Court of King's Bench of Alberta

Citation: Ford v New Democrats of Canada Association, 2024 ABKB 685

Date: 20241122
Docket: 2001 11161
Registry: Calgary

Between:

Caylan Ford

Plaintiff/Appellant

- and -

Karim A. Jivraj, the Broadbent Institute, New Democrats of Canada Association, Progress Alberta Communications Limited, Rakhi Pancholi, Duncan Kinney, Avnish Nanda, Luke Lebrun, Stephen Magusiak, Jeremy Nolais, David Khan, Canadian Broadcasting Corporation, Toronto Star Newspapers Ltd, Emma Mcintosh

Defendants

- and -

New Democrats of Canada Association

Respondent

Reasons for Decision
of the
Honourable Justice C. Dario

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[1] This costs decision emanates from an appeal and reconsideration decision in ***Ford v New Democrats of Canada Association*****,** 2024 ABKB 141 (the "**Decision**"). The Decision dealt with three substantive issues: a) a request by the Plaintiff for advice and direction regarding a litigation representative for the Alberta New Democratic Party (the "**Alberta NDP**"), b) a determination of the New Democrats of Canada Association's (the "**Federal NDP Association**") summary dismissal or striking application, and c) an appeal of a costs award made by an Applications Judge.

[2] The chronology of this matter is set out in detail in the Decision and I will reiterate it here only to the extent necessary to address the parties' costs arguments. What began as a relatively straightforward application has become rather convoluted.

[3] Initially, the Plaintiff brought an application before an Applications Judge. The Plaintiff wished to sue the Alberta NDP, which is an unincorporated association structured with an invalid trustee. Due to this irregularity, she sought advice and directions on the question of who should be named as defendant in respect of the alleged actions of the Alberta NDP. Given the Alberta NDP's unusual structure, and the resultant uncertainty on this point, the Plaintiff had named the Federal NDP Association as one of the defendants in her Statement of Claim. The Federal NDP Association objected to this and brought a cross-application before the Applications Judge to strike the Plaintiff's claim against it or, in the alternative, for summary dismissal of that claim.

[4] As I noted in the Decision, the Plaintiff's application for advice and directions did not go forward before the Applications Judge because, immediately before the application, the Plaintiff and the Alberta NDP entered into an agreement to resolve the issue, namely that the Alberta NDP would appoint a representative who would be backed by an appropriate indemnity agreement approved by Alberta NDP's board. That agreement also would have resulted in the Federal NDP Association being released from the litigation. Consequently, the Applications Judge did not need to provide advice and directions or make a decision about the Federal NDP Association's strike/summary judgement application. The only decision the Applications Judge made was a costs award in favour of the Federal NDP Association. The costs award was substantial (costs and disbursements in excess of $40,000) notwithstanding there was no decisions on the merits of the application. The Plaintiff appealed that costs award.

[5] Unfortunately, the Alberta NDP did not honour the agreement it had made with the Plaintiff as stated before the Applications Judge. The matter subsequently came before me. The Plaintiff sought a reconsideration of her application for advice and directions. In addition, the Federal NDP Association, which had not been released from the litigation as contemplated by the agreement, renewed its application to strike the Plaintiff's claim against it or for summary dismissal of that claim.

[6] In the Decision, I provided the Plaintiff with advice and direction on the rather perplexing question of who to name as defendant in respect of her claim against the Alberta NDP. I also allowed her appeal of the costs award made by the Applications Judge. I declined to strike her claim against the Federal NDP Association or to grant summary dismissal of that claim at that point in the litigation.

[7] The parties are agreed that the Plaintiff was successful in the proceedings before me and that, therefore, she is entitled to costs. The remaining questions are the quantum of those costs and against whom such costs should be awarded.

[8] In her costs submissions, the Plaintiff indicated that she was not seeking costs in respect of her application for advice and directions as it would have been required in order to move the matter forward due to the unusual construction of the Alberta NDP. Rather, she enclosed a bill of costs for, as she put it, "all tariffed steps taken to contest the Federal NDP's Application to strike or summarily dismiss the Plaintiff's claim against it". She claims Schedule C costs on Column 5 with a multiplier of two for a total amount of $22,680, inclusive of GST. I have reviewed the five line items set out in the bill of costs and there does not appear to be anything unusual in them. The Plaintiff seeks the multiplier in recognition of her many attempts to resolve this matter with the other parties both prior to and after filing the application, as well as the subsequent need to bring the application before this court after the Alberta NDP reneged on commitments made before the Applications Judge. Reference may be made to paragraphs 31-35 of the Decision.

[9] Both the Alberta NDP and the Federal NDP Association took the position that Schedule C was the appropriate method to determine costs in this matter; the Federal NDP Association specifically asserted that Column 5 was appropriate: ***McAllister v Calgary (City)***, 2021 ABCA 25 at paras 59-60, 62; ***Barkwell v McDonald***, 2023 ABCA 87, at para 53; R. 10.31(1) of the *Rules*. Although the Federal NDP Association had advocated for solicitor-client costs before the Applications Judge when it was the party to be awarded costs, now as the payor, it concedes rather that Schedule C remains the presumptive default position on costs awards. It now states that elevated costs are generally only awarded in circumstances of misconduct or increased complexity in line with the factors set out by Rule 10.33 (citing ***Stewart Estate v TAQA North Ltd,*** 2016 ABCA 144 at paras 25-26), particularly when the litigation is in the final stages of the action when it is known who will ultimately be entitled to indemnification (***McAllister*** at para 64).

[10] The Alberta NDP asserts that it was not formally a party to the proceedings and that, therefore, costs should not be awarded against it. It cites Rule 10.28, which states that "In this [costs] Division, 'party' includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award." While the Plaintiff had argued that the Alberta NDP did not have standing to make submissions or participate in the proceedings, the Alberta NDP did in fact provide such submissions. Similarly, while I indicated at paras 38 and 105 of the Decision that the Alberta NDP did not have legal standing and I was not obligated to consider its position, the reality is that it provided submissions and I reviewed and considered those submissions: paras 36, 38 to 45 and 105 of the Decision. (To the extent relevant to the legal standing argument, the Alberta NDP's representative has now been named to stand for the NDP *nunc pro tunc* the commencement of these proceedings by consent of the parties.) Accordingly, I reject the Alberta NDP's argument that it "cannot be properly viewed as having participated in the Application and ... there ought to be no award of costs made as against the Alberta NDP."[1]

[11] The Alberta NDP also argued that it had "proposed in advance of the original hearing before Applications Judge (then Master) Prowse, to settle the issue of naming of a representative, and provided the name of its proposed representative prior to the hearing of the Application." That is true, but the Alberta NDP did not follow through in providing the name of its proposed representative until several months after the hearing before the Applications Judge and just prior to the hearing before me. Further, the agreement made before the Applications Judge contemplated that the Alberta NDP would satisfactorily indemnify its proposed representative. It does not appear that an indemnification agreement was ever put in place; if such agreement existed, it was certainly not provided to the Plaintiff to verify its appropriateness. Notably, when the parties attended before me a second time to again address the absence of an indemnity agreement, the identity of the proposed representative had changed, further bringing into question whether an indemnity agreement ever existed with the first proposed representative. In summary, the Alberta NDP did not abide by the agreement that obviated the need for a decision by the Applications Judge, or consequently by this court. This argument is not an answer to the application for costs.

[12] Finally, the Alberta NDP argues that the issues involving it were relatively minor in comparison to those involving the Federal NDP Association and did not contribute significantly

[1] The Alberta NDP argues that it is not responsible to ensure that it is structured or set up in a way to ensure that it can be sued. Sections 43.2(5), 48(2) and 48.1 (1) and (1.1), 48.2 and 50 of the *Election Finances and Contributions Disclosure Act*, RSA 2000, c E-2, for example, suggest otherwise.

to the Plaintiff's total costs. This ignores the fact that the genesis of this matter was the difficulty in determining how to name the Alberta NDP as a defendant in the Plaintiff's lawsuit due to the Alberta NDP's structural irregularity. As discussed in the Decision, the Plaintiff's decision to name the Federal NDP Association as a defendant in her lawsuit was related to this difficulty. Further, despite the Alberta NDP suggesting before me that it required time to reorganize its structure and ensure funds and an indemnity agreement had been backed by the board members, there is no indication it took any meaningful steps to do so even a year and a half after the original application before me and two years after appearing before the Applications Judge. I reject the assertion that the Alberta NDP did not contribute significantly to the Plaintiff's total costs. Its conduct is the very foundation of this aspect of the litigation.

[13] For its part, the Federal NDP Association acknowledges that it is liable to the Plaintiff for costs, but argues that its liability should be only in respect of the costs appeal, not the other issues. It contends that no costs should be payable in respect of the striking/summary dismissal application because the Plaintiff took no position on that application. It also argues that it should pay no costs in respect of the advice and directions application because no relief was awarded against it on that application.

[14] Specifically, the Federal NDP Association states that since the Plaintiff did not take a position with respect to the Federal NDP Association application to strike or dismiss, costs cannot be awarded against a party that takes no position. It relies upon ***Gullion v Gottfried,*** 2018 ABQB 531 at para 34 as authority for this proposition. I do not read ***Gullion v Gottfried*** as being anything more than the Justice exercising his discretion in the context of the circumstances of that case.

[15] The Plaintiff notes that it only took no position because its application was to obtain the court's advice and direction on which party should be properly named; the Plaintiff was open to the court's direction. The Plaintiff provided the court alternatives to consider, one of which was for the Federal NDP Association to remain a named party and be vicariously liable for the conduct of its member, the Alberta NDP. Ultimately, this Court found that the Federal NDP Association should not succeed in the strike/summary judgment claim to release it from the litigation.

[16] In my view, the kind of issue parsing advocated by the Federal NDP Association is unhelpful in these circumstances. The whole of the proceedings arose because of the difficulty in naming the proper defendant in respect of the Alberta NDP. The Federal NDP Association brought its striking/summary dismissal application on the basis that it was not responsible for the conduct of the Alberta NDP; that application was unsuccessful. Moreover, the Federal NDP Association acknowledged in its costs submissions that there was "significant overlap" in the applications. Accordingly, I reject this approach.

[17] As noted above, the parties are in agreement that the Plaintiff's costs should be calculated using Schedule C. This will be applied on all items sought by the Plaintiff's Bill of Costs. The Federal NDP Association acknowledges, and I find, that costs on Column 5 are appropriate. The remaining issue in respect of quantum is whether to apply the multiplier of two sought by the Plaintiff.

[18] The Federal NDP Association asserts that there is no merit to applying a multiplier. Turning to the factors to be considered pursuant to R 10.31 and 10.33, it argues Schedule C remains particularly relevant in interlocutory steps in an action – precisely such as this one, that any

increased complexity in the matter is already captured by the higher applicable column of Schedule C, and that there has been no misconduct on the part of the Federal NDP Association throughout this litigation.

[19] The Plaintiff argues a multiplier is appropriate in the present case. Relying on the findings of the Court in ***Weatherford Canada Partnership v Addie***, 2018 ABQB 571 at paras 36 – 43 and 54 – 57, the Plaintiff referred to three areas where the court found a multiplier was merited, being where the complexity of the case merits it, where the amount in issue significantly exceeds the column 5 amount, and where the conduct of the paying party warrants it. The Plaintiff asserts all three circumstances exist in this case:

(a) the complexity of the matter is reflected in the issues considered in the Decision and the analysis required to come to the Decision despite the short application before the Court,

(b) The amount in dispute in the present case exceeds $7 million and the consequence of the alleged defamatory statements (the Plaintiff asserts) have rendered her unemployable, and

(c) The conduct of the Federal NDP Association, but most specifically that of the Alberta NDP, warrants enhanced costs.

[20] While I agree with the arguments of the Federal NDP Association that many of the cases wherein courts have relied on these factors for enhanced costs are distinguishable in that they dealt with extremely document intensive, long (multi week) trials with damages claimed over a hundred million dollars, even shorter trials that are not as document intensive can trigger the complexity factor. In the present case, however, it is the conduct of the Alberta NDP that is most concerning.

[21] Referring back to the applicable factors set out in Rules 10.31 and 10.33 to determine whether a multiplier is appropriate and by what factor:

i) The Plaintiff was wholly successful against the Federal NDP Association with respect to both the strike/ summary dismissal claim and with respect to the costs award.

ii) Regarding conduct of the parties, including the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action, neither the Federal NDP Association nor the Alberta NDP responded to the Plaintiff's attempts to resolve this issue and avoid a protracted court process. More concerning is the continued failure of the Alberta NDP to honor the agreement it made before the Applications Justice. The delay occasioned impacted not only this litigation, but also the proceedings related to various other named defendants.

iii) Although this claim is not the equivalent of a document intensive multi-day trial, the complexity of the issues is reflected in the Decision. While the Federal NDP Association argues complexity is caught by the use of column 5, column 5 is not alone a full response in this case.

iv) Rule 10.33(2)(h) allows the court to consider any offer of settlement made, regardless of it complies with the specified form of offer contained in the *Rules*.

> Shortly prior to the second appearance before me, the Plaintiff offered to accept the representative designated by the Alberta NDP without reviewing the full form indemnity agreement. As a condition of settlement, the Plaintiff asked that both the Alberta NDP and Federal NDP Association either waive any costs awarded against the Plaintiff, or the Alberta NDP compensate the Federal NDP Association for its costs (as determined by the court either before me or after the conclusion of the litigation). Neither the Alberta NDP nor Federal NDP Association responded to this offer. This was one of many attempts the Plaintiff put forward to attempt to resolve the matter in an amicable manner. The Plaintiff was more successful in the Decision than the offer.

[22] I find that a multiplier of two is the minimum multiplier appropriate in these circumstances. Given the Alberta NDP's reneging on its agreement before the Applications Judge, the individual Plaintiff has been put to considerable unnecessary delay and expense in resolving this matter. The evidence before this court supports the Plaintiff's position regarding her efforts to find an amicable resolution, which was not responded to, and certainly not reciprocated by either party. Further, I am deeply concerned that the Alberta NDP represented to the Applications Judge that an agreement had been reached that forestalled the need for a decision, then resiled from that agreement. This, in my view, is a form of litigation misconduct. Had the Plaintiff sought solicitor-client costs on the basis of that conduct, I would have entertained that application. As it is, I have no difficulty awarding the Plaintiff the relatively modest costs she seeks in light of the parties' conduct. The Plaintiff is granted costs in the amount of $22,680, inclusive of GST.

[23] Those costs will be borne jointly and severally by the Alberta NDP, as represented by Garett Spelliscy, and by the Federal NDP Association. I recognize the Federal NDP Association's argument that it should not be responsible for the conduct of the Alberta NDP. Nevertheless, the Federal NDP Association was the unsuccessful party on both the costs appeal and the striking/summary dismissal application, and the determination of whether the Federal NDP Association is responsible for the conduct of Alberta NDP has not yet been fully decided. In my view, joint and several liability for the costs award is appropriate in these circumstances.

Dated at the City of Calgary, Alberta this 22th day of November, 2024.

C. Dario
J.C.K.B.A.

Appearances:

Richard E. Harrison
Wilson Laycraft
for the Plaintiff/Appellant

Katherine E. Palmer
Strathcona Law Group LLP
for the Alberta New Democratic Party

Arif Chowdhury
Fasken Martineau DuMoulin LLP
for the New Democrats of Canada Association