Date: 20241018
Docket: CI 18-01-15816
(Winnipeg Centre)
Indexed as: Polischuk v. The City of Winnipeg
Cited as: 2024 MBKB 156

2024 MBKB 156 (CanLII)

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DANIEL POLISCHUK,	)	Janet I. Jardine
	)	for the plaintiff
plaintiff,	)	
- and -	)	
	)	
	)	
THE CITY OF WINNIPEG	)	William R. Gardner
	)	Kaisha Thompson
defendant(s),	)	for the defendant
	)	
	)	
	)	Judgment Delivered:
	)	October 18, 2024

MARTIN J.

INTRODUCTION

[1] Daniel Polischuk worked for many years as an independent subcontractor for the City of Winnipeg before he was unjustly banned in 2017 from performing any City work, centered on an untrue allegation. Mr. Polischuk sued for loss of income based on (i) misfeasance in public office, (ii) causing loss by unlawful means and (iii) breach of a common-law duty of procedural fairness or natural justice. The essence of the claim

related to two bans: first, in April 2017, from the Water Department and second, in November 2017, his complete ban from any City department.

[2] After a three-week trial in December 2023, I found Mr. Polischuk could not prove the necessary legal elements for the three heads of liability he advanced and his claim was dismissed, with costs to be determined.

[3] Nonetheless, as noted in ***Polischuk v. The City of Winnipeg***, 2024 MBKB 60:

> [3] However, this decision is not a vindication of the City's actions or conduct. Mr. Polischuk was not dealt with fairly and his bans were neither well-grounded nor just. In response to my enquiry, counsel for the City very fairly acknowledged that if I found the second ban was not reasonable, the City would lift that ban. That said, if I had the authority to quash both bans I would do so. Considering the facts I have found, the City should act honourably and voluntarily lift both bans, particularly as most of the City employees involved have moved on. It is the only right way to make amends. Doing so would enable an opportunity for Mr. Polischuk to take-on City work. I trust the City's counsel will ensure appropriate City personnel are made aware of my assessment of this situation.

[4] As the prevailing party, the City sought party and party Tariff costs of about $144,000 (inclusive of disbursements and taxes). In the alternative, they seek only disbursements. This odd position acknowledges the reality of the bleak fact findings against the City, somewhat benignly summarized in the above quote.

[5] Unusually for a losing party, Mr. Polischuk sought costs in his favour, up to full solicitor-client costs, because although he did not prove legal liability, he factually established the bans were unjust and unreasonable - - he proved he should not have been banned and he suffered an economic loss.

[6] Also, after the judgment issued, remarkably, the City reneged on its position that it would at least lift the second ban from all City work if I found it unreasonable, which

2024 MBKB 156 (CanLII)

I did. In doing so, not only did the City not go further and lift both bans, as I exhorted they were honor-bound to do, but they acted shabbily by breaking their word about revoking the November 2017 ban. The City treated Mr. Polischuk badly and unfairly in 2017, and again after judgment.

2024 MBKB 156 (CanLII)

ISSUE

[7] The sole issue before me is a proper award of costs.

FRAMEWORK FOR A COSTS AWARD IN MANITOBA

[8] Section 96 of the ***Court of King's Bench Act*** (***KB Act***) specifies the costs of a proceeding is in the discretion of the court. Section 57.01 of the *Court of King's Bench Rules* (*KB Rules*) sets out factors which may be considered by a court in exercising its discretion, in addition to the result in the proceeding and any offer to settle made in writing. Further, notably, s. 57.01(2) expressly allows a court to award costs against the successful party "in a proper case".

[9] In addition to this statutory framework, Manitoba jurisprudence generally holds that costs are awarded to the successful party on a "party and party" basis, as calculated with reference to the appropriate Tariff set out in the *KB Rules,* which aim but often fall short of indemnifying approximately 60% of legal fees. Further, in weighing appropriate factors against the backdrop of the specific case at issue, a court may exercise its discretion and award enhanced costs, or, exceptionally, solicitor-client costs or solicitor and own-client costs.

[10] In any case, the proper exercise of discretion is essential. A handy summary of jurisprudence is set out in the ***Canadian Encyclopedia Digest (CED)***, 4th ed.

(Western) (Toronto: Thomson Reuters Canada Limited, 2022), Costs, §3. Principles Guiding Exercise of Discretion:

> The court's discretion is one which must be exercised in accordance with principle and with the rules governing the exercise of all judicial discretion; it is not to be exercised in a harsh or arbitrary manner. The overriding principle is that of reasonableness; otherwise the result may be contrary to the fundamental objective of the access to justice.
>
> The discretion as to costs is a judicial one, and must be exercised judicially and upon fixed principles. Otherwise, however, it is unfettered and untrammeled, although will always be governed by the special circumstance of the case.
>
> A trial judge has a broad discretion in awarding costs; unless that discretion was not exercised judicially, the discretion was based on an erroneous principle of law, or the costs award was plainly wrong, an appeal court will not interfere. Appellate courts will be more reluctant to reverse the trial judge on the question of costs where the analysis is highly fact-driven.

BACKGROUND

[11] The lead up and trial of this case was hard-fought and contentious. This theme followed through the costs application. I will not rehash or parse all the litigation maneuvers or trial details or evidence, despite an invitation to do so, mostly from plaintiff's counsel. Rather, for purposes of background that may have some bearing on the costs decision, I broadly note the following:

- neither the ban in April 2017, nor the complete ban in November 2017, were reasonable or based on an informed, objective process - the process was flawed. In effect, no real scrutiny was brought to bear by Mr. Wiebe (the contract administrator) to the allegations on which the bans were based;
- most critically, respecting November 2017, I found that none of the allegations of lying, trespass and attempted theft were true. As well, as noted at para. 42 of the judgment:

2024 MBKB 156 (CanLII)

> I also find that once Mr. Evinger initiated his allegations of lying, trespass, and attempted theft, and advocated a ban from all City work, there was no looking back; the permanent ban was essentially a foregone conclusion. In testimony, Mr. Wiebe was clear that although Mr. Evinger could not make the decision to ban Mr. Polischuk, he wanted to support Mr. Evinger and other personnel. Supporting staff was the key reason to ban Mr. Polischuk.

- from the start of litigation in 2018, through the close of trial after evidence was concluded in 2023, the City continued to argue that its process was reasonable, and the bans were justified on the underlying fact evidence. In other words, Mr. Polischuk was to blame, and he was, as indicated in a 2017 email to many City employees, banned for "attempting to take materials". This amounted to publicly announcing he was a thief. Conversely, throughout, at a minimum, the City ought to have known its own evidence exposed Mr. Evinger's allegations, and hence its litigation position lacked veracity. To be clear, defamation was not pled;
- after his complete ban in November 2017, Mr. Polischuk hired counsel who shortly thereafter sent a detailed demand letter, and a follow-up letter, to the City seeking a review of the bans by senior officials and replacement of lost income. Remarkably, the City did not respond in any way on either occasion, not even to acknowledge receipt. This left litigation as the only option, not only for a legal remedy but, importantly, to cleanse his reputation;
- because of hardened positions from the outset of the litigation through trial, and the nature of the pleadings, both parties contributed to what became unnecessarily lengthy and complicated pre-trial proceedings and trial;

2024 MBKB 156 (CanLII)

- before trial, Mr. Polischuk made three settlement offers, none of which stimulated a response. The last, a formal offer to settle shortly before trial, was for $380,902 – a sum meaningfully less than the provisional award I would have granted had Mr. Polischuk been successful at trial. The claim was framed in a way that the City defeated it in law;
- after the trial judgment issued, the City reneged on its position that it would lift the November 2017 ban if I found the ban was not appropriate;
- in the shadow of the costs hearing, I urged counsel to resolve this issue. Interestingly, affidavits on the costs motion detailed those efforts. In response to Mr. Polischuk offering to settle by the City lifting of the second ban, the City offered to pay Mr. Polischuk $50,000 toward his costs if he gave-up any potential appeal and accepted the bans would remain. He countered with willingness to accept the contribution to costs, but not give up the right to potentially appeal. That ended negotiations – the costs contest remained.

ANALYSIS

[12] For the reasons that follow, I decline to award any costs to the City. I award costs (inclusive of disbursements and tax) to Mr. Polischuk of $100,000, roughly, in effect, an indemnity to his fees of about $65,000 (less than 1/3 of his actual legal fees, and less than Tariff costs had he been successful), plus his disbursements.

[13] I acknowledge that not awarding a prevailing party costs is exceptional. Moreover, awarding the losing party costs is more exceptional still. In either

2024 MBKB 156 (CanLII)

circumstance, the exercise of such discretion must be judicially reasoned consistent with the *KB Rules* and jurisprudence which, for the most part, requires some form of misconduct by the successful party or significant public interest concerns (See Mark M. Orkin and Robert G. Schipper ***Orkin on The Law of Costs***, 2nd ed. (Toronto: Thomson Reuters, 2024), at §2:39, Liability of Successful Party for Costs). As noted by the Ontario Court of Appeal in ***B. (R) v. Children's Aid Society of Metropolitan Toronto***, 1992 CarswellOnt 301, at para. 101, the rules allow for costs against a successful party, "… and for reasons *not* involving misconduct on the part of the successful party".

[14] Linda S. Abrams and Kevin P. McGuinness, in ***Canadian Civil Procedure Law***, 2nd ed., LexisNexis Inc. 2010, p 1410, §17.28, put it this way:

> On very rare occasions, a court may be prepared to consider the award of costs against a successful party. The authority for doing so is set out in rule 57.01(2). Courts will generally exercise their discretion to award costs against a successful party only in exceptional cases. The burden is on the unsuccessful party to persuade the court that the proceeding concerned has some truly special element sufficient to justify such an order. Exceptional cases usually involve misconduct on the part of the successful party, such as a failure to make proper pre-trial disclosure. In the absence of misconduct the award of costs against a successful party is difficult to justify. However, courts have also exercised this discretion in significant public interest cases such as Canadian Charter of Rights and Freedoms cases. Costs should not be awarded against a party simply because he or she will be indemnified by an insurer, or because the successful party has failed to make an offer to settle, nor because the successful party is better able to pay the costs of the proceedings than the unsuccessful. Rich people, as much as the poor, are entitled to justice.

[15] I am unaware of any Manitoba precedents invoking *KB Rule* 57.01(2), such is its exceptional nature. However, there is some jurisprudence from other provinces with an identical rule, such as Ontario. For example, in ***Schut v. Poll Venture Investments Inc.***, [1991] O.J. No. 2425, costs were awarded against the successful party where

2024 MBKB 156 (CanLII)

their conduct "… created an atmosphere in which [the unsuccessful party] had no recourse but to seek assistance of the courts" (at para. 3). In other words, the successful party provoked the litigation.

2024 MBKB 156 (CanLII)

[16] Misconduct can take many forms, some pre-litigation, some during or even after the litigation. Traditionally however, in Manitoba, pre-litigation conduct is not a factor in costs except in special circumstances. In ***Judges of the Provincial Court (Man.) v. Manitoba et al.***, 2013 MBCA 74, the Manitoba Court of Appeal explained:

> [178] Next, while a rigid rule is not necessary, solicitor-client costs are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone. So, for example, depending upon the nature of the cause of action, it may be possible to compensate the plaintiff by an award of damages or to punish the defendant by a punitive award. It is acknowledged, however, that there may be cases where that is not possible or appropriate. See *Siemens et al. v. Bawolin et al.*, 2002 SKCA 84 at para. 118, 219 Sask.R. 282.
>
> [179] Some examples of the limited circumstances where solicitor-client costs may be awarded for pre-litigation conduct include issues of public interest (see *Lacombe [Quebec (Attorney General) v Lacombe*, 2010 SCC 38] at para. 67), situations where the fruits of the litigation do not provide any appropriate compensation in relation to the reprehensible conduct (see *Sun Life Assurance Co. of Canada v. Ritchie et al*, 2000 BCCA 231 at para. 54, 136 B.C.A.C. 215) and situations where the "principle of indemnification for the wrongdoing (and not merely disapproval, however strong, of the wrongdoing) justifies such an order" (see *Hashemian v. Wilde et al*, 2006 SKCA 126 at para. 32, 289 Sask.R. 105). Indeed, in cases similar to the one at bar, solicitor-client costs were awarded based on conduct surrounding the government's responses to the compensation committee's reports. See the *Newfoundland Association of Provincial Court Judges et al. v. Newfoundland*, 2000 NFCA 46 at paras. 301-13, 192 Nfld. & P.E.I.R. 183. Nonetheless, courts should be careful to avoid double compensation and not to punish, by way of costs, pre-litigation conduct which could be the subject of other relief.
>
> (emphasis added)

Arguably, this dicta resonates here.

[17] In sum, as to Manitoba, as noted by the Court of Appeal in ***Kalo v. Winnipeg (City of)***, 2019 MBCA 46:

> [50] Normally, the general rule is that costs follow success in litigation. But, that is not always the case. The fact that a party is successful in a case does not prevent the court from awarding costs against the party in a proper case. The court has considerable discretion in the award of costs. So, for example, cost awards can be used to discourage steps that unduly prolong litigation (see Mark M Orkin & Robert G Schipper, *The Law of Costs*, 2nd ed (Toronto: Thomson Reuters, 2019) (loose-leaf updated March 2019, release 82), ch 2 at 2-7; and Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, rr 57.01(1)(d.1), 57.01(2)).
>
> (emphasis added)

[18] Turning to germane factors set out in *KB Rule* 57.01(1), succinctly:

- the City successfully defended all legal liability but in no way was it vindicated on the facts. Rather, Mr. Polischuk was;
- the last settlement offer before trial was from Mr. Polischuk, an amount that was less than the provisional damages award I would have given if he was successful;
- the amount claimed was somewhat of a moving target but in any event, fell within the highest Class for Tariff calculation purposes;
- the proceeding should not have been overly complex;
- the issues were important to the parties;
- the conduct of both parties tended to lengthen unnecessarily the duration of the proceedings and unnecessarily complicated the proceedings. The expert opinion evidence (and the foundations for that) of both parties is a striking example; and
- despite the above note, I cannot say that any step in the proceeding was improper, vexatious or unnecessary per se, but this does not mean that the steps were focused, efficient or expedient.

2024 MBKB 156 (CanLII)

[19] Additionally, as noted, the City's approach and rational for the bans, along with ignoring letters from counsel for Mr. Polischuk, left him no option but to sue. As in ***Schut***, they created conditions where Mr. Polischuk's only option was to sue, particularly as they labelled him a liar and thief. Being of good character and reputation was important for future work opportunities.

[20] Moreover, once he initiated his action, the City proceeded with tunnel vision without a complete understanding of the anticipated evidence from City employees, calling into question the justification for the bans. This prolonged matters, forcing Mr. Polischuk to expend far greater resources on his case. Having said this, I can understand the City's focus on the pleadings and whether the claims could be made out in law. What I cannot understand is the City maintaining Mr. Polischuk was dishonest. This is particularly aggravating.

[21] The City ought to have conceded that the attempted theft allegation lacked veracity, and Mr. Wiebe's internal process lacked rigor. This would not have compromised their defences on the claims as pled. Rather, they maintained, through submissions at trial, that Mr. Polischuk was essentially guilty as charged; this is significant, as it was unproven and untrue. This was not simply me preferring some evidence over other evidence; there was no basis for it. It was bad enough that the City sullied his reputation by the whole process in November 2017, concluding with disseminating an email internally announcing he was banned for attempting to take City material, but the City doubled down on the assertion through trial.

2024 MBKB 156 (CanLII)

[22] Further, and critically, surprisingly the City reneged on its position to the court of lifting the second ban if I found it unreasonable. This position seems to have worked its way into the costs settlement discussions.

[23] Balancing all of these factors, I have no hesitation in denying the City any costs award and, further, invoking *KB Rule* 57.01 (2) in awarding $100,000 costs to Mr. Polischuk. There are demonstrated good reasons, special circumstances, that set this particular proceeding apart from the norm. Cumulatively, the above analysis is misconduct deserving of rebuke. This is Mr. Polischuk's last chance for some modicum of justice; or looked at another way, a moderate lessening of the sting and toll this entire affair, from start to end, has inflicted.

CONCLUSION

[24] Costs are awarded to Mr. Polischuk in the amount of $100,000 all inclusive.

_________________________ J.

2024 MBKB 156 (CanLII)