IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Beaini v. Association of Professional Engineers of Nova Scotia, 2003 NSSC 231

Date: 20031124
Docket: SH 181872
Registry: Halifax

Between:

Peter Beaini, P. Eng.

Appellant

v.

The Association of Professional Engineers of Nova Scotia, The Council of the Association of Professional Engineers of Nova Scotia and The Secretary to the Association of Professional Engineers of Nova Scotia

Respondents

DECISION ON COSTS

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	September 17, 2003 in Halifax, Nova Scotia
Written Decision:	November 24, 2003
Counsel:	**Blair Mitchell** for the Appellant **Duncan Beveridge, Q.C.** for the Respondents

By the Court:

[1] Peter Beaini appealed a discipline decision of the Council of the Association of Professional Engineers of Nova Scotia, pursuant to s. 17(3) of the *Engineering Profession Act,* R.S.N.S. 1989, c. 148. This appeal was unsuccessful except with respect to one of the penalties imposed. My decision on the appeal was rendered on June 23, 2003.

[2] The respondent is entitled to its costs. The parties cannot agree on costs except with respect to disbursements totalling $2,503.21.

[3] Duncan Beveridge provided copies of his invoices as follows: October 3, 2002 - $10,000.00 plus HST; November 29, 2002 - $4,000.00 plus HST; and April 1, 2003 - $17,500.00 plus HST. In his letter of September 11, 2003, he refers to additional time totalling five hours at $250.00 per hour for an additional cost of $1,250.00 plus HST. Mr. Beveridge says that all but a very small amount of the time refers to the appeal. In addition, there was one half day in court dealing with the issue of costs.

[4] Mr. Beveridge says s. 17(3) of the *Engineering Profession Act* provides that the appellant is to bear the costs of the appeal if the appeal from suspension or cancellation of his license is unsuccessful. Mr. Beveridge seeks costs in the amount of two-thirds of his actual costs and submits that the cases support this.

[5] Mr. Mitchell, on behalf of Mr. Beaini, does not disagree with the time spent by Mr. Beveridge. In fact, he says his time was the same.

[6] Section 17(3) of the *Engineering Profession Act* provides as follows:

> ... and if the suspension or cancellation be confirmed, the costs of the appeal shall be borne by such person.

In my view, this provision of the *Engineering Profession Act* does not over-ride the judicial discretion to award costs. In any event, s. 17(3) deals only with an appeal with respect to a suspension or cancellation of a license and this appeal dealt with a number of other issues as well. Furthermore, the respondent is not in fact seeking one hundred percent of its costs as appears to be contemplated by s. 17(3).

[7] Mr. Mitchell refers to the section of the *Civil Procedure Rules* dealing with costs on tribunal appeals in the Court of Appeal.

> **Costs**
>
> **62.27** Unless otherwise ordered by the Court in its discretion, no costs shall be ordered paid by or to any party to a tribunal appeal.

He submits that, in appeals from tribunals, the usual practice is to award no costs. However, this is not an appeal to the Court of Appeal and I conclude that this provision is therefore not applicable. In any event, the Court of Appeal has the discretion to award costs in such cases.

[8] In *Hines v. Nova Scotia (Registrar of Motor Vehicles)* (1990) 105 N.S.R. (2d) 240 (NSSCTD), Justice Davison quoted from the report of the Statutory Costs and Fees Committee in para. 8 as follows:

> The recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending a proceeding, but should not amount to a complete indemnity.

[9] The principle that costs awards should constitute "a substantial contribution but not a complete indemnity" is one that has been applied in costs decisions since the new system for costs and fees was created in 1989. The Tariffs of Costs and Fees are the starting point. They provide:

> In these Tariffs, the amount involved shall be
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> > (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
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> > > (i) the amount allowed
> > >
> > > (ii) the complexity of the proceeding, and
> > >
> > > (iii) the importance of the issues;
> >
> > ...
> >
> > (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
> >
> > > (i) the complexity of the proceeding, and
> > >
> > > (ii) the importance of the issues;

In some cases, the court has departed from the Tariffs. That was done in *Campbell v. Jones*, 2001 CarswellNS 342 (S.C.). In that case, Justice Moir had the lawyers' invoices for their fees but concluded, although that was relevant evidence, it was still the responsibility of the court to objectively assess what would constitute a substantial contribution but not complete indemnity. Moir, J. said in *Campbell v. Jones* at para. 102:

> ... the court should try to assess counsel's efforts on a general basis, and should take the actual fees into account only to the extent they tend to show generally what any client of any competent lawyer might expect reasonably to be billed for services necessary to the case at hand.

[10] Although in some cases the "substantial contribution but not complete indemnity" has approximated two-thirds of the actual costs incurred, I do not conclude that this is 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] Although Mr. Beveridge urged me to consider the fact that little effort was made by the unsuccessful appellant to settle the issue of costs, I give little weight

to that argument in this case. The parties did agree on disbursements but were far apart on the issue of costs: Mr. Mitchell's position was that costs should be $10,000.00 to $12,000.00 and Mr. Beveridge's position was that they should be $24,000.00 on invoices totalling just over $37,000.00. In such circumstances, it is unlikely a settlement could be reached and neither should be faulted for being unable to agree.

[12] I also note that the appellant had some small success on the issue of penalty. That is not sufficient of course to deprive the respondent of its costs. Little time was spent on it in argument or in the decision itself. It is a minor factor in the assessment of costs.

[13] I also conclude that the costs award is to include the costs of the respondent on the application before Associate Chief Justice MacDonald and the application before me to admit fresh evidence.

[14] In all the circumstances of this case, I conclude that I should depart from the Tariffs since arriving at an amount involved would be an artificial exercise in this case. I therefore conclude that an award of lump sum costs is appropriate and that

a substantial contribution to, but not complete indemnity of, the successful respondent's costs requires a costs award of $15,000.00 plus the disbursements to which the parties have agreed.

Hood, J.