CITATION: Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology
COURT FILE NO.: CV-22-675035
DATE: 20221124

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mariana Costa, Crystal Love, Alexandra Badowich and Angelina Mandekic, Applicants

AND:

Seneca College of Applied Arts and Technology, Respondent

BEFORE: W.D. Black J.

COUNSEL: *James Manson,* for the Applicants

Howard Levitt, Kathryn Marshall and Alexis Lemajic, for the Respondent

HEARD: In Writing

ENDORSEMENT

Overview

[1] By endorsement dated September 12, 2022, I dismissed the applicants' motion seeking an interlocutory injunction to prevent the respondent Seneca College of Applied Arts and Technology ("Seneca"), from enforcing against them its policy requiring Seneca students to be fully vaccinated against Covid-19 in order to attend on Seneca's campus.

[2] On the last page of that endorsement I said I did not know if Seneca, as the successful party on the motion before me, would be seeking its costs of the motion.

[3] My uncertainty related to the potentially crushing impact of a substantial costs Order on the individual applicants, who were described in the materials before me as Seneca students and single mothers having limited financial wherewithal.

[4] Understanding the implicit concern, Seneca says in paragraph 18 of its submissions on costs:

> "While His Honour might be disinclined to award costs against two students, this case was brought by the JCCF and, when asked whether it would be paying the cost award, it has said that it would not be."

Details About the JCCF and Its Role in the Motion

[5] The JCCF is the Judicial Centre for Constitutional Freedoms, the organization that acted as counsel for the applicants on the motion.

[6] In an article attached to Seneca's costs submissions, the mandate of the JCCF is described by its interim president as follows:

> "The Justice Centre's mandate is to defend Canadians' constitutional freedoms through litigation and education."

[7] That sounds laudable. On the other hand the same article describes the JCCF as taking part in a legal challenge against gay-straight alliances in Alberta schools, representing Maxime Bernier over his arrest in Manitoba for breaking public health orders, and notes that its past president compared the 2SLGBTQ rainbow Pride flag to a swastika.

[8] The article notes that the JCCF is described by The Atlas Network, a Washington-based organization that generally makes donations to right-wing-think-tanks, as one of its "Global Partners".

[9] The article also points out that recently the JCCF was in the news for hiring a private investigator to follow the Chief Justice of Manitoba in an effort to gather evidence of him breaking public health orders.

[10] While "putting a tail" on a judge is troubling, and while the article suggests that the JCCF's defence of constitutional freedoms is relative only to freedoms sought by groups with particular political or ideological leanings, in my view it is a slippery slope to examine too closely the affiliations and activities of groups with charitable status, like the JCCF, and to risk allowing subjective views to colour decisions about such groups.

[11] In my opinion, the better approach is instead to look at the specific case at issue, to consider the steps taken in that case and the state of relevant jurisprudence applicable to the case, and to the steps taken, to see if a costs award is warranted.

[12] If it is, then the Court should look to the origins of the claim to determine whether the organization's encouragement, if any, of the claim, and its participation in the claim, warrants ordering it to pay or contribute to costs.

[13] After all, novel cases serving to delineate and clarify constitutional and human rights ought generally to be encouraged, and organizations funding and undertaking such challenges ought not to be deterred.

[14] In this case, as Seneca points out, JCCF has "advertised it extensively on its website" and has "fundraised to support this case". In the latter regard, as confirmed by its financial statements, also filed with Seneca's materials, JCCF has gone from having assets of $133,271 as of 2014 to having raised donations upwards of $2.6 million in the last couple of years, and net assets as of 2020 of $1,742,314, almost $1.7 million of which was held as cash. In 2020, according to its income statement, it had an excess of revenue over expenses in that year of almost $500,000.

[15] In its materials, Seneca provides links to various pronouncements on the JCCF website relative to this case. A posting on August 24, 2021 is representative. It trumpets various tenets of what ultimately formed the applicants' case before me (many of which I rejected in my decision on the injunction motion). The post announces that:

> "The Justice Centre is preparing a lawsuit against Seneca on behalf of these students, and intends to aggressively defend their Charter rights. Seneca's policy is not only unconstitutional, but also not science or evidence-based…"

[16] It is apparent based on these materials that the JCCF actively and continuously promoted this case on its website, and inserted itself in the "cause" being litigated, rather than maintaining the posture of dispassionate advocate.

[17] Seneca notes all of this in its costs submissions, and, as set out above, makes it clear that it seeks its costs from the well-funded JCCF rather than from the individual applicants.

JCCF Liable for Costs

[18] In my view, that is the appropriate approach and, notwithstanding the JCCF's status as a charity and its stated goal of defending important constitutional rights, it is riding, in this case, the twin horses of advocate and interested party.

Discussion of Rule 57.03 Factors

[19] In terms of the rationale for and quantification of costs, Seneca points to the various factors identified in Rule 57.01(1) for consideration by the Court.

[20] First, it notes that as a general proposition pursuant to Rule 57.03(1)(a), costs of interlocutory matters should be ordered payable within 30 days.

[21] The applicants, in part of their alternative costs submissions (their initial submission is that no costs should be payable at all given that this is public interest litigation), argue that if costs are to be paid by them, it should be in the cause (again on the basis that this is public interest litigation), or should await the outcome of the applicants' pending motion for leave to appeal, and should be stayed if that leave is granted.

[22] In responding to this latter proposition, Seneca says, fairly in my view, that waiting for the outcome of a leave motion to impose a costs Order would create unfortunate encouragement for vexatious appeals (launched with a view to delaying or avoiding costs Orders). I expect that the applicants can and will roll any adverse costs award into the pending leave motion, and so the practical result may be the same, but I see no reason for the Court to facilitate and encourage delay in unsuccessful parties being held to account.

[23] Seneca also fairly points out that, whereas the applicants could and should have commenced their application in 2021 when Seneca's vaccination policy was first put in place, they waited instead until January of 2022 to issue their application, which was amended in March of 2022, and then only served motion materials on July 6, 2022 and, in CPC on July 26, 2022, secured the August 24, 2022 date for the hearing of the motion before me.

[24] The bulk of the applicants' material, comprising several hundred pages, including relatively complex and dense expert evidence, was not served until August 2, 2022.

[25] As such, Seneca asserts the applicants "manufactured their own urgent timelines", by bringing a motion seeking injunctive relief on a hyper-compressed timeframe despite the policy at issue having been in place since 2021.

[26] One of the key consequences of this "manufactured urgency" from Seneca's perspective, is that it meant that Seneca had to respond with urgency in kind. It not only had to develop and deliver extensive materials within a period of about 22 days, but it had to engage and instruct experts, and obtain comprehensive reports within that limited available time, and to prepare for and attend numerous cross-examinations, also on a hyper-compressed schedule.

[27] Seneca insists, again fairly, that the subject of the motion was of critical importance from Seneca's perspective (just as it was for the applicants and the JCCF). That is, from Seneca's standpoint, the integrity of its policy, and the importance from its perspective of providing a safe campus for students, staff and visitors alike was at stake, and required a fulsome response.

[28] Seneca argues that:

> "In this case specifically, to effectively defend the claims made against the Respondent, the Respondent's counsel were required to prioritize preparing its responding factum in this application while placing all other files on hold.
>
> The timing described above meant that there were only three weeks to complete the extensive research and preparation required to respond to the complex claims brought by the Applicants. The accelerated timeframe in this case necessitated a significant amount of overtime work on the part of Respondent's counsel and administrative staff, including work late into the evenings and on multiple weekends. Moreover, due to the complexity of the issues and the sheer volume of work required, other lawyers and a student-at-law from the Respondent's counsel's law firm were required to support."

[29] Seneca notes that, in addition, it had to obtain constitutional law advice to review the Applicants' Charter allegations and respond. Seneca did so by engaging another firm, with in-house constitutional expertise, to assist its main counsel in working up and briefing the Charter issues involved.

Applicants' Responses to Seneca's Claimed Costs

[30] The applicants' response to Seneca's stated bases for the costs claimed is multifold.

[31] After articulating their primary position that no costs should be payable in public interest litigation like (they maintain) this case, the applicants first note what appears to be an arithmetic error in Seneca's calculation of costs. That is, whereas Seneca's calculated number for partial indemnity costs totals $177,176.59, the figures itemized only add up to $126,944.75.

[32] When I add up the figures I come to the same result as the applicants do, and in its reply submissions Seneca has not purported to support its initial calculation, so I proceed on the basis that the figure of $126,944.75 is the accurate sum.

[33] As noted above, the applicants then suggest that costs should be in the cause, or deferred until the outcome of the applicants' motion for leave to appeal. For the reasons set out above, I do not accept these submissions.

[34] Next, the applicants argue that costs here should be on a partial indemnity scale, and that there is nothing in the record that justifies a higher scale.

[35] The two primary bases on which Seneca argues for costs on a higher scale are: first, that the applicants' expert, Dr. Bridle, offered opinions outside his areas of expertise and that his conduct on cross-examination prolonged that exercise "by several hours"; and second, that applicants' counsel would not agree to even a short adjournment of the hearing, despite Seneca's difficulty in assembling responding material during "prime August vacation time".

Conclusion on Scale of Costs

[36] I do not find that these reasons, while clearly taxing on the effort by Seneca's counsel to respond, are sufficient to justify awarding costs on a substantial or full indemnity scale.

Applicants' Position that Seneca's Costs Excessive and Discussion of Same

[37] Next, and occupying the better part of the applicants' costs submissions, the applicants argue that various aspects of Seneca's claims for costs are disproportionate or otherwise unjustified.

[38] By and large, with some exceptions noted below, I reject those submissions. I do not share the applicants' apparent "sticker shock" in response to Seneca's claimed costs. Indeed, in my view, given the volume and complexity of the materials, the importance of the issues to Seneca, and the limited time available to amass a response, the costs sought are entirely reasonable.

[39] In terms of the specific arguments the applicants make in this category, first they note that the names of seven counsel and students appear as timekeepers on the file, and that this, particularly noting the level of experience of a number of those counsel, is excessive. As the applicants put it: "Such firepower is a gross overuse of resources for a motion of this nature."

[40] I disagree. The deployment of counsel and students, especially on such a tight timeframe, strikes me as reasonable and appropriate. It also strikes me as disingenuous for the applicants to deliver hundreds of pages of material, including complex expert material, and to create and insist upon compliance with a very tight timeframe, and then to complain that Seneca's response is unduly comprehensive and overstaffed.

[41] As part of its position on the deployment of counsel, the applicants single out a number of docketing lawyers from the office of Seneca's counsel, and complain that they collectively docketed a "staggering 248.1 hours", without sufficient details to explain why their involvement

was required. The applicants suggest that the fees resulting from the work of this cohort, totaling $46,956.25 on a partial indemnity basis, simply be struck out entirely.

[42] Again, I disagree. Again the rapid deployment of a sizeable team to research and prepare the necessary materials within the limited time available was predictable, necessary, and appropriate.

[43] The applicants next note that the two main counsel for Seneca, Mr. Levitt and Ms. Marshall, between them generated $79,988.50 in counsel fees alone on a partial indemnity basis. The applicants say that "Quite simply, no moving party should expect to pay such an amount."

[44] Once more, I disagree. By choosing a target in Toronto, and bringing the application and motion in the Court here, the applicants must be taken to accept the inevitability of counsel charging rates consistent with the Toronto market, and, again, by delivering voluminous and complex materials, the applicants must be taken to expect a response in kind.

[45] The applicants next argue that, inasmuch as the application will proceed to a hearing, and given therefore that cross-examinations and other procedural steps will have value in that context, no amounts should be allowed for those steps. While much of the cross-examination was referable and relevant to the issues in the motion, I accept that some of the work done would also have value on the ultimate hearing of the application, and so I will grant a modest reduction on this basis.

[46] The applicants go on to allege in additional and different ways that the time spent by counsel was excessive or unnecessary. Without going into the details of these additional submissions I repeat my observations above, that in my view, the time and resources spent defending the motion were warranted and reasonable.

[47] Overall, against a claim for fees on a partial indemnity basis of $126,944.75 (accepting the applicants' observation about the arithmetical error), I allow fees on a partial indemnity basis in the amount of $110,000.00.

[48] With respect to the total disbursements claimed in the amount of $67,938.74, the applicants first complain that a disbursement of $12,139.03 for a payment to another firm, Lax O'Sullivan LLP, for input on Charter issues was unnecessary and unjustifiable and should be disallowed in its entirety.

[49] Seneca responds that its main counsel had little expertise in Charter issues (given that firm's focus on labour and employment issues and the fact that Charter issues rarely arise in that domain), and that in fact it was cost-efficient to engage external expertise as compared to "having to learn that law ab initio".

[50] I accept Seneca's explanation and rationale, and see no reason why Seneca's main firm would reach out for external assistance if it was not genuinely required. I also note that the amount in issue strikes me as reasonable given the numerous Charter issues put in play in the application.

[51] The applicants then raise concerns about expenditures on secretarial overtime, photocopying, court reporting, meals and parking. None of these items seem unwarranted or disproportionate to me, and I allow them.

[52] The one area in which I find some merit to the applicants' position on disbursements is their observation that the expenditure on expert witnesses, totaling $43,476.75, can and will have value on the hearing of the application. I do not accept the applicants' suggestion that therefore those expenditures should be disallowed entirely. I considered and relied upon the expert evidence in my determination of the motion, and so in my view, a substantial portion of the expenditure on expert evidence is properly allocated to the motion itself.

[53] In that regard, against a total claim of $43,476.75, I allow $22,000.00, and the balance should be deducted from the total claim for disbursements of $67,938.74, yielding a balance payable for disbursements in the amount of $46,461.99.

Allegations of Intemperate Conduct on the Part of Seneca's Counsel

[54] Finally, the applicants argue that Seneca's lead counsel sent inappropriate emails during the period following the hearing of the motion, articulating inappropriate positions, in particular on the topic of who should pay Seneca's costs, that Seneca's materials were filed late, and that one of the cross-examinations undertaken by Seneca's counsel was demonstrably and predictably unproductive and unnecessary.

[55] While I agree that one of Seneca's lead counsel's emails was heavy-handed, I do not find in the heated circumstances surrounding this motion, that email was so untoward as to disentitle Seneca to its costs. I also reject the applicants' other submissions in this category. In my view it was the applicants' creation of and inflexible insistence on a compressed timeframe that turned up the temperature and led to conduct and steps that, if regrettable, were nonetheless understandable in those circumstances.

Overall Conclusion

[56] In sum, then, I order JCCF to pay Seneca's partial indemnity costs in the amount of $110,000.00 plus its disbursements in the amount of $46,461.99 within 30 days of the date of release of this endorsement.

W.D. Black J.

Date: November 24, 2022