5142 NWT Ltd. et al v. Town of Hay River et al, 2008 NWTSC 31 Date 2008 05 13
Docket: S-0001CV2007000051

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

5142 NWT LTD., AFM HOLDINGS LTD., CARTER INDUSTRIES LTD., G&L WORKWEAR LTD., GODWIN STORES LTD., HAY RIVER DISPOSALS (1985) LTD., JAMESON HOLDINGS LTD., operating as JAMESON'S TRUE VALUE HARDWARE, SCOTT'S ELECTRICAL SERVICES LTD., STAN DEAN & SONS LTD., and TERRITORIAL QUICK PRINT INC.

Applicants

-and-

THE MUNICIPAL CORPORATION OF THE TOWN OF HAY RIVER, GREG McMEEKIN and HAY RIVER LIQUOR RETAILERS (1991) LTD.

Respondents

MEMORANDUM OF JUDGMENT ON COSTS

[1] As set out in Reasons for Judgment in *5142 NWT Ltd. et al v. Town of Hay River et al,* 2008 NWTSC 02, an appeal by the Applicants from a decision of the Development Appeal Board for Hay River ("the Board") was allowed and the matter of a development permit issued to Hay River Liquor Retailers (1991) Ltd. ("the developer") was remitted to the Board for a new hearing.

[2] The Applicants now seek costs of these proceedings. They seek full indemnity for their actual legal costs of $42,000.00 plus disbursements. Alternatively, they seek indemnity for a substantial portion, 40 to 50 per cent of those costs, or some other amount achieved by using multipliers of the costs tariff under the *Rules of Court* along with an inflationary increase. They ask that costs be set in a lump sum so that taxation is not necessary. Finally, they submit that they should be entitled to recover a set of costs against each of the developer and the Municipal Corporation of the Town of Hay River ("the Town"). They do not seek costs against the Board.

[3] The Town's position is that the Applicants are entitled to some costs, but far less than what they are seeking. The Town objects to the inclusion of some items claimed

by the Applicants and also disputes the amount of photocopying charges sought as disbursements.

[4] The developer argues that all parties should bear their own costs. It says that costs should not be awarded against it because the appeal was ultimately successful due to the Board's failure to give adequate reasons for its decision, which is not the developer's fault. Alternatively, the developer takes the position that the costs sought are excessive and that in any event no costs should be awarded for an adjournment sought and obtained by the Applicants since it arose from actions attributable to the Applicants.

[5] The circumstances of the case are set out in the judgment referred to above as well as the judgment on the application for leave to appeal: *5142 NWT Ltd. et al v. Town of Hay River et al,* 2007 NWTSC 51. Two of the several Applicants named in the style of cause were given leave to appeal after argument in a chambers application that took most of a day. The appeal itself took a half day. Finally, submissions on costs took most of another half day.

[6] Costs are in the discretion of the Court, although the usual rule is that the successful party is entitled to costs. The tariff in the *Rules of Court* applies, unless otherwise ordered by the Court: Rule 648(1). In this case, since no monetary relief was claimed, Rule 648(7) says that costs should be awarded in Column 2 of the tariff. The Applicants argue that costs so calculated would be inadequate considering the legal costs they have actually incurred and the complexity and importance of the case, as well as the difficulties posed by having to deal with three opposing counsel. These are all appropriate considerations on the question whether costs should be "enhanced" beyond what the tariff would provide.

[7] In seeking full indemnity, however, the Applicants are really seeking solicitor client costs, which are generally reserved for cases where the Court feels it is necessary to sanction conduct on the part of a party. No such allegation is made in this case.

[8] On the face of it, $42,000.00 in legal costs seems a very large sum for these proceedings. Counsel for the Applicants indicated that he considered submitting material to the Court with a breakdown of the sum but felt he could not do so because the detail would result in a breach of solicitor client privilege. I accept that explanation, however, it still leaves the Court with no way of assessing whether the

costs claimed are reasonable. As Lutz J. pointed out in *Fullowka v. Royal Oak Ventures Inc.*, [2005] N.W.T.J. No. 57(S.C.) (paragraph 48), in order to award party-party costs equal to a fraction or percentage of solicitor client fees, the solicitor client fees must be demonstrably appropriate. Here, the Applicants say they should be fully indemnified or costs awarded should approach 50 per cent of what they have incurred. The Court is unable, however, to consider whether that would be appropriate without backup information.

[9] Factually, and in terms of the material involved, this case was not complex. It arose from an application for a development permit. The paperwork in the record is not extensive. The appeal hearing before the Development Appeal Board resulted in a transcript of only 17 pages. The Board's decision, from which the Applicants appealed, is contained in two pages. Ultimately, two of the ten named Applicants were given leave to appeal on two grounds.

[10] The question whether the Applicants had standing to appeal to this Court even though they had not appealed to the Development Appeal Board was a novel one, at least in this jurisdiction. One of the two grounds for appeal, the adequacy of the Board's reasons for its decision, involves fairly well established jurisprudence, but is still an issue that involves some analysis. The choice of standard of review under the jurisprudence as it then was is also a matter of some complexity.

[11] The Applicants emphasized the importance of the appeal decision for residents and businesses in Hay River because the issue at the root of these proceedings is a development permit that allowed a retail liquor store in an industrial area, which is said to conflict with the General Plan for the Town. It is important to bear in mind, however, that the decision was not that the Board erred in upholding the permit, but that it erred in not giving sufficient reasons for its decision to do so. This Court's decision did not go any further than that. So while the main issue is undoubtedly one of interest and concern to the community, whether the Applicants' position against the permit will ultimately be upheld is yet to be determined.

[12] Of the three opposing counsel, counsel for the Board took no position on the issues in these proceedings. Counsel for the Town and counsel for the developer took very similar positions for the most part. The developer adopted the submissions of the Town on some of the issues on the leave to appeal application. On the standard of review for the appeal itself, the developer also adopted the Town's submissions. Both

the developer's and the Town's submissions, written and oral, were concise and to the point. This is quite a different situation from that in *Fullowka*, where there were multiple counsel for multiple parties and the trial was a very complicated one. The fact that in this case counsel for the Applicants had to deal with three counsel did not result in any significant complications that came to the Court's attention.

[13] In my assessment, the only one of the above factors that can be said to merit consideration of costs in excess of the tariff is the complexity of the issues.

[14] Although not characterizing it as conduct to be sanctioned for which solicitor client fees would be appropriate, the Applicants also refer to the refusal of the other parties to agree that the leave application and the appeal itself be heard together. The Applicants say hearing them together would have been more efficient and involved less material having to be filed and less delay.

[15] I do not think the two step process can be faulted in this case. The Applicants initially listed seven grounds of appeal; the Respondents argued on the leave application that the Court should grant leave on only two of those grounds. By the time of argument the Applicants pursued only two grounds and leave was granted on those two grounds, with some change in their scope. So until the leave application was heard, there was some uncertainty as to just what the grounds would be. Even more importantly, standing was a significant issue as none of the Applicants had been appellants before the Board. If none of them had been granted standing, the appeal would not have proceeded at all. Because of that, I do not think counsel can be criticized for wanting a ruling on the standing issue before delving into the merits of the appeal.

[16] The Applicants claim success on the application for leave to appeal. While only one of the Applicants had to be granted leave for the appeal to proceed as all of the Applicants sought leave on the same grounds, much of the argument on the leave application centered on whether any of the Applicants had established that they should be given standing. Ultimately, eight of the ten Applicants were unsuccessful. On the other hand, the position they advocated and that was taken forward by the two Applicants who were given leave was ultimately successful. I would say that the Applicants as a whole were successful and so should have costs of the application for leave to appeal as well as the appeal itself.

[17] The Applicants say that if costs are to be based on the tariff, whether as it now stands or in some multiple or higher column, they should recover a fee for second counsel. In this case, two counsel appeared for the Applicants on both the leave application and the appeal but only senior counsel made submissions to the Court. I am not persuaded that a second counsel fee is warranted in these circumstances.

[18] The Applicants also seek the amount applicable to appearance at trial rather than applicable to a complex opposed motion under the tariff. The Applicants point out that the costs tariff under the *Rules of Court* does not, unlike Alberta's tariff, include an item for special chambers applications. Instead, our costs tariff refers to simple and complex motions or applications. A complex motion or application would normally require a special chambers sitting, as was the case here. One could have a special chambers sitting where *viva voce* evidence is called and that might be justification for using the trial item in the costs tariff. Where, as here, no evidence is called at the special chambers hearing and the issues are legal rather than factual ones, the tariff item for motions or applications is generally the more appropriate one. I see no reason to deviate from that in this case. On the other hand, there is no item in the costs tariff for the briefs required for a special chambers hearing and so the item for trial briefs is appropriate.

[19] The Applicants submit that if the tariff is to be used, it should be increased as it is outdated and inadequate, having come into effect when the *Rules of Court* were amended in 1996. One way of dealing with an outdated tariff is to use an inflationary factor, as was done by Veit J. in *Spar Aerospace Ltd. v. Aerowerks Engineering Inc.*, [2007] A.J. No. 1264 (Q.B.). In that case, the Bank of Canada's inflation calculator was used. In this case, the Applicants have submitted some information from a publication, but it is not clear what that information is based on or how it compares to the Bank of Canada's inflation calculator and in any event, the Applicants propose an inflationary factor in excess of what is found in the publication, which would seem to defeat any certainty that the use of an inflationary factor should provide.

[20] Although it cannot be said to provide for any certainty either, the more usual method in this jurisdiction of recognizing that the costs tariff is not adequate compensation in all cases is by using a multiple of the tariff. For example, recently, in recognition of the complexity of the issues involved, Vertes J. ordered costs in triple Column 2 in a case of judicial review: *Diavik Diamond Mines Inc. v. Northwest Territories (Director of Human Rights)*, [2007] N.W.T.J. No. 89 (S.C.).

[21] In this case, taking into account the matters outlined above and having considered what the costs would be under Column 2 of the tariff and also in multiples of that tariff in relation to the complexity of the issues and proceedings in this case, I set costs at $6000.00 exclusive of disbursements and GST.

[22] The disbursements claimed total $2112.90. The Town objects that the amount included in that for photocopying (3582 pages x $00.25 per page = $895.50) is excessive. The Applicants filed three large volumes of material, one for each of the leave application, the appeal and this application for costs. There would have been an original and four copies of each to distribute to the Court and all parties. A great deal of material was repeated. For example, all 13 documents included in the volume filed for the leave application were included again in the volume filed for the appeal itself. This was not necessary; a separate volume with the 4 extra documents for the appeal and referencing the earlier volume would have been sufficient and acceptable. I acknowledge that it may be more convenient or efficient for the Court or counsel to have only one volume to refer to on a particular application. On balance, however, I do not see any justification for requiring the Respondents to bear the cost of unnecessary reproduction of material. The photocopying charge will be reduced by the cost of 1000 pages, thus by $250.00, making the allowable disbursement $645.50. The total disbursements allowed are therefore $1862.90 plus GST.

[23] The next issue is whether the costs awarded should be payable by both the Town and the developer. The developer argues that no costs should be awarded against it since the ground upon which the appeal was allowed was the Board's failure to provide adequate reasons for its decision, which is not something attributable to the developer.

[24] The developer was a proper party to the proceeding, as it has an interest in the permit and the attempt to have the permit quashed is to its detriment: *Baffin Plumbing & Heating Ltd. v. Northwest Territories (Labour Standards Board)*, [1993] N.W.T.J. No. 111 (S.C.). In response to the appeal, and particularly the argument that the Board had given inadequate reasons, the developer sought to uphold the Board's decision by urging a certain interpretation of the decision and the underlying reasons. The developer was unsuccessful in that submission. It was also unsuccessful in its argument that none of the named Applicants should be granted leave to appeal. In these circumstances there is no reason why the developer should not be liable for costs.

[25] I see no reason, however, to grant the Applicant a set of costs against each of the Respondents, particularly since the positions taken by them were so similar.

[26] The Applicants' request for an adjournment of the appeal hearing date was opposed only by the developer and costs of the adjournment are sought only against the developer. The record indicates that the Judge who granted the adjournment ordered costs in the cause. Since the Applicants are granted costs against the developer, those costs should include the costs of the adjournment application: Orkin's *The Law of Costs*, 2nd ed., 2007, p.1-15.

[27] As the costs of the adjournment were not sought against the Town, I will specify that $350.00 is the amount attributable to the adjournment so the parties can make the required adjustment.

[28] In summary, the Applicants are granted costs in the amount of $6000.00 and disbursements of $1862.90 plus GST on those amounts. The Town and the developer are jointly and severally liable save that the sum of $350.00 for the adjournment is the responsibility of the developer alone. These amounts include costs and disbursements attributable to the costs application.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT this
13th day of May, 2008.

Counsel for the Applicants: Steven Cooper
Counsel for the Municipal Corporation of the Town of Hay River: Nicole MacNeil
Counsel for Hay River Liquor Retailers (1991) Ltd.: Katherine Peterson, Q.C. (by written submission)

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THE HONOURABLE JUSTICE V.A. SCHULER