurisdiction for reply submissions, the Defendants and Plaintiffs agreed that the Defendants could file a written reply response by May 30th 2014. Thereafter, I reserved my decision on the motion.

[12] While my decision was under reserve, the Defendants sought to reopen the hearing to present further evidence pursuant to Rule 82.22(2)(c). The parties agreed that this motion could be heard by way of correspondence. The motion was supported by the June 24, 2014, sworn affidavit of Kathryn Podrebarac. The Plaintiffs requested in their submissions, that if I granted the Defendants' Motion, to re-open, that they have the opportunity to file responding evidence and submissions.

[13] The admissibility of portions of Ms. Podrebarac's affidavit were contested by the Plaintiffs. Within my decision, I made rulings regarding the admissibility of her affidavit, as well as others filed by the Plaintiffs and Defendants on the main motion.

Should costs not be awarded in this case to the successful party, in light of their request to not do so for policy reasons?

[14] It is highly unusual for successful party on a motion to ask the Court to decline awarding it costs. The Plaintiffs herein argue that neither under Section 40 of the *Class Proceedings Act*, nor under the *Civil Procedure Rules*, is there an obligation on the Court to order costs.

[15] Furthermore, they suggest that as Plaintiffs' counsel in the class action arena, they would prefer that the Court signal its general dis-inclination to award interlocutory pre-certification motions costs, by not awarding costs in this case, because such costs awards may be sufficiently large as to operate as a disincentive, particularly to plaintiffs in class proceedings.

[16] They point out that four legislatures strictly prohibit class-action costs, save for in enumerated special circumstances – see *Class Proceedings Act* R.S. B.C. 1996 s. 37 [1]; the *Class Actions Act*, S.S. 2001, c. C – 12.01, s. 40 (1); the *Class Proceedings Act*, C. C.S.M., C. 130, s. 37 (1) and *Class Actions Act*, S. N.L. 2001, c.C – 18.1, S. 37 (1). The Federal Court of Canada has also followed this model – *Federal Court Rules*, SOR/98 – 106, part 5.1, rule 334.39 (1) .

[17] I note that the Defendants have not requested or had the opportunity, to respond to the Plaintiffs' position in this regard. It is reasonable to infer that they would prefer to pay less costs, and therefore they would not be opposed to the Plaintiffs' suggestion in this individual case.

[18] I am not prepared to accede to the Plaintiffs' request, to not order costs against the Defendants herein.

[19] Our legislation and Rules specifically permit costs in interlocutory motions made in class-action proceedings. Without the benefit of more extensive argument, I am not prepared to say in this decision that the courts in Nova Scotia are adopting, or should adopt, a no-costs award policy in interlocutory motions in class-action proceedings.

[20] Moreover, to my mind, such policy-based approaches are better contained in legislation, where presumptively a collective, comprehensive and reasoned examination of the competing positions has been undertaken.

[21] The Plaintiffs' suggested costs award against the Defendants in this case is reasonable. I consider Tariff C applicable, and that the length of the hearings for the motion to stay and the motion to reopen effectively consumed more than one and a half days. Therefore a base amount of $3,000 is an appropriate starting point. In concluding what is a "just and appropriate" award in these extra ordinary circumstances, given the complexity of the matter, the importance of the matter to the parties, and that the Defendants sought to effect a termination of this Action thereby, a multiplier of three would be an appropriate standard to use, resulting in a $9,000 costs award (inclusive of HST), Tariff C, Item (3).

[22] Plaintiff's counsel did not seek disbursements because they did not incur any filing fees or similar court disbursements. They suggest that travel disbursements for them as out-of-Province counsel [as were the majority of counsel for the Defendants] should not be claimed since their clients elected to retain counsel from outside the Province. Although this point was not argued, I will say that generally the latter sentiment has merit.

Order

[23] Costs will be awarded against the Defendants jointly and severally, in any event of the cause, and in favor of the Plaintiffs, in relation to both the motion to stay the proceedings, and the motion to reopen the proceedings. The amount will be $9,000 all inclusive, to be paid forthwith.

[24] I direct that the Defendants prepare the order to reflect my decision.

Rosinski, J.