SUPREME COURT OF YUKON

Citation: *MWL v RKL*, 2016 YKSC 1

Date: 20160108
S.C. No. 12-D4482
Registry: Whitehorse

Between:

M.W.L.

Plaintiff

And

R.K.L.

Defendant

Before Mr. Justice L.F. Gower

Appearances:
Debbie P. Hoffman — Counsel for the plaintiff
Michelle K. Chan — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an assessment of a draft bill of costs submitted by the plaintiff father, for the total amount of $10,299.53, inclusive of disbursements. The defendant mother opposes the father's draft bill of costs and submits that it should be limited to a total of $1,406.03, again inclusive of the claimed disbursements, which are not at issue. What is at issue, for the most part, is whether cross-applications which were heard on July 9, 2015, following a consent order entered into by the parties on July 4, 2014, fall within the definition of "proceeding" in the Yukon *Rules of Court*.

[2] The significance of the interpretation of "proceeding" is that, in his draft bill of costs, the father has claimed items under the Tariff of party and party costs in Appendix B of the *Rules of Court*, which refer to steps taken in relation to a "proceeding", specifically items 1A ,1B, 3, and 4. The mother says the father is not entitled to claim these (and other) items.

DEFINITIONS

[3] "Proceeding" is defined in Rule 1 of the *Rules of Court* as including "an action, suit, cause, matter, appeal, or originating application". "Originating application" is also defined in Rule 1 and "means a proceeding commenced by petition or requisition".

[4] "Family law proceeding" is defined in both Rule 1 and in Rule 63, with the latter definition being slightly more expansive. In Rule 1, the term:

> [I]ncludes a proceeding in which relief is claimed under the *Family Property and Support Act*, the *Children's Act* or the *Divorce Act* (Canada), and includes a proceeding for nullity;

In Rule 63, the term:

> [I]ncludes a proceeding in which relief is claimed under the *Family Property and Support Act*, the *Children's Act* or the *Divorce Act* (Canada), divorce proceeding, uncontested divorce proceeding, and applications for division of property under the common law;

[5] The terms "action", "cause", and "matter" are all defined in the *Judicature Act*, R.S.Y. 2002, c. 128 as follows:

> "action" means a civil proceeding commenced in the manner prescribed by this *Act* or by the *Rules of Court*, and includes suit;
>
> "cause" includes any action, suit, or other original proceeding between a plaintiff and a defendant;

> "matter" includes every proceeding in the Court not in a cause;

[6] Incidentally, I assume "matter" might include things like the voluntary winding up of a company, assignments into bankruptcy, guardianships, adoptions, probate, and the like. However, the case at bar could not be considered a "matter" since it is a "cause" involving a proceeding between a plaintiff and a defendant.

[7] *Black's Law Dictionary*, (5th ed.), includes the following in its definition of "proceeding":

> …Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding... (my emphasis)

[8] The definition of "proceeding" in *Black's Law Dictionary,* (9th ed.) includes the following:

> The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment… An act or step that is part of a larger action… (my emphasis)

[9] In The *Dictionary of Canadian Law*, (3rd ed.), the definition of "proceeding", includes the following:

> One of those words of very wide import that must be interpreted according to the context in which it is used… Capable of including every species of activity in matters legal, from an interlocutory application in Chambers to an appeal in a Court of last resort... (my emphasis)

BACKGROUND

[10] The parties are involved in a family law dispute. On July 4, 2014, the parties agreed to a consent order which addressed custody of the children, residential time, child support, family assets, and the sale of the family home. The net proceeds from the

sale of the home were to be divided equally between the father and the mother, except that the mother was to pay the father an additional $10,000 from her share of the proceeds, presumably to represent his interest in a jointly held family business managed by the mother. Each party was to bear their own costs to the date of that order. When the order was filed, both parties were represented by counsel.

[11] The parties then negotiated and corresponded about the listing of the house for sale, accepting offers to purchase and the actual sale of the house.

[12] On December 16, 2014, the mother filed a notice of self-representation.

[13] The family home sold in January 2015. The parties then attempted to settle the distribution of the sale proceeds and exchanged formal offers to settle, but were unsuccessful in reaching a settlement. There was disagreement about the extent to which other matters which had arisen since the consent order of July 4, 2014 should be taken into account before dividing the net sale proceeds. These other matters included such things as utility bills, insurance payments, a line of credit, and the mother's claims for cleaning and storage costs.

[14] The father's offer to settle offered to pay the mother an extra $2,500 from his share of the proceeds. The mother's offer to settle offered that the father pay to her $9,512.50 from his share of the sale proceeds.

[15] On June 5, 2015, the father filed a notice of application asking the court to determine the distribution of the net sale proceeds.

[16] On June 15, 2015, the mother again retained counsel and filed a cross-application regarding the distribution of the proceeds.

[17] The cross-applications came on for hearing on July 9, 2015 before me. Three items were agreed to by consent, but the remaining items were left to me to decide. In the result, the net amount which the father was ordered to pay to the mother from his share of the net sale proceeds was $1,547.75, almost $1,000 less than the $2,500 the father offered to pay to the mother in his formal offer to settle.

[18] Thus, there is no dispute that, pursuant to Rule 39 of the *Rules of Court*, the father is entitled to costs assessed to the date the offer was delivered (February 5, 2015) and to double costs assessed from that date.

FATHER'S POSITION

[19] The father's counsel submits that the bill of costs should cover all steps from the consent order of July 4, 2014 to the conclusion of this matter, including the assessment of this bill of costs, with double costs from February 5, 2015.

[20] The father relies upon *Harkness v. Bell's Asbestos Engineering, Ltd.*, [1966] 3 All E.R. 843, in which Lord Denning M.R. interpreted the meaning of "proceeding" in a recently amended provision of the English *Limitation Act*. In that case, the plaintiff applied by way of an affidavit for an order that the *Limitation Act* should not give rise to a defence to his proposed action for damages for personal injuries. An issue arose whether the filing of the affidavit constituted a proceeding. If it did, then another provision of the *Limitation Act* stated that a failure to comply with the rules therein would be treated as an irregularity and not a nullification of the proceedings. At p. 845, Denning M.R. stated:

> It is said that this [irregularity/nullification] rule does not cover this case ... [I]t is said that at the time of the registrar's order, there were no "proceedings"; because no writ had been issued. So the rule, it was said, did not apply. I think that this

> is far too narrow an interpretation. This rule should be construed widely and generously to give effect to its manifest intentions. Any application to the court, however informal, is a "proceeding". There were "proceedings" in being at the very moment that the plaintiff made his affidavit and his solicitor lodged it with the registrar. (my emphasis)

[21] *Harkness* was referred to with approval by the Newfoundland Court of Appeal in *Clancey v Clarke Transport Canada Inc.* (1998), 160 D.L.R. (4th) 621. In that case, the Court observed that the definition of "proceeding" in the Newfoundland *Judicature Act* included "an interlocutory application" (para. 33). In that context, the Court discussed the application of Rule 2 of the Newfoundland *Rules of Court*, which was similar to the provision in *Harkness* about irregularities not nullifying a proceeding. Green J.A., speaking for the Court said this:

> 37 I conclude, therefore, that the notion of "proceeding" in Rule 2 must be given a broad and liberal interpretation to encompass any bona fide attempt, however inaptly styled, to invoke the remedial jurisdiction of the court. The basic thrust of Rule 2 is to limit the notion of nullity and to treat as irregularities situations which formerly might have become derailed because of technical non-compliance with procedural requirements. Substance rules over form. So long as the document filed is a bona fide attempt to raise justiciable issues, then the court has power to reshape the matter and to place it into an appropriate procedural package for adjudication. It should not be rejected as a nullity. (my emphasis)

Green J.A. further recognized that the *Harkness* approach has been followed by the British Columbia Supreme Court. At para. 42, Green J.A. quoted from Andrews J. in *Re Edwards* (1977), 6 C.P.C. 312:

> 42 … Any proceeding or application to court that can fairly be said to be an honest attempt to properly claim relief before the Court, cannot be held to be a nullity, and any error in practice or procedure should be corrected as long as it can be done without injustice. (my emphasis)

[22] The father also relies upon *Hanson v Hanson*, 2007 BCSC 1573. That is a case involving an assessment of a party's bill of costs following a summary trial on an issue of variation of child support, which in turn followed a final order - a similar situation to the case at bar. District Registrar Bouck held that the variation application was a "proceeding", as defined in Rule 1(8) of the British Columbia *Rules of Court*, which is worded very similarly to Yukon Rule 1(13):

> 7 … I find that the plaintiff is entitled to claim units under items 1A and 1B as this variation application is a proceeding as defined in Rule 1(8) of the Rules of Court. Following *Pacific Savings & Mortgage Corp. and Can-Corp Developments Ltd.* (1982) 135 D.L.R. (3d) 623 (C.A.), I find that this application to vary a final order is a "cause" or "matter" under that definition. It is "a factual situation that entitles one person to obtain a remedy in court from another person" and "something that is to be tried and proved": *Black's Law Dictionary* (8th Ed.).

[23] Finally, the father relies upon the definition of "family law proceeding" in Rule 63, which I quoted above at para. 4. Here, the father notes that his application to resolve the division of the net proceeds from the sale of the family home was made under the *Divorce Act*, and was also an application for division of property under the common law. In addition, the father observes that mother's cross-application was similarly for division of property and purported to be based upon both the *Divorce Act* and the *Family Property and Support Act*. Accordingly, the father submits that the cross-applications argued on July 9, 2015 constituted a form of "proceeding".

MOTHER'S POSITION

[24] The mother relies upon *Laxton v Coglon*, 2009 BCSC 1544. In that case, the defendant brought an application to reopen the trial to present further evidence after the trial had been completed. The application was unsuccessful and the sole remaining

issue was whether or not the plaintiff was entitled, as part of her costs award, to claim items 1A, 1B, and 4 under the British Columbia Supreme Court Tariff, which are worded identically to the same items in the Yukon Tariff. District Registrar Sainty referred to her colleague's decision in *Hanson*, cited above, but concluded that the application was Interlocutory and did not constitute a "proceeding" under items 1A,1B and 4:

> 14 While I agree with my colleague that, in certain circumstances, where an application is brought after a final order has been granted, a successful party may be entitled to units for tariff items 1A, 1B, 1C and the like, I do not find that to be the case in this particular instance. In most instances applications brought once a proceeding has started (if other than an "originating application") are interlocutory in nature, i.e., an "application within a proceeding to which it relates": see *Young v. Battiston*, [1983] B.C.J. No. 1559, 50 B.C.L.R. 139 (S.C.) at para. 4. Here the application cannot be said to be "originating". While it was brought by a non-party, it was brought to determine an "issue in the proceeding", and does not, in and of itself, constitute a proceeding. What the defendant Coglon did here was bring an application to the trial judge following a judgment. The very nature of the application shows that it was interlocutory ("not final or definitive" (Miriam Webster.com)) in nature… (my emphasis)

[25] The mother's counsel also pointed to a criticism of *Hanson* in the 2016 *British Columbia Annual Practice* (Canada Law Book: 2015) at p. 712, where the authors refer to *Hanson* and state:

> [This decision is not necessarily correct as a matter of interpretation even if the outcome is fair. It is hard to think how and interlocutory application could fall within the exclusive definition of "proceeding" in Rule 1(8)…]

ANALYSIS

[26] With respect, I do not think that the criticism of *Hanson* in the 2016 *British Columbia Annual Practice* is justified. The authors there seem to agree with the District

Registrar in *Laxton* that an interlocutory application cannot be considered a proceeding. However, there are several authorities and legal dictionaries indicating exactly the opposite, including *Harkness* and *Re Edwards*. I also came across the decision of the Ontario Court of Appeal in *Ontario (Attorney General) v. Palmer et al.* (1979), 28 O.R. (2d) 35, which involved a limitation issue under a provision of the Ontario *Public Authorities Protection Act*, which included the words “action, prosecution or other proceeding”. Anderson J., in dissent in the Divisional Court, concluded that these words must be construed to include the counterclaim which was at issue. However, he also went on to say:

> "Proceeding" is a word of very large and broad import and, in respect of matters legal, it would be difficult to select a term of more general application. The Shorter Oxford Dictionary contains, among its definitions of "proceeding", the following: "... the instituting or carrying on of an action at law; a legal action or process; any act done by authority of a court of law; any step taken in a cause by either party". In my view, it is capable of including every species of activity in matters legal, from an interlocutory application in Chambers to an appeal in a Court of last resort…(my emphasis)

The majority of the Court of Appeal agreed with Anderson J. that a counterclaim was included in the term “action”, and therefore said that it was unnecessary to decide whether it was also an “other proceeding”. However, the majority did not disagree with Anderson J.’s comments above.

[27] I also, with respect, have some difficulty understanding the rationale of District Registrar Sainty in para. 14 of *Laxton*, quoted above at para. 24. Her language is tentative to say the least:

> … I agree with [*Hanson*] that, in certain circumstances, where an application is brought after a final order has been

> granted, a successful party may be entitled to units for tariff items 1A, 1B, 1C and the like… (my emphasis)

Indeed, Sainty D.R. almost seems to distinguish *Laxton* as an unusual case, when she decided not to follow *Hanson* "in this particular instance" because the post-trial application to clarify findings of fact "was brought by a non-party" and could not be said to be an "originating" application. I further find the "non-party" reference confusing, as the application was brought by one of the defendants, Richard Coglan, who was clearly a party.

[28] I also note that *Hanson* relied on an earlier decision of the British Columbia Court of Appeal, *Pacific Savings and Mortgage Corporation v. Can-Corp Development Ltd.* (1982), 135 D.L.R. (3d) 623. That case dealt with the definition of "proceeding" in the Supreme Court Rules as meaning "an action, suit, cause, matter, appeal or originating application". The case involved foreclosure proceedings in which an order absolute was issued in favour of the mortgagees. Shortly afterwards, the mortgagors filed a notice of motion that they intended to reopen and redeem the mortgage. The Court of Appeal held that the notice of motion may be a "cause or matter" , and thus allowed the mortgagors to claim for tariff items that would normally only be claimable in respect of a "proceeding":

> 35 In my opinion, the notice of motion filed by the mortgagors in the court registry and attached to the certificate of lis pendens was a document commencing a "cause or matter".
>
> 36 The word "cause" has been defined as a "matter or other similar proceeding competently brought before and litigated in a particular court". See *Re Green* (1882) 51 L.J.Q.B. 25 at 41.

> 37 The word "matter" has been defined as covering proceedings not commenced by action. For example, the phrase "cause or matter" includes the voluntary winding up of a company. See *Re Mysore Mining Co.* (1889), 42 Ch.D. 535.
>
> 38 As the words "cause or matter" have not been defined in our rules, I have no hesitation in holding that they include the commencement of a proceeding to re-open a mortgage by way of motion…

[29] As I noted above, “cause” and “matter” are defined in the Yukon in the *Judicature Act*. Nevertheless, *Pacific Savings* indicates that the Court of Appeal was taking a broad approach to the interpretation of “proceeding”.

[30] I am also in agreement with the father’s counsel that the cross-applications in this assessment fall within the definition of “family law proceeding” in Rule 63. Thus they are a type of “proceeding”, for the purposes of the items at issue under the Tariff.

[31] For all these reasons, I conclude that each of the cross-applications constitute a “proceeding” for the purposes of interpreting the Tariff of costs.

[32] I will now turn to the specific arguments raised by the mother’s counsel on the Tariff items claimed by the father in his draft bill of costs.

Items 1A and 1B – Instructions and Investigations

[33] Tariff item 1A is for “correspondence, conferences, instructions, investigations or negotiations by a party until the commencement of the proceeding” and Tariff item 1B is for similar work undertaken “after the commencement of the proceeding”. The mother’s counsel argued that neither the father’s application, nor the mother’s cross-application, constitute a proceeding for which either of these Tariff items can be claimed. For the reasons above, I disagree and therefore this argument must fail.

[34] The father's counsel has claimed 5 units for item 1A at Scale B, which is for matters of ordinary difficulty. Five units is in the middle of the range which can be claimed, which is 1-to-10. That seems reasonable and I will allow this claim.

[35] The father's counsel originally claimed 10 units for item 1B, which was at the low end of the claimable range, which is 10-to-30. However, during the assessment hearing, the father's counsel informed me that she was dropping her claim for item 7, dealing with discovery and inspection of documents, based upon a related ruling in *Hanson*, at para. 15. Counsel informed me that the original reason for this claim was that she had to review 69 pages of documents provided by the mother to support her arguments regarding the division of the net sale proceeds. Therefore, the father's counsel submitted that in lieu of dropping item 7, she sought to increase the number of units under item 1B from 10 to 15.

[36] Here, I agree with the argument of the mother's counsel that 5 units at Scale B ($110 per unit) seems a large number for item 1B, especially when doubled, for reviewing not 69 documents, but 69 pages of material. To put this in perspective, I note that the range that can be claimed under item 7 for discovery is 1-to-10 units, in cases where the numbers of documents range from 1 to 999. In the case at bar, we do not know the exact number of documents, but logically they can be no more than 69, which is in the bottom 10% of the range. Therefore, I will allow the father 11 units for item 1B.

Item 1C – Instructions and Investigations

[37] The father's counsel did not refer to this item in her written submissions. She initially explained at the assessment hearing that this item is claimed to reflect work done following the Order of July 9, 2015, in order to complete the division of the sale

proceeds, as well as negotiations with respect to the draft bill of costs. With regard to the latter, counsel referred to having provided the mother's counsel with a copy of the case of *P.B. v R.J.P.*, 2008 YKSC 9.

[38] Later in the assessment hearing, the father's counsel argued that this item could also be applicable to steps taken to enforce the July 4, 2014 consent order, which was then thought to be the "final order" resolving the matter. Although the parties agreed to bear their own costs "in respect to this proceeding" I interpret that agreement as referring to all steps taken by the lawyers up to the point in time when the order was consented to. It appears that significant difficulties arose following that point in time, which required the father to pay his lawyer to negotiate for a considerable period of time with the mother acting on her own behalf, in the listing of the house for sale, dealing with offers, the actual sale of the house, and subsequently with the distribution of the net sale proceeds.

[39] While I accept that the father should be entitled to claim for this item for negotiations to enforce not only the July 4, 2014 consent order, but also the July 9, 2015 order, I must also be careful not to allow double dipping for legal work the father has already been compensated for under items 1A and B. In my respectful view, 5 units, although in the middle of the claimable range is rather high. I will allow 3 units for this item.

Items 3 and 4 - Pleadings

[40] These items are with respect to all "process" for commencing, prosecuting and defending a proceeding. The mother's counsel points out that in Appendix B, "process" is defined in s. 1 as meaning:

> …the drawing, filing, and service or delivery of a document and any amendments to it or particulars of it, but does not include an application made with respect to the process or any part of the process. (my emphasis)

Thus, counsel submits that since these items can only relate to the two cross-applications, which have been claimed for separately elsewhere in items 16 and 17, they ought not to be allowed. I agree.

Item 7 - Discovery

[41] As stated, the father's counsel abandoned this claim during the assessment hearing.

Items 16 and 17 - Applications, Hearings & Conferences

[42] These items are for the preparation and attendance at the hearing on July 9, 2015, when the cross-applications were argued. They are not opposed by the mother's counsel. However, because the hearing on July 9, 2015 only lasted for half a day, the units claimable for item 16(b) are limited to 1.5 (x 2) and the units claimable for item 17(b) are limited to 2.5 (x 2).

Items 20 and 21 - Applications, Hearings and Conferences

[43] The mother's counsel does not oppose the units claimed here, which are 2 and 4 respectively. Rather, she opposes the doubling of those units pursuant to Rule 39(24). The argument is that the assessment of costs is not associated with the reasonableness of the father's formal offer of settlement. The mother's counsel acknowledged that an award of double costs is a punitive measure against a litigant for that party's failure to have accepted an offer to settle that should have been accepted: *Hartshorne v Hartshorne*, 2011 BCCA 29, at para. 25. However, counsel submitted that the failing litigant should not be punished for every subsequent step taken to secure or protect

their interests, such as contesting the assessment of costs. No particular authority was provided for this proposition.

[44] Rather, I note that Rule 39(24) is indeterminate and does not specify an end date beyond which the doubling of costs will no longer occur:

> (24) If the plaintiff has made an offer to settle a claim for payment of money, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment for the amount of money specified in the offer or a greater amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

[45] I decline to accept the mother's argument on this point and will allow the father double costs for each item.

Item 34 - Miscellaneous

[46] This item applies to:

> Negotiations, including mediation, and process for settlement, discontinuance, or dismissal by consent of any proceeding if settled, discontinued, or dismissed by consent as a result of the negotiations.

[47] The mother's counsel argued here that the cross-applications for the division of the net sale proceeds were not "settled, discontinued or dismissed by consent as a result of negotiations", and accordingly item 34 is not applicable. I disagree. As stated, three items applicable to the division of the net sale proceeds were settled by consent at the hearing on July 9, 2015. Accordingly, I will allow this item. Curiously, the father's counsel only claimed 2 units here, when the maximum claimable is 5. I do not recall any explanation for that at the assessment hearing, but nevertheless agree that 2 units are appropriate. What is not appropriate in the draft bill of costs is the reference to the December 19, 2014 consent order, which should be deleted.

CONCLUSION

[48] In summary, the father's costs are allowed at:

Fees:	31 units x $110 x 2 =	$6,820.00
	GST:	$ 341.00
	Sub-total	$7,161.00
	Disbursements & GST:	$ 135.53
TOTAL:		**$7,296.53**

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GOWER J.