SUPREME COURT OF NOVA SCOTIA
Citation: *Sipekne'katik v. Nova Scotia (Environment)*, 2017 NSSC 254

Date: 20170926
Docket: Hfx No. 450765
Registry: Halifax

Between:

Sipekne'katik

Appellant

v.

Nova Scotia (Minister of Environment)
and Alton Natural Gas Storage LP

Respondents

Decision on Costs

Judge:	The Honourable Justice Suzanne Hood
Heard:	By written submissions, Halifax, Nova Scotia
Final Written Submissions:	June 30, 2017
Counsel:	Raymond F. Larkin, Q.C., and Balraj Dosanjh, for the Appellant Edward A. Gores, Q.C., and Debbie Brown for the Respondent Nova Scotia (Minister of Environment) Robert G. Grant, Q.C., and Daniela Bassan, for the Respondent Alton Natural Gas Storage LP

By the Court:

Introduction

[1] Sipekne’katik was successful in its appeal to the court from the decision of the Minister of Environment made pursuant to section 137 of the *Environment Act*. There were two issues before the court: procedural fairness and adequacy of consultation. In the decision released January 27, 2017, I concluded that the Minister’s decision was not procedurally fair. As a result, I did not deal with the issue of consultation, since the matter was remitted back to the Minister of Environment. Since Sipekne’katik was successful on the appeal, it is entitled to its costs.

[2] In my decision, I asked that, if the parties could not agree on costs, they make written submissions by March 31, 2017. That deadline was extended on two occasions at the parties’ request. Sipekne’katik filed its submissions on June 26, 2017 and reply submissions on June 30, 2017. The submissions of the Minister of Environment (the Minister) and those of the respondent Alton Natural Gas Storage LP (Alton) were filed on June 30, 2017.

[3] Sipekne’katik requests lump sum costs in the amount of $75,000 inclusive of legal fees and disbursements. The Minister says costs should be awarded pursuant to paragraph 4 of Tariff C using a multiplier of 4. The Minister further submits that costs should be awarded jointly and severally against the Minister and Alton and on an equal basis. Alton agrees with Sipekne’katik that costs should be awarded on a lump sum basis, but submits the costs award should be $30,000. Alton further submits that it should not be liable for any of the costs awarded to Sipekne’katik.

Immunity from costs award

[4] Sipekne’katik made submissions with respect to administrative decision makers not being immune from an award of costs where there has been a breach of procedural fairness. The Minister, however, did not submit that she has that immunity. I agree that the Minister is not immune from a costs award.

Civil Procedure Rule 77, Costs

[5] The following provisions of Rule 77 with respect to costs are applicable to the issues raised by the parties.

> **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 (3)** Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> **Assessment of costs under tariff at end of proceeding**
>
> **77.06 (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.
>
> **Lump sum amount instead of tariff**
>
> **77.08** A judge may award lump sum costs instead of tariff costs.
>
> **Disbursements included in award**
>
> **77.10 (1)** An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[6] Tariff C of Rule 77 provides as follows:

> **TARIFF C**
>
> **Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia**
>
> For applications heard in Chambers the following guidelines shall apply:
>
> (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C 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 and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	**Range of Costs**
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1000 - $2000
1 day or more	$2000 per full day

Tariff costs or lump sum costs

[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:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
>
> > " … 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.

[9] In *Homburg v. Stichting Autoriteit Financiele Markten*, 2017 NSSC 52, Justice Wood said the proper approach on a costs motion is to start with the presumption that the tariffs should be applied. The burden is on the party who wishes to depart from the tariffs to establish circumstances demonstrating why a

lump sum is appropriate to do justice between the parties. The successful defendants in that case sought lump sum costs based upon the argument that party and party costs calculated under the tariff did not represent a substantial contribution to their actual expenses.

[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:

> 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."

[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)

[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:

> 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:

> 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.

[14] The first step is to determine the amount of costs to be awarded pursuant to Tariff C. Tariff C applies to statutory appeals. Paragraph (4) of Tariff C (quoted above) provides that the Chambers judge:

> … may multiply the maximum amounts in the range of costs set out in this Tariff C 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 and conducting the application.

[15] For a hearing of one day or more, the costs are $2000 per full day. In this case, the appeal was heard on two days, November 14 and 15, 2016.

[16] In my view, this matter was complex. It is true that the issue of procedural fairness has been dealt with in a number of decisions; however, the position taken by the Minister on the issue of consultation made the matter more complex. The Minister's argument was that there was no duty to consult, basing this upon an interpretation of a number of previous decisions. Although the Minister subsequently withdrew the claims made with respect to the duty to consult, this was not done until after the conclusion of the hearing. Accordingly Sipekne'katik incurred significant legal costs in responding to this issue. The positions which were withdrawn after the hearing are set out in summary in para. 35 of Sipekne'katik's submissions on costs. They include:

> Nova Scotia does not owe a duty to consult to Sipekne'katik;
>
> The constitutional duty to consult does not apply in Nova Scotia;
>
> The historical evidence demonstrates that there was a submission by the Mi'kmaq peoples, which negates a constitutional duty to consult;
>
> The Supreme Court of Canada *R. v. Marshall*, [1999] 3 SCR 456 was wrongly decided; and
>
> The law does not support a claim on Marshall treaty rights and title at Shubenacadie.

[17] Although ultimately these issues were not dealt with in my decision, Sipekne'katik had to respond to them.

[18] In addition the issue was an important one for Sipekne'katik. As Sipekne'katik said in para. 32 of its written submissions on costs:

> The appeal concerned a project located in the traditional territory of the Mi'kmaq, and Sipekne'katik is the closest community to the Alton Gas project. Furthermore … the positions that the Minister took in the appeal proceedings included a denial of established treaty and Aboriginal rights. The threat to established rights was of significant importance to Sipekne'katik.

[19] In my view, the amount of effort involved in preparing for and conducting the application was extensive. The Minister filed a record which comprised ten volumes and a supplementary record together totalling thousands of pages. Substantial time was required to review the record. In addition, lengthy affidavits and extensive legal briefs were filed. Six affidavits were filed by Sipekne'katik with numerous exhibits which totaled 408 pages. The Minister filed one affidavit in response and two affidavits were filed by Alton totalling 691 pages. In addition, the briefs were extensive: 157 pages from Sipekne'katik, 77 pages from the Minister and 81 pages from Alton. Extensive books of authorities were filed. I agree with Sipekne'katik's submission at para. 7 of its brief that "The workload was far disproportionate to the Court time in this case."

[20] The issue then becomes whether all of these factors combined result in a costs award pursuant to Tariff C which represents a substantial contribution to Sipekne'katik's actual expenses. In *Homburg*, Wood, J. said in para. 13:

> In this case the defendants' submission that a lump sum is appropriate was based primarily on the size of its solicitor client account and the relatively small contribution a tariff award would make towards that amount. They also referred to

> the complexity of the matter and the significance of the issues to the defendants as part of the justification for a lump sum.

[21] Wood, J. treated the hearing as three full days for the purposes of Tariff C and he said in para. 15 that because of the complexity of the matter, its importance and the effort involved, the tariff amount should be increased by four times. He went on to say in para. 16:

> In many ways the hearing was no more complex than other matters dealt with by the court including summary judgment, judicial review and forum non-convenience [sic].

[22] He then said in para. 17 that the international nature of the litigation resulted in increased costs and, as a result, he increased the tariff costs by two-thirds bringing the award to $40,000. The adjusted amount sought for lump sum costs was $169,527.14.

[23] In this case, the hearing was two days and, according to Tariff C, with costs of $2000 per full day, the tariff basic amount would be $4000. Using a multiplier of 4, that would result in Tariff C costs of $16,000. Were I to follow the reasoning of Wood, J. in *Homburg*, increasing that amount by two-thirds would increase the costs award by something under $11,000. That would result in a costs award of just under $27,000.

[24] I conclude that having regard to all the factors referred to in Tariff C and the principle that costs should be a substantial but not complete indemnity, a costs award of less than $27,000 is not just and appropriate in this case. Sipekne'katik has met the onus of showing that the circumstances are such that an award of lump sum costs should be made.

Lump Sum Costs

[25] In *Armoyan v. Armoyan*, 2013 NSCA 136, Fichaud, J.A. said in para. 18:

> But some cases bear no resemblance to the tariffs' assumptions. … The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. … Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity – *e.g.* to define an artificial "amount involved" as Justice Freeman noted in *Williamson* – that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the *Rules* or case law.

[26] In *Trinity Western*, Campbell, J. concluded in para. 60:

> In order to do justice between the parties and having regard to the public interest elements involved, a lump sum amount of $70,000 is set. That is intended to include taxes and disbursements. The amount is somewhat more than double what the tariff would provide with the highest multiplier and somewhat less than 40% recovery of fees and disbursements incurred.

[27] In that case, the tariff amount would have resulted in an award of $32,000 The claim made by *Trinity Western* was for costs in the amount of $120,000.

[28] An affidavit was filed by Sipekne’katik showing costs incurred of $172,904. The lump sum costs award sought, as referred to above, is $75,000.

[29] Alton says the actual costs incurred should be reduced for three reasons.

1. It says the costs related to the Stay Motion before Wood, J. should be deducted. However, it is clear from Sipekne’katik’s submissions that these costs are not included in the total of $172,904.

2. Alton says Sipekne’katik should not be awarded any costs for fees incurred in the period January 2019 to March 2016. Sipekne’katik says it appealed the granting of the Industrial Approval (which was issued on January 20, 2016) and the breach of procedural fairness by the Minister in the hearing of that appeal caused costs to be incurred by Sipekne’katik.

   In my view, these costs should not be deducted because Sipekne’katik had to bring the appeal and, in preparing for it, tried to ensure the procedure was fair.

3. Alton also submits a ten percent overall deduction should be made because no detail of the legal work was provided. I conclude that would reduce the actual legal fees by approximately $17,000, to

$156,000. Sipekne'katik says it is not necessary to produce actual invoices and not doing so protects solicitor-client privilege.

In *Trinity*, the court awarded lump sum costs without having affidavit evidence of actual invoices.

In *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Company Ltd.*, 2011 NSSC 423, Duncan, J. concluded that, since there was no accounting for the work done, no guarantee that it related solely to the matter before him, and was for an amount which "seems extraordinary" when compared to the union's account (para. 60):

> … it would be speculative of me to say that the amount billed was reasonable or necessary … (para.61)

He said in para. 62 that he would not place much weight on that evidence.

This case does not have the problems alluded to by Duncan, J. which caused him to give little weight to the amount of fees claimed. In my view, that decision does not stand for the proposition that actual invoices must be submitted.

> Furthermore, in the circumstances of this case and in light of the fact that the duty to consult issue may still be litigated, it would not be appropriate for actual invoices to be provided. Solicitor-client privilege needs to be protected.

[30] Alton also says there was mixed success on the affidavits issue heard by Arnold, J. on August 17, 2016. He made no ruling about costs, saying only that the weight to be given to the affidavits would be decided on the appeal.

[31] Sipekne'katik points out that it should have its costs since it was successful in having certain portions of affidavits struck. However, I conclude the decision did result in mixed success. Affidavits which Sipekne'katik wanted struck were not struck and portions of affidavits which Sipekne'katik wanted struck were struck. I conclude Sipekne'katik is not entitled to costs on the affidavits motion, nor is the Minister or Alton.

[32] Alton says Sipekne'katik should not have its costs on the Motion for Directions. Because it was a non-substantive step, taking little time, I conclude there would have been little in the way of costs incurred. Sipekne'katik is not seeking all of its costs incurred in any event.

[33] Alton points out that Sipekne'katik was not successful in obtaining a stay pending the Minister's decision on the appeal remitted back to her. In my decision I concluded I did not have the authority to grant the stay requested. In spite of this, I said Sipekne'katik was successful on the appeal.

[34] Alton also submits since the appeal was decided only on the issue of procedural fairness rather than on the duty of the Crown to consult, much of Sipekne'katik's claimed amount for legal fees were with respect to the latter issue. In my decision I concluded that it was " … unnecessary … to deal with the issue of consultation." (Para. 95 of the decision.) Alton takes the position that a decrease in the award of costs is warranted because of the significant costs incurred in preparing to deal with the consultation issue. Alton therefore concludes that it cannot be said that the appellant was successful in all the arguments raised before the court.

[35] In response Sipekne'katik says that it was successful on its appeal and that it did in fact incur the costs in arguing the consultation issue. Sipekne'katik also points out that "Alton has not cited any authority for its position that costs can only be claimed for issues that are directly addressed in the written decision. (Quoting from para. 7 of Sipekne'katik's reply submissions.)

[36] This is not a situation like that in *Garner v. Bank of Nova Scotia*, 2016 NSSC 105, where there were mixed results. Sipekne'katik was successful and the Minister and Alton were not. The appeal submissions and authorities dealt with both the issues of procedural fairness and the duty to consult. Sipekne'katik was entitled to take the position that it would argue both the issue of procedural fairness on the appeal and the duty to consult. Clearly, if Sipekne'katik had not been successful in its argument about procedural fairness, the decision would have had to address the duty to consult issue.

[37] Furthermore, Sipekne'katik says that considerable time and effort were spent dealing with the positions which were withdrawn by the Minister after the conclusion of the hearing. Sipekne'katik says I should consider that approximately one-half of its costs in preparing its Reply Brief ($18,980) and its preparation for and arguing the appeal ($33,451.50) are "thrown away costs". Sipekne'katik says I should take that into consideration and award a complete indemnity for these costs.

[38] Neither the Minister nor Alton addressed this submission by Sipekne'katik.

[39] In *McQuaid v. LaPierre*, 1993 N.S.R. (2d) 327, Grant, J. awarded costs for work "thrown away" as the result of an adjournment granted on day one of a three-day trial because the plaintiffs dismissed their lawyer on the Friday before the trial

was to begin on Monday. Grant, J. concluded a lump sum costs award should be made. He did not refer to those costs as a complete indemnity, but did order the costs to be paid forthwith and the proceeding stayed until payment was made.

[40] In *Hardman v. Alexander*, 2003 NSSC 151, submissions were made with respect to a costs award where a lawsuit against two parties and an application to wind up a company were dropped on the first day of trial. In that case, the court said in para. 138:

> If there were a means by which it could be concluded that a certain percentage of the pre-trial preparation done by counsel for the parties could be attributed to those actions, it might well be appropriate to order solicitor/client costs relating to that portion of work done and costs thrown away. I do not, however, feel it is appropriate to make a guesstimate about the time and expense involved.

[41] In the result, the decision was that those matters be dealt with "as part of the overall award of lump sum costs" (para. 138).

[42] In *Oz Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2016 ONSC 4272, Hackland, J. awarded "costs thrown away" where a party refused for seven years to admit it was the successor to the defendant company and responsible for any of its liabilities in the action.

[43] Hackland, J. said in para. 5:

> The term 'costs thrown away' normally connotes complete indemnification although, the court has a residual discretion to order otherwise. The complete

> indemnification does not flow from any misconduct on the defendants' part as both parties seem to suggest in their written submission, rather it simply means cost unnecessarily and uselessly incurred by the defendants' actions ie. costs that were thrown away. The plaintiffs are entitled to be reimbursed for such expenditures on a full indemnity basis.

[44] He then commented on the difficulty of segregating the "costs thrown away" from the costs incurred on the merits (para. 6). He had "the billing information and dockets" (para. 9) and was able to conclude that one-half the time was spent on the successor issue.

[45] Hackland, J. then noted in para. 10:

> Furthermore, I am mindful of the well-established case law reflected in Rule 57 that I am not bound to render a costs award that simply reflects the arithmetical results of hours docketed multiplied by hourly rates. Of at least equal importance is that the award reflect an amount that would be within the reasonable expectations of the unsuccessful party who is required to pay the costs awarded.

[46] It is difficult in this case to determine what are the "costs thrown away" for several reasons. I do not have the billing information in detail (and I have concluded above why that is necessarily so). I am also mindful of the caution of Moir, J. in *Campbell v. Jones*, 2001 NSSC 139, cited in *Hardman, supra*, at para. 141:

> Also , the costs are subject to objective assessment. … The tariffs were designed to achieve a substantial indemnity but without regard to the arrangements between the particular party and counsel. One might say the objective was substantial indemnity against what would generally or ordinarily be charged to a client in like circumstances.

[47] For these reasons, I am not satisfied that the amounts sought by Sipekne'katik should be awarded on a complete indemnity basis. As in *Hardman*, I will consider these costs to be dealt with as part of the overall award of lump sum costs.

Allocation of costs

[48] The Minister says costs should be apportioned 50/50 between the Minister and Alton and should be awarded jointly and severally against them. Alton says firstly there should be no apportionment of costs and, if I conclude there should be, it should not be on a 50/50 basis but "only a small fraction (less than 20%), if any, should be allocated to Alton". (quoting from para. 36 of Alton's submissions)

[49] I agree with Alton that the province should bear responsibility for the bulk of the costs. I do not, however, agree that it should be 80/20. Although Alton was not responsible for the procedural unfairness, which I concluded resulted in the appeal being allowed, Alton did address procedural fairness, albeit rather briefly. Alton also addressed the duty to consult issue and filed extensive affidavits with exhibits in support of its position. The duty to consult issue was a substantial one on the appeal and, although not addressed in my decision, was dealt with in a substantial way by all the parties. As I said above, Sipekne'katik did not have the luxury of

resting all of its appeal arguments on the procedural fairness issue. I do recognize, however, that the Minister, by taking the positions referred to above, which were subsequently withdrawn, added in a material way to Sipekne'katik's costs.

[50] I therefore conclude that the apportionment of costs should be 65/35 with the province paying the larger share.

[51] I conclude, based upon all the factors to which I have referred above, that Sipekne'katik's request for all inclusive lump sum costs in the amount of $75,000 is a just and appropriate award of costs which will do justice among the parties. It represents a substantial but not complete indemnity. The total costs claimed to have been incurred are $172,904. The lump sum award is approximately 43 percent of those total costs. Considering the "thrown away costs" as a factor, I am satisfied that is an appropriate costs award. I also note the costs award is inclusive of a relatively modest amount for disbursements.

Hood, J.