Bargen v. *Medical Board of Inquiry*, 2009 NWTSC 19

Date: 2009 04 03
Docket: S-0001-CV-2007000180

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DR. RICHARD BARGEN

Appellant

- and -

MEDICAL BOARD OF INQUIRY
OF THE NORTHWEST TERRITORIES

Respondent

MEMORANDUM OF JUDGMENT ON COSTS

[1] On January 30, 2009, I issued reasons for judgment dismissing this appeal with costs. Counsel subsequently informed me that they could not agree on two items claimed as costs by the successful respondent: (1) travel and living expenses for counsel from outside of the jurisdiction; and (2) fees paid to a local agent. Counsel have provided me with written submissions on these points and these are my directions respecting same.

Entitlement to Travel Expenses:

[2] The respondent claims a total of $1,123.49 (plus GST) for airfare, hotel, taxis and meals, incurred by its counsel, who lives and practices in Edmonton, to come to Yellowknife for the purpose of the hearing of this appeal. The respondent objects on the basis of what has been termed the "traditional rule" that the client is responsible for putting its counsel at the place of trial at its own expense.

[3] Entitlement to travel expenses as costs is covered by Rule 648(4) of the *Supreme Court Rules*:

> (4) The proper travelling and living expenses of a solicitor who does not reside in the Territories are recoverable under subrule (3) only where, in the opinion of the Court,
>
> > (a) the expertise required to perform the particular service was not available from those solicitors resident in the Territories; or
> >
> > (b) conflicts of interest prevented solicitors resident in the Territories from acting in the matter.

[4] It has been generally accepted that the criteria set out above are applicable to all types of proceedings and all steps in a proceeding. The rationale is that some special circumstance must justify the retention of non-resident counsel if recovery for the additional costs incurred thereby is sought from the other side: *Seeton* v. *Commercial Union Assurance Co. of Canada*, [1999] N.W.T.J. No. 75 (S.C.), at para. 5.

[5] This approach is similar to that of Alberta where that province's Court of Appeal adopted (in *Allen* v. *University Hospitals Board*, [2006] A.J. No. 377), the following articulation of the appropriate test, given by Slatter J. in *Hansraj* v. *Ao* (2002), 314 A.R. 283 (Q.B.), at paras. 12 and 15:

> The test under R. 600(1)(a) [of the Alberta rules] is whether the disbursement is reasonable and proper 'for carrying on the proceeding'. In this context reasonableness must be measured in terms of whether one litigant should expect another to pay the expense, not whether it was reasonable for the litigant to incur the expense for his own personal purposes and reasons. In other words, the test is more objectively based than subjectively based. ...
>
> It is undoubtedly true that parties have the right to select counsel of their choice. However, that is not the issue; the issue is who is to pay for that choice. Where counsel are retained outside the judicial district where the action is commenced, the travel expenses of that counsel are not taxable unless the party who retained out-of-town counsel can demonstrate that there were no competent counsel within the judicial district who could handle the matter, or other special reasons. It is generally not sufficient that the party has formed a particular relationship with the counsel, or prefers for personal reasons to deal with that counsel. Those are legitimate personal reasons to hire that counsel, but not sufficient reasons to pass the costs on to another party ....

[6] The record of this case indicates that the respondent had originally retained local Yellowknife counsel but subsequently Edmonton counsel (Mr. Boyer) was retained for the original hearing before the Board of Inquiry and for this appeal. Mr. Boyer's practice is focused on administrative law issues, specifically medical professional disciplinary proceedings. Mr. Boyer submits that administrative law, and in particular professional discipline, is a complex area. And, since the number of health professionals in the Northwest Territories is relatively small, and there are very few professional discipline hearings, local members of the Bar have very little practical experience in this field.

[7] Furthermore, Mr. Boyer says he took steps to minimize the expense because part of the overall expense was allocated to another client for whom he appeared on a court application on the same day as the hearing of the appeal in this case. I am sure such planning was appreciated by both of his clients (but the size of the expense is not the pertinent point on this application).

[8] The appellant submits that the respondent's argument does a disservice to the quality and expertise of the local Bar. His counsel cites a number of examples where local counsel have been involved in professional disciplinary and medical litigation. He also states that the case was not complex (the entire appeal hearing taking two hours to argue). The case did not involve questions of patient care. It was an issue of, as I put in my judgment, professional ethics.

[9] I recognize that it is difficult for an outside observer to assess whether a client is justified in hiring one lawyer over another. Skill and expertise come into consideration but so do client trust and confidence. I can well appreciate why the President of the Medical Board of Inquiry wanted to retain the services of a specialist, such as Mr. Boyer, for the initial hearing into the subject matter of the complaint against the appellant. Witnesses, including medical professionals, testified and questions of professional judgment had to be explored. But it is different when I examine the issues that made up the appeal. And it is only the appeal that I am concerned about.

[10] The appeal, in my opinion, essentially turned on the standard of review. Once that was established the remaining issues were relatively easy to resolve. Having regard to those factors, I am not convinced that the respondent's case could not have been argued, and argued well, by local counsel. I am not second-guessing

the respondent's decision to retain Mr. Boyer to act on the appeal. It is simply that a party, in retaining counsel from outside of the jurisdiction, should not automatically expect to recover from the other side the expense to put counsel in the jurisdiction.

[11] The claim for travel expenses relating to Mr. Boyer's attendance in Yellowknife is therefore disallowed.

Agent's Fees & Disbursements:

[12] The respondent claims, as a disbursement, the fees and disbursements charged by a local law firm, as agent for Mr. Boyer, totalling $636.15 (inclusive of GST). This total includes fees of $548.00 for what appears to be 1.4 hours of work related to the filing and service of documents.

[13] Rule 641(c) of the *Supreme Court Rules* provides that "costs" include "all reasonable and proper expenses" paid by a party, including "the charges of a legal agent". The agent's bills are clearly contemplated by the rule but the emphasis in the rule is on the reasonableness of the expense.

[14] Appellant's counsel objects to this expense for two reasons.

[15] First, counsel submits that the expense charged is the equivalent of "double-billing". In Mr. Boyer's Bill of Costs he claims a fee under tariff item 26 ("preparing and filing factum"). Part of the service provided by the agent, however, is for filing and service of the factum.

[16] Second, appellant's counsel submits that these services were not required since filing and service could have been easily effected by mail or courier.

[17] It is not for me to inquire into the necessity for hiring a local agent. A non-resident counsel requires an address for service within the jurisdiction. There may be other services required from a local agent. The particular mode of filing and service is not something to be regulated after the fact. I am not convinced that it was unreasonable to retain a local agent. Having said that, the tariff contemplates filing as part of item 26, albeit a small part. So to charge a further

disbursement for filing does amount to double-billing. I will direct a deduction of $50.00 for this item.

[18] I may have been inclined to question the "value for money" when I look at the fees charged by the agent. But neither party raised that as an issue for me to consider here.

[19] I should make a further comment regarding the claim for agent's fees. It may seem illogical to, on the one hand, disallow travel expenses for non-resident counsel and then allow charges from a local agent when, if the party had retained local counsel, there would have been no need to retain an agent. But that misses the point of having Rule 648(4). It is not meant to say that a litigant cannot hire outside counsel. It is meant to address under what conditions the extra costs occasioned by the need to travel can be passed on to the other litigant. The need to retain a local agent, because counsel is from outside the jurisdiction, is unrelated to the travel expenses sought to be recovered. Agent's fees are a separate item recognized by the rules.

[20] Therefore, the claim for disbursements for agent's fees is allowed but subject to a $50.00 deduction (exclusive of GST).

[21] There will be no costs of this application.

J.Z. Vertes
J.S.C.

Dated this 3rd day of April, 2009.

Counsel for the Appellant: Allan A. Garber

Counsel for the Respondent: Craig D. Boyer

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MEMORANDUM OF JUDGMENT ON COSTS OF
THE HONOURABLE JUSTICE J.Z. VERTES
