*GNWT v 831594 et al*, 2017 NWTSC 78

Date: 2017 10 24

Docket: S-1-CV-1999-08127

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

as represented by the MINISTER OF PUBLIC WORKS AND SERVICES

Plaintiff

- and -

831594 N.W.T. LTD. carrying on business under the name and style of FERGUSON SIMEK CLARK, FERGUSON SIMEK CLARK ENGINEERS AND ARCHITECTS carrying on business under the name and style of FSC GROUP, 831594 N.W.T. LTD., FERGUSON SIMEK CLARK ENGINEERS AND ARCHITECTS, FERGUSON SIMEK CLARK, FSC GROUP, JOHN DOE NO.1, G.P. VALUE ENGINEERING LTD., ANTHONY P. SILVA, JOHN DOE NO. 2, JOHN DOE NO. 3 and JOHN DOE NO. 4, COMARC ARCHITECTS LIMITED and CLIVE HAROLD CLARK

Defendants

- and -

NINETY NORTH CONSTRUCTION AND DEVELOPMENT LTD.

Third Party

- and -

ANTHONY P. SILVA

Third Party

- and -

NINETY NORTH CONSTRUCTION AND DEVELOPMENT LTD.

Third Party

- and -

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

as represented by the MINISTER OF PUBLIC WORKS AND SERVICES

Fourth Party

RULING ON COSTS OF APPLICATION

TO DISMISS BY REASON OF DELAY (RULE 327)

1. On August 16, 2017, I dismissed the Defendants' Application to dismiss this action by reason of delay. *GNWT v 831594 et al.*, 2017 NWTSC 57. This is my ruling on the issue of costs of that Application.
2. The Plaintiff has submitted an Affidavit which details the fees and disbursements incurred in defending the Application. The total costs add up to $47,181.88.
3. The Plaintiff seeks an order for solicitor-client costs. In the alternative, it argues that enhanced costs are justified under the circumstances. It also seeks an order that costs be payable forthwith. The Defendants argue that enhanced costs are not justified and that there is also no basis to order costs payable forthwith.
4. The legal framework that governs costs awards in this jurisdiction is not controversial. The basic principles can be summarized as follows: costs are always in the discretion of the Court; they are intended to indemnify the successful party, encourage settlement, and punish inappropriate behavior by litigants; they generally consist of partial indemnification, calculated in accordance with the Tariff set out in Appendix A of the *Rules of the Supreme Court of the Northwest Territories*, R-010-96, as amended; they can, however, also be awarded on an enhanced basis, and, in rare circumstances, be awarded on a solicitor-client basis. *Williams* *v* *Steinwand*, 2015 NWTSC 3, paras 10-11.
5. The Plaintiff was successful in having the Defendants’ Application dismissed. It is entitled to costs. The issue is whether it is entitled to indemnification beyond the amount stipulated in the Tariff.
6. The Plaintiff argues it is entitled to solicitor-client costs for two reasons: the timing of the Application, and the shortcomings of the evidence presented by the Defendants. The Plaintiff argues that the Defendants’ conduct was reprehensible and is deserving of sanction through a solicitor-client costs order.
7. An award for solicitor-client costs is an exceptional measure. It is only justified against a party who has engaged in reprehensible, scandalous or outrageous conduct. *Young v Young*, [1993] 4 S.C.R. 3; *Katlodeechee First Nation v H.M.T.Q*., 2004 NWTSC 12.
8. In my decision on the Application, I made comments about its timing, and about the quality of the evidence adduced by the Defendants. In short, I found the timing of the Application somewhat puzzling, given the history of the matter, and the fact that it had already been in case management for almost two and a half years when counsel mentioned for the first time that a delay application might be brought. I also found that the evidence presented by the Defendants did not provide the full history and context of this litigation and that this lack of detail rendered aspects of that evidence misleading. *GNWT v 831594 et al.*, *supra*, paras 13-16 and 24-25.
9. The question of intent is another matter entirely, however. I do not have any basis to conclude that the timing of the Application shows an intent by the Defendants to derail the trial. The Application was filed several months before the scheduled trial date and did not in fact compromise it. As for the evidence adduced by the Defendants, while it was not as thorough as it should have been, I am unable to conclude that this was done with a view to deliberately mislead the Court.
10. The Defendants’ position at the hearing seemed to be that the delay was of such magnitude that it warranted a dismissal of the action, irrespective of which party was responsible for that delay. Although that was a novel approach to a Rule 327 application, this may be why the Defendants thought it unnecessary to present evidence outlining the full history of this litigation. Ultimately, I disagreed with the Defendants’ position in this regard and thought it was misguided. It does not necessarily follow that an order for costs on a solicitor-client basis is justified. Such orders are geared at sanctioning outrageous, scandalous or blameworthy conduct. They should not flow merely from approaches and strategies later found by the Court to be erroneous or even ill-advised.
11. One of the cases the Plaintiff relies on in seeking solicitor-client costs is *Jackson v Trimac Industries Ltd.,* 1993 Carswell Alta 310 (aff'd, 1994 ABCA 199). The examples of conduct referred to in that case include things like disobeying court orders, concealing evidence, delaying matters unduly and fraudulent or deceitful conduct. The Defendants’ conduct on this Application is not analogous. I am not satisfied that it warrants an order for solicitor-client costs.
12. The next question is whether the Plaintiff should be granted enhanced costs.

Enhanced costs represents a sum that is greater than the Tariff, but less than full indemnification. In deciding whether enhanced costs are justified, the factors to be considered include the reasonableness of the fees, the adequacy of the Tariff, the complexity of the matter and the importance of the issues for the parties; also, whether the case has broader implications for the community. *W.C.B. v Mercer; Mercer v W.C.B.*, 2012 NWTSC 78; *Williams v Steinwand*, *supra*.

1. In my view, there was nothing unreasonable about the fees and nothing excessive about the time the Plaintiff’s counsel spent to respond to the Application.
2. It was time-consuming for the Plaintiff to respond to this Application, in large measure, because the Plaintiff had to ensure that detailed evidence of the entire history of this litigation was before the Court. The Plaintiff’s position was that the Defendants were responsible for most of the delay. The evidence adduced by the Defendants was very general and sorely lacking in details of many relevant things that had transpired since the action was commenced. The Plaintiff could not have properly made its case without having first filled in those evidentiary blanks.
3. It falls to reason that this Application was of great importance to the Plaintiff. This litigation, which involves a very large monetary claim, would have come to an end had the Defendants’ Application succeeded. The Plaintiff cannot be faulted for having taken it seriously and having been as thorough as it could be in defending it. It was the Plaintiff’s very ability to pursue its case that was at stake.
4. In terms of complexity, an Application pursuant to Rule 327 is not, from a legal standpoint, particularly complex; the law that applies to it is reasonably well settled. But it can be rendered factually complex when it arises in a case that has an extensive litigation history.
5. The last factor to consider is the adequacy of the Tariff. The sum that would be awarded pursuant to the Tariff, $3,000.00, is a small fraction of what it actually cost the Plaintiff to respond to the Application. There is often a gap between the Tariff amounts and the costs actually incurred by litigants, but the shortfall to the Plaintiff, in this case, is enormous. More importantly, the Plaintiff’s costs could have been greatly reduced if the Defendants had presented, as they should have, a more complete record of the history of the litigation.
6. Under those circumstances, it would be unfair for the Plaintiff to have to bear most of the costs of work that was rendered necessary by the shortcomings in the Defendants’ materials. For that reason, I am satisfied that an order for enhanced costs is appropriate. I set the amount of the costs at $25,000.00.
7. The Plaintiff is seeking to have the costs of this Application payable immediately, despite the general rule that costs of interlocutory motions are dealt with at the conclusion of the proceedings.
8. The Plaintiff argues that there is no indication that an order for costs payable forthwith would impede the Defendants’ ability to continue with this litigation. That may be the case, but in my view this is beside the point. The Plaintiff is seeking an exceptional remedy. The question is not merely whether the Defendants can afford to pay the costs immediately and still continue with the litigation. It is, rather, whether the circumstances justify departing from the usual rule that costs are payable at the conclusion of the case.
9. The Plaintiff relies on *Anderson v Bell Mobility*, 2011 NWTSC 28, but that case is entirely distinguishable from the situation here. That costs decision was rendered in the context of a certification application in a class action against a large corporation. There was considerable power imbalance between the parties and significant access to justice issues at stake.
10. That is not the case here. If there was evidence that the Plaintiff, having had to devote significant resources to defend the Application, now finds itself in a precarious financial position that may impede its ability to go to trial, an argument that costs should be payable immediately may be more compelling. But the Plaintiff is a government and there is no indication that its ability to pursue its claim is compromised in any way.
11. Given this, I decline to order that the costs be payable immediately. The costs ordered as part of this ruling will have to be accounted for at the conclusion of the proceedings, in the ordinary course.

L.A. Charbonneau

J.S.C.

Dated at Yellowknife, NT, this

24th day of October, 2017

To: Counsel for the Plaintiff Gary A. Holan

Counsel for the Defendants Dennis Picco

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| **S 1 CV 1999 08127** |
| **IN THE SUPREME COURT OF THE**  **NORTHWEST TERRITORIES** |
| BETWEEN:  THE GOVERNMENT OF THE NORTHWEST TERRITORIES as represented by the MINISTER OF PUBLIC WORKS AND SERVICES  Plaintiff  - and -  831594 N.W.T. LTD. carrying on business under the name and style of FERGUSON SIMEK CLARK, FERGUSON SIMEK CLARK ENGINEERS AND ARCHITECTS carrying on business under the name and style of FSC GROUP, 831594 N.W.T. LTD., FERGUSON SIMEK CLARK ENGINEERS AND ARCHITECTS, FERGUSON SIMEK CLARK, FSC GROUP, JOHN DOE NO.1, G.P. VALUE ENGINEERING LTD., ANTHONY P. SILVA, JOHN DOE NO. 2, JOHN DOE NO. 3 and JOHN DOE NO. 4, COMARC ARCHITECTS LIMITED and CLIVE HAROLD CLARK  Defendants  - and -    NINETY NORTH CONSTRUCTION AND DEVELOPMENT LTD.  Third Party  - and -  ANTHONY P. SILVA  Third Party  - and -  NINETY NORTH CONSTRUCTION AND DEVELOPMENT LTD.  Third Party  - and -  THE GOVERNMENT OF THE NORTHWEST TERRITORIES as represented by the MINISTER OF PUBLIC WORKS AND SERVICES  Fourth Party |
| RULING ON COSTS OF APPLICATION TO DISMISS BY REASON OF DELAY  (RULE 327)  OF  THE HONOURABLE JUSTICE L.A. CHARBONNEAU |