Docket: 2014-2454(I)G

BETWEEN:

J.G. GUY SIMARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2014-3884(IT)G

AND BETWEEN:

WAYNE WELLS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2014-3891(IT)G

AND BETWEEN:

RAYNOLD MURPHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2015-4930(IT)G

AND BETWEEN:

DOUGLAS FORSETH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2015-4931(IT)G

AND BETWEEN:

BRIAN J. MATHESON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ORDER RESPECTING SUBMISSIONS ON COSTS

WHEREAS the Respondent was successful in a motion heard on November 23, 2018 brought by the Appellants for, *inter alia*, an order granting the Appellants' appeals pursuant to Rule 126(4)(b) of the *General Rules of Procedure* on the grounds the Respondent failed to comply with my Court Order of March 29, 2018, which motion was dismissed with costs to the Respondent;

AND WHEREAS the parties were invited to make submissions as to costs if not satisfied with the above cost order;

THEREFORE having considered the submissions of the Respondent and the Appellants not having made any submissions;

It is ordered that the Respondent shall be entitled to increased costs equal to 80% of her solicitor and client costs for a total of $25,800 inclusive of disbursements, payable regardless of the result in the end.

Signed at Vancouver, British Columbia, this 28th day of December 2018.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2018 TCC 266
Date: 20181228
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Respondent;

Docket: 2015-4931(IT)G

AND BETWEEN:

BRIAN J. MATHESON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER RESPECTING SUBMISSIONS ON COSTS

Pizzitelli J.

[1] The Respondent was totally successful in a motion heard on November 23, 2018 brought by the Appellants for, *inter alia*, an order granting the Appellants' appeals pursuant to Rule 126(4)(b) of the *General Rules of Procedure* on the grounds the Respondent failed to comply with my Court Order of March 29, 2018, which motion was dismissed. My Order dismissing the Appellants' motion above was dated the 26th day of November, 2018 and granted costs to the Respondent payable regardless of the result at trial but with a proviso that if any party disagreed with such Order as to costs they were invited to make submissions within 30 days.

[2] The Respondent made submissions in writing for increased costs equal to 80% of its solicitor and client costs incurred during the period from October 23, 2018 and November 23, 2018 for a lump sum total of $25,800. The Appellants have not made any submissions.

[3] There is no dispute that Rule 147 grants the Court complete discretion in determining the amount of costs, their allocation and the persons required to pay them and that Rule 147(3) sets out the factors that the Court may consider in exercising such discretion which must be considered on a principled basis. Having regard to the costs submissions made, the relevant provisions of Rule 147 read as follows:

147 (1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.

…

(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,

(a) the result of the proceeding,

(b) the amounts in issue,

(c) the importance of the issues,

(d) any offer of settlement made in writing,

(e) the volume of work,

(f) the complexity of the issues,

(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,

(h) the denial or the neglect or refusal of any party to admit anything that should have been admitted,

(i) whether any stage in the proceedings was,

(i) improper, vexatious, or unnecessary, or

(ii) taken through negligence, mistake or excessive caution,

(i.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the proceeding, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute; and

(j) any other matter relevant to the question of costs.

…

> (4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

[4] This matter did not involve any settlement offers to which the provisions of Rules 147(3.1) to (3.8) would be applicable.

[5] I am in agreement with the arguments made by the Respondent with respect to those factors in paragraphs 147(3) (a) to (i.1) which in my opinion would have justified an award of costs higher than the Tariff costs awarded, which I will now analyse. For ease of reference I will refer to the factors in Rule 147(3) by their paragraph numbers.

[6] In connection with paragraph (a) the Respondent was totally successful in having the motion dismissed with costs. There was absolutely no merit to the Appellants position.

[7] In connection with paragraph (b) the Respondent agrees that while the amounts in issue with respect to these particular Appellants are not overly large, that the total amounts in issue for all the cases impacted by these lead cases exceeds over $600 million and therefore is huge. Having regard to the amount in issue and the draconian relief sought by the Appellants in this matter, I agree with the Respondent's position that it was forced to take the Appellants' motion very seriously and to fully defend its right to continue with these lead case proceedings and to have them heard by this Court on the merits as per *Ford Motor Co.of Canada v Canada*, 2015 TCC 185 at paragraphs 12-13.

[8] In connection with paragraph (c), aside from the importance of hearing these lead cases resulting from the arguments in (b) above, the importance of the actual issues that were the subject matter of the motion, whether a party violated a Court Order and abused its process, is of the highest importance to this Court and the integrity of its processes. As I mentioned in my Order dismissing the Appellants' motion, such allegations should be made only with very strong evidence in support of same. More particularly, paragraphs 24 and 34 of my Order expresses my concern as to the cavalier manner in which the Appellants approached this serious allegation, including the unjustifiable self-serving characterization of my Order as a "Disclosure Order":

> [34] Not only have the Appellants mischaracterized the nature and effect of my Order, but they, in addition to accusing the Respondent of violating a Court Order, an accusation that, aside from issues of civility and ethics, should only be made in the face of very strong evidence given in support of same, have pleaded that the actions of the Respondent amount to an abuse of process.

The importance of the issue will be dealt with further when discussing the conduct of the Appellants.

[9] In connection with paragraph (d), on whether there was any settlement offer in writing, while we are not dealing with a settlement offer of the appeals in respect to the context of the motion itself, it is apparent from my Order that the Respondent had offered in its Letter of September 28, 2018 to discuss the wording of its requested implied undertaking acknowledgment and Section 241 confidentiality undertaking and continued to be prepared to discuss these matters as set out in the Respondent's follow up letter of October 17, 2018; all without any reply or effort to negotiate by the Appellants, before bringing the motion. In my opinion, the Appellants should have attempted to work out its undertaking concerns, but clearly had no intention of doing so.

[10] In connection with paragraph (e) dealing with volume of work, I am in complete agreement with the Respondent that the volume of work in connection with this motion was enormous. The Appellants' contention that the Respondent's conduct caused undue delays required the Respondent to canvas the entire record of case management to rebut such allegation and in fact prove that many of the delays were at the request of the Appellants themselves. The Appellants also submitted 16 affidavits in support of its motion, all of which had to be reviewed by the Respondent, within the short period of time, notwithstanding my finding that 15 of the affidavits were not relevant to the issue as to whether the Respondent violated my Court Order in question. The Respondent had also to consider these affidavits in the context of the confidentiality order as to their personal contents sought by the Appellants and devote its time and resources to reviewing and preparing arguments in respect of same.

[11] In connection with paragraph (f), I agree with the Respondent that the complexity of the issue in this motion is a neutral factor herein, amounting to simply a question of fact.

[12] In connection with paragraph (g), the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding, I note that again, the submission of 15 of the 16 affidavits in support of the motion that were

not relevant to determining the main issue, 13 of whom were sworn by non-parties to these proceedings, and all of which were duplicative in their nature, only served to increase not only the volume of work the Respondent was put to but to lengthen the proceeding in dealing with those issues, particularly with respect to their confidentiality.

[13] I am also in agreement with the Respondent's submission in paragraph 17 of its written submissions, that "The Court has recognized the inappropriateness of the Appellants' conduct in bringing this unnecessary motion and the impropriety of the Appellants' conduct while doing so", making reference to paragraphs 34 and 35 of my Order of November 26, 2018:

> [34] Not only have the Appellants mischaracterized the nature and effect of my Order, but they, in addition to accusing the Respondent of violating a Court Order, an accusation that, aside from issues of civility and ethics, should only be made in the face of very strong evidence given in support of same, have pleaded that the actions of the Respondent amount to an abuse of process. In paragraph 7 of the Notice of Motion the Appellants stated:
>
> > 7.A party's failure to abide by the timelines imposed by this Court to streamline a litigant's case is tantamount to an abuse of process which this Court cannot brook...
>
> [35] I agree with the Appellants that there has been an abuse of process here, but that of the Appellants in bringing a Motion such as this without any merit or reasonable basis and filing 16 Affidavits in support, only one of which addresses the issue; all ironically under the auspice in seeking severe relief for an alleged six month delay. This is a complete waste of the Court's resources and unnecessarily increases costs and risks further delay to the processes. The Appellants could have simply proceeded to make a Motion to request the documents without inappropriately accusing the Respondent of violating a Court Order and abusing process.

[14] I am in full agreement with the Respondent that civility also matters. When the evidence shows the Respondent attempted to accommodate the Appellants several times throughout the process as I discussed earlier, it seems somewhat odious to attempt to attach the integrity of the Respondent in these circumstances and the Court should not condone this conduct.

[15] Adding to the questionable conduct of the Appellants, it seems 6 of the 16 Affidavits relied upon by the Appellants in the Motion were sworn before September 28, 2018, the deadline the parties agreed the Respondent would reply to the Appellants' request for further documents by, a fact supporting the

Respondent's contention in its submissions that this unnecessary motion was part of the Appellants' litigation strategy and would proceed regardless of the reply given.

[16] In connection with paragraph (h), the denial or the neglect or refusal of any party to admit anything that should have been admitted, other than my obvious conclusion that the Appellants should have admitted there was no violation of my Court Order, there were no other facts to admit of relevance here.

[17] In connection with paragraph (i), whether any stage in the proceedings was,

(i) improper, vexatious, or unnecessary, or

(ii) taken through negligence, mistake or excessive caution,

it is only clause (i) that is applicable here. In my opinion, as summarized above in paragraphs 34 to 35 of my Order, there was absolutely no basis for alleging the Respondent violated my Court Order nor in alleging the Respondent's actions amounted to an abuse of process. On the contrary, I found the Respondent to have been more than accommodating in attempting to assist the Appellants with further documentary disclosure prior to discovery, notwithstanding the lack of any application by the Appellants for Rule 82 enhanced document disclosure nor the delays on the Appellants' part for such disclosure following the June 30, 2017 completion of exchange of documents. The Respondent, notwithstanding having no obligation pursuant to the *Rules* to provide such further documentation, acted in good faith, and in my opinion worked diligently to review an onerous volume of documents within the agreed 6 month period to respond to the Appellants' request and offered to provide some 16,000 further documents to the Appellants that were not being relied upon by the Respondent within the Rule 81 exchange.

[18] The Appellants sought an extreme remedy pursuant to Rule 146(4)(b), without attempting to resolve the issues before bringing their motion, when they knew or clearly should have known there was no merit to their position. They wasted both the Respondent's time as well as the Court's time and resources, a clear abuse of process in my opinion, in what appears to be an inappropriate and ill founded litigation strategy to unnecessarily delay these proceedings and unfairly attempt to discredit the conduct of the Respondent. The positions taken by the Respondent in its Letter of September 28, 2018, which complied with my Court Order in issue, are not *prima facie* unreasonable and should have been the subject of the entire motion to begin with; now to be heard by another judge to ensure a

quick resolution and full impartiality. The Court cannot and should not condone such conduct nor permit its processes to be abused in this manner, especially not when the conduct of the Respondent has been accommodating and respectful to the Appellants.

[19] Paragraph (i.1) is not applicable as there were no expert witnesses involved in this motion.

[20] In connection with paragraph (j), dealing with any other relevant matters, no other matters were brought to the Court's attention.

[21] Having regard to the above, I am in agreement that the Respondent should be entitled to her increased costs equal to 80% of her solicitor and client costs for a total of $25,800 inclusive of disbursements, payable regardless of the result in the end. These costs were incurred solely as a result of the Appellants' improper, vexatious and unnecessary actions, all of which could have been avoided simply by proceeding to the motion for disclosure in the first place, and which constitute a serious abuse of process on the part of the Appellants; essentially amounting to mischaracterization of my Order, the making of inappropriate and unfounded allegations against the Respondent's actions and character - conduct I find rather distasteful having regard to the Respondent's clear accommodating and helpful manner throughout the case management of these proceedings - and a disrespect for the Court's time and resources. If the Appellants or any other party to a proceeding wishes to proceed in this manner, the Court has an obligation to ensure they pay the price in costs for their actions. Frankly, the Respondent would in my opinion have been justified in seeking full solicitor and client costs in this matter.

Signed at Vancouver, British Columbia, this 28th day of December 2018.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2018 TCC 266
COURT FILE NO.:	2014-2454(IT)G
STYLE OF CAUSE:	J.G. GUY SIMARD v. THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 23, 2018
REASONS FOR ORDER BY:	The Honourable Justice F.J. Pizzitelli
DATE OF ORDER:	December 28, 2018

APPEARANCES:

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