
CANADA / JUDGMENT

Nesbitt v. Neufeld

2012 BCSC 813

COURT

Supreme Court of British Columbia

DECIDED

1 June 2012

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2012 BCSC 813 Nesbitt v. Neufeld

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nesbitt v. Neufeld,

2012 BCSC 813

Date: 20120601

Docket: S118846

Registry: New Westminster

Between:

Patrick Michael Nesbitt

Plaintiff

And

Wendy Lee Neufeld

Defendant

Before: Master Caldwell

Reasons for Judgment

The Plaintiff, appearing on his own behalf:

Patrick Michael Nesbitt

The Defendant, appearing on her own behalf:

Wendy Lee Neufeld

Place and Date of Hearing:

New Westminster, B.C.

April 14, 2011, October 24-25,

and 27-28, 2011

Place and Date of Judgment:

New Westminster, B.C.

June 1, 2012

- [1] This is an assessment of three separate awards of special costs in favour of the defendant, Ms. Neufeld.
- [2] In April of 2009 the plaintiff, Dr. Nesbitt, filed a Statement of Claim against Ms. Neufeld; it consisted of 163 paragraphs of allegations relating to some form of relationship between the parties and a child who was conceived as a result of that relationship. The 164th paragraph sought general, special, and punitive damages from Ms. Neufeld.
- [3] Ms. Neufeld had previously sued Dr. Nesbitt for defamation but that action had not proceeded to any great extent; in this action she counterclaimed for defamation.
- [4] In late July of 2009 Dr. Nesbitt applied for default judgment; in late August of 2009 counsel for Ms. Neufeld brought application to have paragraphs 2-164 struck pursuant to Rule 19(24) in that such paragraphs disclosed no reasonable claim or cause of action and that they constituted an abuse of the process of the court. Those applications were ultimately heard by Hyslop J. on November 24, 2009; she adjourned the application for default judgment, struck the impugned paragraphs of the statement of claim and gave Dr. Nesbitt leave to amend the Statement of Claim by December 18, 2009. Written judgment was given on January 13, 2010.
- [5] It is worth noting that between September and November of 2009, applications/appearances were necessary on September 11 (Arnold-Bailey J.), September 16 (Rice J.), October 14 (Truscott J.) and October 21 (H. Holmes J.).
- [6] These appearances dealt with procedural matters, disclosure and an on-going dispute between the parties as to Ms. Neufeld's application to strike being heard before, after or concurrent with Dr. Nesbitt's application for default judgment.
- [7] In her decision following the November 24 hearing, Hyslop J. said at paragraphs 59 and 61:

59. It is obvious that paragraphs 2 to 164 of Dr. Nesbitt's statement of claim were intended to punish Ms. Neufeld. The statement of claim was a personal attack on Ms. Neufeld. The statement of claim names other parties who have nothing to do with the allegations that Dr. Nesbitt makes against Ms. Neufeld, and who have nothing to do with any reasonable cause of action.
61. I can only conclude that this action, as depicted in the statement of claim, is intended to punish Ms. Neufeld for bringing on the defamation action against Dr. Nesbitt and the events in the child custody and access action.
- [8] In light of her findings, Hyslop J. struck out the impugned paragraphs of the Statement of Claim and awarded Ms. Neufeld special costs of that application as against Dr. Nesbitt.
- [9] The Counterclaim of Ms. Neufeld was set for hearing by summary trial; it was heard by Crawford J. on April 22, 23, and 26, 2010. Judgment was granted in favour of Ms. Neufeld on her Counterclaim in the amount of \$40,000 for defamation and breach of privacy on November 15, 2010 with special costs "of this action" against Dr. Nesbitt. In his closing paragraph, Crawford J. commented as follows:

...counsel for Ms. Neufeld submitted that Dr. Nesbitt continued to subject Ms. Neufeld to the same groundless claims in his pleadings; that his claims are designed to cause her emotional suffering; and that they are malicious and relentless, deliberately designed to humiliate Ms. Neufeld and force her to acknowledge him. I agree that Dr. Nesbitt engaged in reprehensible conduct, giving rise to Ms. Neufeld's counterclaim, and that his misconduct is deserving of the Court's rebuke.

- [10] The matter of Dr. Nesbitt's "Amended" Statement of Claim was back in Court on March 5 and November 12, 2010 at which time Ms. Neufeld again applied to have that document struck. The bases of that application were first that it had not been filed in compliance with the strict terms of the order of Hyslop J. and further that it was still defective when measured against Rule 19(24) as previously found by Hyslop J.
- [11] Upon hearing the matter and granting judgment in favour of Ms. Neufeld, Gropper J. found that the terms of the order of Hyslop J. were explicit, that Dr. Nesbitt had not complied with the terms of that order and that that ended the matter without the need for her to consider whether the Amended Statement of Claim complied with the Rules of Court. She also found that Dr. Nesbitt failed to comply with the disclosure order of Truscott J. of October 14, 2009. Notwithstanding these findings, Gropper J. went on to find that Dr. Nesbitt's Amended Statement of Claim did not disclose a reasonable claim or one that could be resolved by amendment; she ordered the Amended Statement of Claim struck, agreed with the comments of Hyslop J. and Crawford J. as to the behaviour and motives of Dr. Nesbitt, and again ordered that Dr. Nesbitt pay special costs to Ms. Neufeld.

[12] This matter originally came before me as an assessment of the original special costs order as it arose from the decision of Hyslop J. Following the commencement of that assessment, the decisions of Crawford J. and Gropper J. were published and application was made to have me expand the assessment to cover all three special costs awards and I made the order in those terms.

[13] The assessment of special costs is to be conducted pursuant to Rule 14-1(3) of the Supreme Court Civil Rules as follows:

- (3) On an assessment of special costs, a registrar must
 - (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
 - (b) consider all of the circumstances, including the following:
 - (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;
 - (ii) the skill, specialized knowledge and responsibility required of the lawyer;
 - (iii) the amount involved in the proceeding;
 - (iv) the time reasonably spent in conducting the proceeding;
 - (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;
 - (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;
 - (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;
 - (viii) Rule 1-3 and any case plan order.

[14] Prior to July 1, 2010 the governing rule was Rule 57(3) which read as follows:

- (3) Where the court orders that costs be assessed as special costs, the registrar shall allow those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees relate, and, in exercising that discretion, the registrar shall consider all of the circumstances, including
 - (a) the complexity of the proceeding and the difficulty or the novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the solicitor,
 - (c) the amount involved in the proceeding,
 - (d) the time reasonably expended in conducting the proceeding,
 - (e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding,

- (f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained, and
 - (g) the benefit to the party whose bill is being assessed of the services rendered by the solicitor.
- [15] With the exception of the reference to a case plan order, the Rules are substantially and substantively identical in their directions as to the conduct of the assessment of special costs.
- [16] The general test to be applied by the registrar conducting the assessment remains as stated in *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.) affirmed (1992), 73 B.C.L.R. (2d) 212 (B.C.C.A.): the registrar must allow the amount for fees that a reasonable client would be bound to pay a reasonably competent lawyer for the work done. In proceeding with such an assessment, the registrar is directed by the Rules to consider the complexity and difficulty of the issues, the skill required of the lawyer, the amount involved or the importance of the issue to the party, the time reasonably spent in conducting the proceeding, the conduct of any party that tended to unnecessarily lengthen the duration of the proceeding and the benefit of the services provided by the lawyer.
- [17] While the amount charged by the solicitor and/or paid by the client is relevant to the assessment of special costs it is certainly not determinative of the appropriate amount to be allowed. The materials filed and evidence given indicate that Ms. Neufeld paid approximately \$130,000 in legal fees from commencement through the conclusion of the order of Gropper J. In her submissions she acknowledges that not all of that amount is properly claimable as special costs in this matter and she submits that the appropriate total should be \$93,000 in fees plus disbursements, taxes and interest. In addition to that amount she seeks costs of this assessment which consumed four and a half days of court time plus at least two pre-hearing attendances and one Chambers application.
- [18] Counsel for Ms. Neufeld acknowledged that the fees charged and the special costs claimed are unusually high but he testified that that was largely, if not solely, due to the actions of Dr. Nesbitt in delaying, frustrating and abusing the process of the Court at almost every turn. He pointed to, among other things, disclosure failure even in the face of court orders, repetitive inaccurate production of materials by facsimile transmission totalling several hundreds of pages, unilateral setting of court dates, complaints to the Law Society and the misleading of the Court regarding the resulting investigation.
- [19] Dr. Nesbitt alleges that counsel for Ms. Neufeld over-billed, billed for services not provided, wasted time, manipulated the Court and chambers system to frustrate the hearing of matters and that he acted, in general, in an unprofessional manner. He says further that he acted throughout on his own behalf (although there was evidence that he consulted counsel on occasion) and that he was not familiar with the court system, the technicalities of pleadings and other procedural requirements.

- [20] Having heard and assessed the evidence before me over the course of this hearing I have no hesitation in concluding that Dr. Nesbitt set out from the commencement of this litigation to cause Ms. Neufeld the maximum amount of difficulty, inconvenience and expense possible.
- [21] The comments of Hyslop J., Crawford J., and Gropper J. as outlined above indicate that they each formed the view that the substance of Dr. Nesbitt's claim was intended to punish and embarrass Ms. Neufeld. It is clear to me that he used the process and procedures of the Court and the overall litigation process in general as weapons to do the same thing. In this regard, I find that Dr. Nesbitt continued to pursue that goal throughout the assessment hearing, using it as a continuing platform for his complaints against Ms. Neufeld.
- [22] Having found that Dr. Neufeld was primarily responsible for the high temperature and tone of the litigation, I also find that Ms. Neufeld and her counsel occasionally took the bait, with the result that they too contributed to the tone of the litigation, unnecessary court attendances and the like. One particular example of this occurred when counsel, on instructions from Ms. Neufeld, set a chambers hearing on a date which they knew coincided with an appearance by Dr. Neufeld before the College of Physicians and Surgeons; his requests for an adjournment were rebuffed.
- [23] In addition Ms. Neufeld, directly or through counsel who appeared early in the assessment, acknowledged several apparent duplications and references to matters which related more to the earlier litigation commenced by Ms. Neufeld or to the custody litigation between these parties.
- [24] This was not a complex matter or one which involved novel issues. It required no particular or special skill or knowledge on the part of counsel. The amount involved was modest in monetary terms with damages being awarded to Ms. Neufeld in the amount of \$40,000.
- [25] On the other hand, the time spent in conducting the proceeding was excessive, due in large part to the conduct of the plaintiff, Dr. Nesbitt; that conduct in my view clearly unnecessarily lengthened the duration of the proceeding and required counsel for the defendant, Ms. Neufeld, to undertake additional steps and safeguards to adequately protect his client's interests. Dr. Nesbitt not only attacked with a large sword, but also with dozens of daggers; counsel for Ms. Neufeld was required to craft an extraordinarily large and comprehensive shield to defend, counterattack and protect his client and her interests.
- [26] Finally, as to the importance of the proceeding to Ms. Neufeld and the benefit to her of the outcome, I return to the words of Hyslop J. and Crawford J. who described Dr. Nesbitt's action as a personal attack on Ms. Neufeld, intended to punish her, reprehensible and worthy of the Court's rebuke.

- [27] Ms. Neufeld is a businesswoman whose character and reputation were maligned by Dr. Nesbitt in the electronic and social media and by way of direct electronic mailings to her rotary club and/or business associates; he also involved non-party acquaintances of Ms. Neufeld. The details and extent of the publications need not be related here but may readily be seen by reference to the written decision of Crawford J. at 2010 BCSC 1605.
- [28] Ms. Neufeld was exonerated by Crawford J. who awarded her damages and special costs; Dr. Nesbitt's claim was struck out not once but twice by two separate judges of this Court, both of whom awarded her special costs. She was entirely successful.
- [29] The first issue which I will deal with is the scope of the orders of special costs.
- [30] The order of Hyslop J. awarded Ms. Neufeld "costs in these proceedings on a solicitor-client basis, forthwith and in any event of the cause." While I take that order as correct as entered, I note that it is somewhat inconsistent with the written reasons of Hyslop J. which say simply "I award special costs to Ms. Neufeld for this application." I interpret the order as indicating that Ms. Neufeld is entitled to her costs relating to the application/proceeding which was before Hyslop J., as special costs in any event of the overall cause; the issue regarding the provision for payment forthwith is moot at this time as the quantum of such costs has not yet been determined.
- [31] The order of Crawford J. was settled by Registrar Cameron on February 16, 2011. The matter before Crawford J. was the summary trial of the Counterclaim of Ms. Neufeld and at the conclusion of his reasons he awarded her special costs. The order as settled provided that "the Plaintiff pay the Defendant's costs of this action as special costs." Again, I interpret that order as awarding Ms. Neufeld her special costs as regards the action which was before Crawford J., namely the prosecution of her Counterclaim. I do not interpret the Crawford J. order as awarding Ms. Neufeld her costs of the whole or overall action/proceeding. Dr. Neufeld was still in the position, at least theoretically, to amend his pleadings, proceed to trial, win judgment and seek costs in light of such victory; I do not interpret Crawford J. as addressing that eventuality and in doing so, foreclosing the opportunity for the subsequent trial judge to deal with the issue of costs.
- [32] The order of Gropper J. was also settled by Registrar Cameron on February 16, 2011. The matter before Gropper J. was the only matter remaining active and alive before the Court, namely the claim of Dr. Nesbitt. In her concluding paragraphs, Gropper J. said simply "Dr. Nesbitt's statement of claim is struck. Ms. Neufeld is entitled to special costs." The settled order provided that "the Plaintiff pay the Defendant's costs of this action as special costs." Unlike the previous orders, both of which had to anticipate at least the potential for future proceedings, this order finally put the entire action at an end and thus constituted a final order of special costs for anything not covered by the previous orders.

- [33] The cumulative effect of the three orders of special costs is to award the defendant Ms. Neufeld special costs for all steps taken in the action commenced by Dr. Nesbitt, inclusive of all interlocutory applications unless the orders arising from such applications contain a contrary direction regarding costs. I was not directed to any interim order containing an inconsistent direction regarding costs.
- [34] The result is that each entry may be assessed as to its appropriateness without the need to determine specifically which of the three special costs orders applies to that particular step or entry.
- [35] Regarding preliminary matters, I find that Mr. Misner was a reasonably junior lawyer, having approximately four and a half years of experience at the beginning of this matter. His billing rate of \$250 per hour is within the reasonable range but tends towards the high end of that range; that will be an issue for consideration regarding the hours spent and the efficient delivery of legal services.
- [36] The charge out rate for Mr. MacAdams, Q.C. at \$400 per hour is reasonable given his extensive experience and standing in the legal community. Given the nature of the issues raised by Dr. Nesbitt, their extent and his persistence, I find it appropriate for Mr. Misner to have consulted with and involved Mr. MacAdams in the file.
- [37] I also consider the issue of Dr. Nesbitt's complaint or complaints to the Law Society regarding Mr. Misner and the law firm as supporting the involvement of Mr. MacAdams. Various members of this Court have found that Dr. Nesbitt set out to damage the reputation of Ms. Neufeld; his actions became an attack on the reputation of Mr. Misner and the law firm and it is reasonable to expect that Mr. Misner would consult senior counsel in the firm in order to deal with that situation.
- [38] I find that a total of eight hours of involvement by Mr. MacAdams was appropriate in all of the circumstances.
- [39] I find the charge out rate of \$200 for the services of a paralegal to be excessive, particularly given the absence of any evidence supporting that rate. I would reduce that rate to \$100 per hour and allow a total of 20 hours for her involvement in the file.
- [40] In addressing the accounts in the context of special costs I have divided the time entries relating to Mr. Misner into four general categories which I have titled Review, Drafting of Pleadings, Court/Chambers and Registrar. This division is imperfect as certain entries refer to a variety of tasks but it does provide a general mechanism for assessing where and how time was spent in the defence of the main claim and the prosecution of the Counterclaim.

Review

- [41] This category includes the preliminary matters such as receiving and reviewing the original claim, meeting with the client, discussing various options and preliminary communications with Dr. Nesbitt. There are between 15 and 20 hours of time entries which could reasonably

be assigned to this category and in the circumstances of this case I find that 16 hours was reasonably spent for these tasks. This is somewhat more than might normally be expected however the Statement of Claim was very lengthy and unusual and thus required more than normal initial attention and assessment.

Drafting

- [42] This category includes largely the drafting of the responsive pleadings, namely the Statement of Defence and the Counterclaim. Time records indicate that somewhere between 16 and 18 hours was assigned to such drafting or preparation for same.
- [43] I allow 10 hours for this category; this allows for the fact that some of Mr. MacAdams time was allowed for his involvement in overseeing or reviewing the drafting.

Court/Chambers

- [44] This category contains by far the largest number of hours claimed as well as the widest range of services. I have included in this category, among other things, drafting of chambers motions, responses, affidavits and arguments, travel time, legal research, attendance/appearance in chambers and preparation/settlement/entry of orders.
- [45] Allowing for some duplication, there are between 225 and 250 hours claimed and relating to this general category. This amounts to between 28 and 32 eight hour days.
- [46] The court/chambers appearances in this matter included:
- November 12, 2010 - One day hearing before Hyslop J.;
 - March 5 and November 12, 2010 - Two days of hearing before Gropper J.;
 - April 23, 24 and 26 - Three days of hearing before Crawford J.
- [47] In addition to these major hearings, there were at least four other partial day chambers attendances before Justices Arnold-Bailey, Rice, Truscott and Holmes.
- [48] Based upon the above, there was a total of at least eight court days required to conclude this matter through the final order of Gropper J. Allowing a conservative estimate of two days of preparation for each day of court results in an additional 16 days; at 8 hours per day, this results in a reduction of the hours claimed to a total of 192 hours of Mr. Misner's time.

Registrar

- [49] Considerable additional time was expended compiling material and preparing for the assessment of the special costs allowed by each of the three noted orders. This also included at least two further chambers appearances, and at least one Pre-Hearing Conference attendance prior to or during the assessment process itself. There were five full or nearly full days of assessment of these bills before me, two of which had Ms. Neufeld represented by counsel; counsel attended as a witness for Ms. Neufeld thereafter as needed.
- [50] For all matters relating to costs assessment, while Mr. Misner continued to act as counsel for Ms. Neufeld, I would allow a total of 40 hours of the almost 55 hours claimed. I will deal with the cost of having Mr. Misner attend as a witness when dealing with the matter of disbursements claimed.

Disbursements

- [51] There are three disbursement accounts before me for assessment. The first of these relates to the Appointment filed April 26, 2010 and totals \$1,950.80; the second relates to the Appointment filed March 9, 2011 and totals \$8,309.98; the third itemizes the disbursements relating to the special costs assessment process and totals \$8,775.00 including the accounts of Mr. Misner for his attendance as a witness for Ms. Neufeld.
- [52] After review of the first disbursement account and supporting documentation, I would disallow the travel/mileage expense, having considered that time in the context of the Chambers section above and having made a global allowance for it there and would reduce the photocopying charges to arrive at a global disbursement allowance for the first account of \$1,500.
- [53] After review of the second disbursement account and supporting documentation, I would disallow item 11 as relating more, if not exclusively, to the family file; I would disallow all travel/mileage expense for the same reason stated above; I would disallow the parking expenses for November 25 and 26 as being duplications of expenses allowed in the first disbursement account and I would reduce the photocopy charges to arrive at a global disbursement allowance for the second account of \$6,500.
- [54] After review of the third disbursement account and supporting documentation, I would allow it in whole as presented in the amount of \$8,775.

Summary

Special Costs

MacAdams

8 hrs. at \$400/hr.

\$3,200

Paralegal

20 hrs. at \$100/hr.

\$2,000

Misner

258 hrs. at \$250/hr.

\$64,500

Total Special Costs Allowed:

\$69,700

Disbursements

\$1,500

\$6,500

\$8,775

Total Disbursements Allowed:

\$16,775

Total Special Costs and Disbursements Allowed

\$86,475

"Master Caldwell"

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Prepared on 29 October 2026 · Esheria