SUPREME COURT OF NOVA SCOTIA

Citation: *307625 Nova Scotia Limited v. Nova Scotia (Minister of the Environment)* 2017 NSSC 150

Date: 20170530
Docket: Hfx. No. 449947
Registry: Halifax

Between:

3076525 Nova Scotia Limited

Appellant

v.

Minister of the Environment Representing Her Majesty the Queen in Right of the Province of Nova Scotia

v.

Respondent

Marlene Brown, Melissa King and Angela Zwicker

Intervenors

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	November 24, 2016, in Halifax, Nova Scotia
Final Written Submissions:	April 10, 2017 (On Costs)
Counsel:	Robert G. Grant, Q.C. and Sara Nicholson, for the Appellant Sheldon Choo, for the Respondent Kaitlyn Mitchell and Julia Croome, for the Intervenors

By the Court:

[1] This is a decision on costs in relation to this matter.

[2] On November 24, 2016, I heard submissions in relation to an appeal by 3076525 Nova Scotia Limited (hereinafter "307 NSL") of a Ministerial Order issued by the Nova Scotia Minister of the Environment (the "2016 MO"). In my decision, reported as *3076525 Nova Scotia Limited v. Nova Scotia (Environme*nt), 2017 NSSC 67, I dismissed the appeal and, at the conclusion thereof, I indicated that "if the parties wish to be heard on the issue of costs, I would require short written submissions within 30 days". The appellant and the respondent Minister of Environment have indicated that they have reached an agreement with respect to costs.

[3] There has been no such agreement between the appellant and the intervenors. These latter have requested costs in the amount of $1500 inclusive of disbursements. This is opposed by the appellant.

Procedural History

[4] Some brief comment with respect to the long and tortuous journey that this matter has taken on its voyage through the courts must be made. Much of this history is contained in my decision referenced above.

[5] This was the second appeal brought by 307 NSL as a result of Ministerial Orders pertaining to its base of operations, which comprised 1275 Old Sambro Road in Halifax Regional Municipality, and the environs. The first appeal related to a 2010 Ministerial Order (the "2010 MO"). In that case, 307 NSL was a co-appellant, along with another corporate entity, 301 NSL. The latter's appeal was completely dismissed. As to 307 NSL, the appeal was substantially dismissed, although allowed in small part.

[6] That first appeal was heard by Arnold J. and reported as *3076525 Nova Scotia Limited v. Nova Scotia (Environment)*, 2015 NSSC 137. Therein, he concluded that the Minister had lacked a sufficient factual basis upon which to include one of the clauses (clause 7, in the 2010 MO) insofar as that particular clause pertained to the present appellant. He remitted the matter back to the Minister for further consideration in relation to that clause only. All of the other

clauses in the 2010 Ministerial Order were determined by Arnold J. to be a reasonable exercise of the discretion conferred upon the Minister pursuant to the *Environment Act*, and, therefore, upheld.

[7] After the 2010 MO was issued, and while the first appeal by 307NSL made its way through the court, discussions took place between the Minister and the appellant in an attempt to get the clean-up work started. These discussions went on for some years, and during that time not much progress occurred. Finally, by 2014, it was clear that no progress was going to be made, and so the first appeal (which had been put "on hold" while discussions ensued) was reactiviated. Justice Arnold heard the first appeal in 2014, and rendered his decision (pertaining to the 2010 MO) in 2015 as noted above.

[8] After the result of that first appeal was known, the parties engaged in further consultations. As part of this dialogue, the appellant was permitted to file a full legal opinion from its counsel and also report from an expert in the field (Mr. Blackmer). The Minister had the benefit of this material, together with all of her department's pre-existing information, together with the results of her own department's further investigations (including those of Hydrogeologist, Melanie Haggart), by this point. The Minister opted to cancel the 2010 MO in its entirety (as it pertained to the appellant) and issue a new Ministerial Order. This "2016 MO" contained virtually all of the clauses of which Justice Arnold had approved (in the first appeal), and omitted clause 7 –the only clause in the 2010 MO which Justice Arnold had remitted back to the Minister for further consideration.

[9] The appellant, 307 NSL, nonetheless appealed the issuance of this 2016 MO as well. In my decision referenced earlier, I concluded that the terms of this second Ministerial Order were reasonable, and dismissed the appeal.

[10] The present intervenors were also participants (in that capacity) in the first appeal. Their motion to be added as intervenors in this (the second) appeal is reported in *3076525 Nova Scotia Limited v. Nova Scotia (Minister of the Environment)*, 2016 NSSC 138.

[11] At para. 14 of that decision, Justice LeBlanc indicated:

> 14 The proposed intervenors have also requested an order from the Court exempting them from any adverse costs award. The appellant does not consent to such an order and therefore the issue of costs will have to be the subject of a further motion.

Analysis

[12] The parties agree that in Nova Scotia the presiding justice has a general discretion with respect to costs. Indeed, Civil Procedure Rule 77.02 makes this explicit:

> 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.

[13] Justice LeBlanc, in *A.B. v. Bragg Communication Inc.*, 2010 NSSC 356 had occasion to say at para. 14:

> 14 Although the Herald and Global argue that the principle that costs should follow the results also applies to them as intervenors, I find no general rule of law that suggests that to be the case. It appears to me that the general rule that applies to the intervenors should not be an award of costs in their favour, nor should costs be awarded against them unless there is very good reason to deviate from this practice. Therefore, the issues that must be addressed are whether the nature of this application modifies the general rule regarding costs and intervenors, and whether the Herald and Global Television have demonstrated a very good reason to deviate from the general rule, modified or otherwise.

[14] The parties appear to agree that the general rule is as set forth above and that departure from that rule is only justified in the event that the court has a "very good reason" to deviate from it. The intervenors, in this context, have referenced the appellant's conduct during the appeal process, citing the appellant's failure to comply with a schedule established by the court on May 3, 2016. This schedule had required 307 NSL to file its brief on or by September 30, 2016. Compliance with that directive would have provided the respondents and intervenors with four weeks within which to respond with their own brief, which was due on October 28, 2016.

[15] The appellant, in fact, failed to file its brief until November 9, 2016, more than six weeks past the scheduled date, leaving the intervenors with one week prior to their own due date (and two weeks prior to the actual hearing date) to respond. Their only other alternative would have been to seek an adjournment, which would have postponed the hearing (hence the possibility of site cleanup) once again, and

this would have been very inimical to the intervenors' interests, as well as those of the surrounding landowners.

[16] The challenge was compounded by what the intervenors refer to as the "detailed and voluminous nature of the appeal record". Materials date back, in some cases, as much as fifteen years, and the record itself consisted of over fifteen hundred pages.

[17] Compounding the intervenors' challenge yet further, was the fact that when the appellant filed its brief on November 9, 2016, it simultaneously filed a motion to adduce fresh evidence in this appeal (which it later withdrew). The intervenors were left to respond to a motion of the appellant to introduce this new evidence during the same one week period during which they also had to respond to the appellant's brief. The intervenors continue:

> To ensure the appeal could be heard in full on November 24, 2016, the intervenor agreed to withdrawal of this motion on a without cost basis. As such they do not seek their costs from the fresh evidence motion here, but rather their costs in the main appeal arising from the appellant's non-compliance with the court ordered litigation schedule which had the effect of frustrating their ability to effectively participate in the appeal.

[18] In *Bragg Communications Inc.*, *supra*, the intervenors, Chronicle Herald and Global argued for costs because of:

> 19 …the lack of proper notice and the need for an adjournment, it was necessary for them to spend a considerable amount of effort to prepare for the hearing with an abridged time period. The applicants did not provide any explanation or justification for abridging time. Secondly, the intervenors point out that the application had to be adjourned as the applicants did not provide proper brief of the law as required by the Rules. As a result, the applicants were permitted to file a supplementary brief which necessarily resulted in the intervenor, the Herald, filing a supplementary brief of its own. As a result of the adjournment, Global had an opportunity to file its own brief, which had not been filed earlier because Global had not appeared at the initial hearing.
>
> 20 Although I did permit the application to be heard within the abridged time period, there was no adequate explanation as to the need for counsel to be granted an adjournment to prepare and file a supplementary brief dealing with the privacy issue. The fact that there was a need for an adjournment to allow the applicants' counsel to provide a supplementary brief dealing with the privacy issues, in my opinion, takes these circumstances outside of the general rule that costs should not be awarded to intervenors.

> [Emphasis added]

[19] Another example in which intervenors have been awarded costs occurred in *Lienaux v. 2301072 Nova Scotia Limited,* 2007 NSCA 66, where at para. 29 the Court of Appeal awarded costs to an intervenor where the plaintiff's conduct resulted in a needlessly complex appeal that caused both the respondent and the intervenor to incur avoidable expenses.

[20] An alternative approach was taken in *Lawtons Drug Store Limited v. Zinck,* 2009 NSSC 243, where costs were also awarded to intervenors. At paras. 9 and 10, McDougall J. stated his rationale:

> 9 Although an intervenor is generally not entitled to costs, in this particular case I feel it is appropriate to use the general discretion codified in Civil Procedure Rule 77.02. My reason for doing so is based on the very significant interest that the MacDonnells had in the proceeding. If the injunction had been granted, the sale of the MacDonnell Pharmacy to Zinck and MacLean would have been further delayed and perhaps frustrated entirely.
>
> 10 Furthermore, Lawton's were seeking to enjoin Zinck and MacLean from working in their chosen profession within the limits of the Village of St. Peter's. This would have prevented the MacDonnells from hiring either Zinck or MacLean for a 24-month period. Mrs. MacDonnell was the only licensed pharmacist at MacDonnell Pharmacy. The pharmacy could only be open while a licensed pharmacist is on duty. To disentitle Zinck and MacLean from working at MacDonnell Pharmacy would have severely compromised the MacDonnells' business and perhaps even Mrs. MacDonnell's health.

[21] Further, in *Corporation Express Canada Inc. v. Memorial University of Newfoundland,* 2015 NLCA 52 at para. 47, costs were awarded to intervenors as a result of the important contribution that they had made to the court's understanding of the substantive issues in the case.

[22] I have considered the fact that the intervenors were represented by counsel in this matter on a *pro bono* basis. This is not necessarily a bar to recovery of costs, as was noted in *1465778 Ontario Inc. v. 1122077 Ontario Limited Ltd.*, (2006), 82 O.R. (3d) 757 (CA):

> 34 It is clear from the submissions of the amici representing the views of the profession, as well as from the developing case law in this area, and I agree, that in the current costs regime, there should be no prohibition on an award of costs in favour of pro bono counsel in appropriate cases. Although the original concept of acting on a pro bono basis meant that the lawyer was volunteering his or her time

> with no expectation of any reimbursement, the law now recognizes that costs awards may serve purposes other than indemnity. To be clear, it is neither inappropriate, nor does it derogate from the charitable purpose of volunteerism, for counsel who have agreed to act pro bono to receive some reimbursement for their services from the losing party in the litigation.
>
> 35 To the contrary, allowing pro bono parties to be subject to the ordinary costs consequences that apply to other parties has two positive consequences: (1) it ensures that both the non-pro bono party and the pro bono party know that they are not free to abuse the system without fear of the sanction of an award of costs; and (2) it promotes access to justice by enabling and encouraging more lawyers to volunteer to work pro bono in deserving cases. Because the potential merit of the case will already factor into whether a lawyer agrees to act pro bono, there is no anticipation that the potential for costs awards will cause lawyers to agree to act only in cases where they anticipate a costs award.

[23] As Feldman, JA continued at para. 36:

> 36 Where costs are awarded in favour of a party, the costs belong to that party. See Mark M. Orkin, Q.C., The Law of Costs, looseleaf (Aurora: Canada Law Book, 2005) at s. 204 and Rules of Civil Procedure, rule 59.03(6). However, pro bono counsel may make fee arrangements with their clients that allow the costs to be paid to the lawyer. This ensures that there will be no windfall to the client who is not paying for legal services.

[24] In the present case, when one considers the years that have elapsed wherein the ground water contamination affecting the intervenors' homes has gone unremediated, the risk was (if the appellants had succeeded in this appeal) that a longer, more protracted delay would ensue. This would have exacerbated the impact of the environmental damage that has already occurred.

[25] It is readily apparent that the intervenors had a significant interest in the outcome of this proceeding. Their stake in these proceedings is much larger than a merely monetary one. The intervenors' quality of life (as well as that of their neighbours) has been significantly (and adversely) impacted for a long time now. This is attributable to the ground water contamination emanating from the appellant's work site located at 1275 Old Sambro Road. Having participated in the first appeal, it should have been obvious to the appellant from the outset that the intervenors would seek to participate in the second one, too.

[26] In summary, I conclude that:

i. the intervenors were required to spend “a considerable amount of effort to prepare for the hearing in an abridged time period”, due to the appellant’s failure to comply with the filing schedule set by this court;

ii. when they did file their brief, the appellant’s accompanying notice to adduce fresh evidence in the appeal (which they subsequently withdrew) exacerbated point number (i) above;

iii. the intervenor’s interest in this proceeding was not a merely theoretical one. It went beyond financial interest. The outcome has an impact directly upon the quality of their lives and health; and

iv. the intervenors made a direct and important contribution (via briefs and oral argument) to the court’s understanding of the substantive issues involved.

[27] The amount sought by the intervenors in this matter is extremely modest, and I have no hesitation concluding that it is appropriate for the reasons noted above. Accordingly, the intervenors shall receive their costs in the amount sought, consisting of $1500 inclusive of disbursements. My expectation is that counsel for the intervenors have made arrangements with their clients that will allow the costs to be paid directly to counsel in these circumstances.

Gabriel, J.