CITATION: University of Guelph Central Student Association v. Canadian Federation of Students, 2011 ONSC 17
COURT FILE NO.: 109/10
DATE: 20110107

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: UNIVERSITY OF GUELPH CENTRAL STUDENT ASSOCIATION

Applicant

v.

CANADIAN FEDERATION OF STUDENTS and CANADIAN FEDERATION OF STUDENTS – ONTARIO

Respondents

BEFORE: O'CONNOR J.

COUNSEL: Ryan Teschner, for the Applicant

Jonathan Davis-Sydor, for the Respondent Canadian Federation of Students – Ontario

Gordon Douglas, for the Respondent Canadian Federation of Students

C O S T S E N D O R S E M E N T

[1] The University of Guelph Central Student Association (CSA) brought an Application for a declaration that a referendum be conducted among the student

population at the University of Guelph. The referendum sought the students' wishes respecting their continued membership in the Canadian Federation of Students (CFS) and the Canadian Federation of Students – Ontario (CFS-O). The CFS and CFS-O opposed the Application on grounds that the procedure adopted by CSA did not conform to the by-laws of CFS and CFS-O.

[2] After a full day hearing, this Court ordered that a referendum be held. It provided a protocol for conducting it and for settling any administrative matters not specifically addressed by the protocol.

[3] The referendum was held in accordance with the Court's Order. A majority of students voted to "defederate", that is, to discontinue their membership in CFS and CFS-O.

[4] CSA seeks its costs on two steps in the proceeding, the Application and an unsuccessful motion by CFS eight days before the date set for the hearing of the Application, this under Rule 39.02, seeking leave to file new material. CSA also asks the Court to take into consideration an unsuccessful motion by CFS-O, heard on February 22, 2010, for a lengthy adjournment of the Application date. It does not seek costs on this motion.

[5] CSA argues that it was entirely successful on the Application and is therefore entitled to its claimed costs of $105,070.25 on a partial indemnity basis. It argues that much of the time and costs claimed were incurred because of the numerous attempts by the Respondents to derail and/or delay the proceedings, their goal being to push the referendum date into the next academic year.

[6] The Respondents submit that "[T]here were important issues raised by the CSA's Application and those issues deserved a full and fair hearing". *See CFS Costs submissions, para. 7).* Thus, they submit, the attendances and time spent were necessary to ensure this end. They argue that as the result was divided, all parties should bear their own costs.

[7] CSA seeks its costs on the Rule 39.02 motion of $12,286.12, on a substantial indemnity basis. It argues it was entirely successful on the motion. The Motion's Judge denied leave to the Respondent, CSA, to file further material. She characterized its conduct as "…attempting to split their case and/or delay the peremptory (sic) return of the Application on March 23, 2010." She found further that, "I am very suspect of the party's reasons at the 9th hour before the return of the Application…" and "…Today the moving party has made nothing more than allegations, untested statements, suppositions, theories and innuendos." She

awarded costs to the CSA, the scale and quantum of which were left to this Court. She noted that the motion took 2.5 hours. *See Ruling of Snowie J., dated March 16, 2010.*

[8] S. 131 of the *Courts of Justice Act* gives a court discretion in awarding costs "…and the court may determine by whom and to what extent the costs shall be paid". Rule 57.01 sets out the general principles a court may consider when exercising its discretion in awarding costs. The overriding principles are that costs are generally awarded to the successful party, that any offer to settle by either party must be considered, but that costs must, above all else, be fair and reasonable. *Larcade v. Ontario (Ministry of Community and Social Services)* (2006), 211 O.A.C. 247 (Div. Ct.), *Anderson v. St. Jude Medical, Inc.* (2006), 264 D.L.R. (4th) 557. In considering the *quantum* of a costs award, the Court may consider the eleven criteria listed in Rule 57.01. I find the following apply to this case:

- the hours spent by the lawyers for CSA;
- the amount that the unsuccessful parties could reasonably expect to pay;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of a party that tended to lengthen unnecessarily the proceeding;

- whether any steps were improper, vexatious or unnecessary. This criteria would include unfounded allegations of fraud.

[9] In this case, the CSA was entirely successful in defeating the Rule 39.02 motion brought by CFS and supported by CFS-O. I find that the hours spent by the CSA counsel were reasonable, given the importance of the matter. If the motion had been granted, the time necessary to receive and respond to the fresh affidavit would have precluded the Application proceeding on March 23. Thus, the referendum would have been delayed at least until the next academic year and possibly forever. Further, as noted above, Snowie J. found the motives of the Applicants were "suspect", in that they appeared to have brought the motion "…attempting to …delay the peremptory return of the Application…" She also characterized the strength of the moving party's case as "nothing more than allegations, untested statements, suppositions, theories and innuendos."

[10] These factors, plus the importance of the issue to the CSA, are sufficient to raise the costs award on this motion to the substantial indemnity scale. Further, I find the time and amount sought is fair and reasonable.

[11] There will be an order that the CFS and CFS-O forthwith pay the costs of CSA on a substantial indemnity basis, fixed at $12,286.12. This amount shall be

apportioned between the Respondents to reflect that the motion was brought by only CFS, but was supported by CFS-O. Therefore, CFS shall be responsible for 60% of the total, or $7,371.67 and CFS-O shall be responsible for 40%, or $4,914.44.

[12] CSA justifies their partial indemnity costs claim of $105,070.25 sought on the Application on the basis of its success, the necessarily large commitment of resources, including the time and efforts of six lawyers, four students-at-law, a law clerk and three researchers, all of whose efforts had to be performed in a very short time frame. CSA alleges the Application was further complicated by the Respondents' serious allegations of impropriety and fraud against a student at the University of Guelph and a lawyer.

[13] The Respondents deny any impropriety whatsoever, and argue the alleged delaying tactics were sincere and honest attempts to represent their clients' interests. That is, if a referendum were to be held, they merely wished to ensure that their by-laws be complied with.

[14] The Respondents argue success on the Application was mixed, and that either each party should pay their own costs or in the alternative that the figure sought be significantly reduced. They also submit that some of the costs claimed

relate to work done after the Application, in preparation for the referendum, and should not be included in the bill, as they would have been incurred in any event.

[15] In considering the applicable Rule 57 criteria noted above, I would make the following observations and findings:

The Hours spent by the CSA Legal Team

[16] Notwithstanding the tight time frame under which they worked, six lawyers incurring total fees of over $89,000 leads to the conclusion that some duplication of file familiarization and work must have been involved. Further, the work undertaken in connection with the running of the referendum should not be included.

The Amount that the Unsuccessful Parties Could Reasonably Expect to Pay

[17] The Responding parties did not seek costs and thus did not present Bills of Costs, the quantum of which is often a factor the courts consider to ascertain what the unsuccessful parties could reasonably expect to pay. However, if asked, they would no doubt suggest a considerably lesser figure than the one claimed. As it is, they have both argued only that each side pay their own costs or that the figure sought be reduced.

The Complexity of the Proceeding

[18] I would assess these proceedings as moderately complex, in that the issues were straight forward, requiring no experts to inform the court on them, but were numerous, requiring considerable material and lengthy submissions to understand the full picture.

The Importance of the Issues

[19] The issues and thus the outcome was vitally important to all the parties, involving issues of student governance and the costs of student associations at a large university. Further, I would assume that any precedent set by this case may have some repercussions at other universities across the country. Thus, many people were to be financially and otherwise affected by the outcome.

The Conduct of a Party that Tended to Lengthen Unnecessarily the Proceeding

[20] Much was made by the CSA (and somewhat by Snowie J.) of the alleged attempts by the Respondents to lengthen unnecessarily or even derail the proceedings. There is some evidence of this conduct, as Snowie J. found in her Ruling. I have relied on her views and findings to grant substantial indemnity costs on the Rule 39 motion. However, the Applicant has sought only partial indemnity costs on the Application. I agree that that the substantial scale is not appropriate on this phase of the proceedings. There was no evidence of conduct by the Respondents to unnecessarily lengthen the Application proceedings. The

parties had scheduled one day for the hearing. They substantially completed their presentations in the time allotted.

Whether any Steps were Improper, Vexatious or Unnecessary

[21] An allegation of improper proceeding was made by the Respondents against the student activist who prepared the petition and a lawyer who certified the original copy of it. It was alleged that the student had cut off a small corner of 26 of the 249 pages of the petition. The corner contained a logo or a few words that had nothing to do with the contents of the petition. The student had been using another petition form, minus the small corner, as a precedent for his petition. At the Rule 39.02 hearing counsel for the CFS-O argued that it appeared that the cut was made to hide something. The court rejected the comment and counsel moved on with his submissions.

[22] I do not consider the allegations by the Respondents' counsel to be "serious unfounded accusations of fraud". Inevitably, in the course of important, hard fought litigation, the parties and sometimes counsel stretch the boundaries of proper court decorum and say or do something they would later wish they had not said or done. It is part of the rough and tumble of the courtroom.

[23] Taking into account all of the above factors, I would assess the fair and reasonable costs to be awarded to the Applicant, CSA, at $65,000, inclusive of fees, disbursements and GST, such amount to be apportioned equally between the Respondents.

[24] Thus, there will be an order that the CFS pay costs to the CSA of $7,371.67 (para. 11 herein) plus $32,500.00 for a total of $39,871.67. There will be an order that CFS-O pay costs to the CSA of $4,914.44 (para. 11 herein) plus $32,000 for a total of $36,914.44.

O'Connor J.

DATE: January 7, 2011

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COSTS ENDORSEMENT

O'Connor J.

DATE: January 7, 2011