

COURT FILE NO.: 08-01105

DATE: 20090527

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE SYNOD OF THE DIOCESE OF NIAGARA

-and-

REVEREND SUSAN WELLS,
ADMINISTRATOR OF THE PARISH OF
ST. GEORGE'S LOWVILLE IN THE
DIOCESE OF NIAGARA

- and -

THE REVEREND CANON DR. BRIAN
RUTTAN, ADMINISTRATOR OF THE
PARISH OF ST. HILDA'S OAKVILLE IN
THE DIOCESE OF NIAGARA

Plaintiffs

-and-

RON BALES, NEIL DENISON, MARTIN
JONES and JEFF KENDALL

Defendants

)
)
) Mr. John Page, Mr. Gerald Aggus, and Ms.
) Eunice Machado, counsels for the Plaintiffs
) (Moving Party)

)
)
) Mr. Peter Jervis, and Mr. Stanley Martin
) counsels for the Defendants (Responding
) Party)

) HEARD: March 20, 2008

MILANETTI J.

REASONS ON COSTS

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[1] The applicant seeks costs in connection with an injunction motion heard by me for a full day on March 20th, 2008. I reserved and delivered my decision on the issue on May 5th, 2008.

[2] The case was a hotly contested battle about the interim use of three Anglican Church properties, pending resolution of the larger ownership issue (in a trust context) to be tried ultimately.

[3] The matter was originally scheduled to proceed on February 25th, 2008. That hearing was adjourned by Justice Ramsay under specific terms. Those included exclusion of the diocese from the properties from that date until the motion, and ultimately my decision in connection with same were heard.

[4] As such, The Synod of the Diocese of Niagara was precluded from use of three church properties which I found them to own, at least on the face of it, from February 25th, 2008 until my May 5th, 2008 decision.

[5] This sequence is important to me as substantial costs are sought in connection with both of these attendances (before Justice Ramsay and myself).

[6] As a result of a scheduling perversity, the leave to appeal motion and the costs argument affiliated with it have already been concluded. I have read neither but understand leave was denied.

[7] The applicant; the successful party on the motion before me, seeks its costs on a partial indemnity basis up to March the 14th of 2008 and on a substantial

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indemnity basis thereafter. They concede that the resolution suggested to the respondent is not a formal Rule 49 Offer (not having been made 7 days prior to the hearing), but asked me to exercise my discretion to consider the making of this overture given my adoption of virtually all of its terms in my own Order.

[8] This latter aspect, most particularly, makes a compelling argument. Moreover, in written response to the defendants written submission on costs, I learned that another without prejudice resolution had been proposed by the applicants on March 10th, 2008.

[9] That Offer suggests that the March 20th, 2008 motion be adjourned for 60 days. Various terms include appointment of a mediator; joint management and administration of the three properties; and various other terms. Most importantly however, the applicant diocese proposes that they use of one of the three properties – St. George's, on a quite narrow basis – Sundays from 2:00 p.m. and one afternoon through the week from 2:00 p.m. to 5:00 p.m. and one evening between 7:00 p.m. and 9:00 p.m. Those latter periods were to be allocated by the respondent "acting reasonably".

[10] Clearly this Offer was substantially better for the respondents than my ultimate Order on May 5th, 2008.

[11] As such, both of the overtures made by the applicant – 1) a without prejudice letter framed as an Offer on March 10th, 2008 (10 days before the motion); and 2) a proposal provided six days before the hearing, and thus short by one day of the Rule

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49 trigger, (the terms of which were virtually adopted by me in my decision) were significant offers of compromise.

[12] All of that being said, the numbers that I am asked to consider for costs are substantial. The applicants, even on a partial indemnity basis only, seek costs of \$154,073.30. If I accede to their request for substantial indemnity costs after March 14th, 2008, the number becomes \$182,827.75. The fees component in both is \$131,041.00 and \$158,426.00 plus GST respectively.

[13] The applicant justifies such large numbers based on:

- 1) The significant complexity of the matter;
- 2) The time frame involved;
- 3) The uniqueness of the matter (there being no precedent); and
- 4) The significant importance of the issue to the diocese and the community at large.

[14] I concede that all of these factors (as set out in Rule 57.01 of the Rules of Civil Procedure) were very much in play in this case. I recognized then and now, that the issue is one of considerable significance to all of the parties herein and indeed further afield in the broader Anglican community.

[15] The record was indeed voluminous. The applicants filed 23 affidavits and the respondents filed 27 affidavits. There were three days of cross-examinations. The applicants' factum was 38 pages long and cited 17 authorities; the respondents'

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factum was 27 pages long and cited 8 authorities. In short, the material presented to me for this one day interim injunction and motion was voluminous.

[16] However, as I said in my decision, I was not certain why such extensive historical and global information was required for an interlocutory motion involving three local churches. Indeed, such depth of information (while admittedly interesting) would likely be important to the full litigation; that however should not be compensated in connection with this, more discrete issue. I also had the sense reading the materials put before me that this was much more than a small local dispute – I had affidavit evidence for instance, from individuals from across the country. This was the case on both sides.

[17] It was and is clear, that this deeply divided religious community nationally and perhaps farther afield, is banding together in each local contest for leverage or otherwise. There are deep issues dividing these groups of Anglicans.

[18] I was told that numerous lawyers at varying experience levels were involved for the applicant given the tight time frames and the great deal of work and preparation to be shared. This explanation is feasible and relevant to me. A factor for me to consider is the number of people involved and the potential duplication of effort that situation could imply.

[19] I accept that significant work had to be done in a relatively short time frame on issues of extreme significance to the parties. As well, I accept the complexity of the matter.

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[20] That being said, I need to balance these features against what a reasonable litigant would expect to pay. This is given further context when I am told that the responding party was billed \$29,000.00 by their lawyers; ie: that was a substantial indemnity fee.

[21] I note in comparison that the substantial indemnity fee now being sought here amounts to \$236,898.03. I am loath to say that a lawyer has wasted his or her time. Lawyers, when faced with complex matters do what it takes to succeed. Such investment of time is easier if they have clients able to fund such efforts; although they often do the work regardless because they realize the stakes involved. That however, is not the standard when a judge is assessing costs payable by another. Reasonable expectations must be considered.

[22] It is largely as a result of the most substantial fees being sought that I will not exercise my discretion to award substantial indemnity costs after March 14th. The numbers are simply too high for me to reasonably consider compensation on this scale. I concede that the applicant made significant real efforts to resolve this matter consensually. Such olive branch was not accepted.

[23] I know that matters of conscience and faith can often be the most difficult for parties to affect compromise, but in a court of law, regardless of such underlying sentiments, real efforts to avoid the court process should not be ignored. Again, had these been formal Rule 49 Offers I would have had little option regardless of the underlying sympathies or concerns. However, I find that there were no formal offers to settle.

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[24] As well, I cannot say that there were not similar efforts to resolve the issue earlier by both parties. It does bear noting that the respondents' attempts appear to have been earlier in the process rather than more recently. I note as well, that the Offer that was unacceptable to the respondents when it was tendered back in March of 2008, is still unpalatable to them today. Despite my Order that the parties share the properties, the respondents have apparently chosen not to do so. I have learned that they opted to incur additional costs to worship elsewhere. Although that is clearly their prerogative, those additional expenses, (despite their argument based on same), cannot and will not be considered by me in this decision.

[25] As indicated earlier, there was significant work done in preparation for both attendances at court – numerous affidavits were prepared, filed and reviewed by both sides and cross-examinations were held. Massive document briefs and facta were assembled. The arguments were weighty and complex.

[26] All of this being said, the costs sought to be paid by the respondents are excessive. These litigants cannot expect their opponents to pay such extraordinarily high fees even in spite of their accepted (by me) rationale for same.

[27] In view of the timing, complexity, significance and necessity for substantial investment of time, the costs awarded should be higher than would typically be the case for two court attendance to deal with an injunction. They cannot, in fairness, be as high as the applicants' would seek.

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[28] My difficulty is ascertaining how to reduce the fees payable in a sensible and respectful way. I repeat, I do not say that the lawyers did not do their work or necessarily did do too much, but they cannot expect a responding party, reasonably to pay such a piper.

[29] I would eliminate the hours spent by senior trust lawyer (Guthrie) as I believe those hours are referable more to the bigger picture than these interlocutory steps. I would also eliminate the hours spent by the senior litigation research partner (Kligman), once again for the purpose at hand. Those fees, I believe, may arguably be compensable elsewhere.

[30] From my perspective, lawyers Page and Machado were the lawyers responsible for the interlocutory steps I am now assessing. While I understand the need to involve others owing to the tight time frame, I will not compensate for their time as I do believe that there would necessarily be duplication of effort. Similarly, I would eliminate the hours spent by Ms. Clarke (2005 call) as duplication to some degree of the hours spent by Ms. Michado (2003 call).

[31] When the hours reflective of the work of the aforementioned individuals are eliminated, the partial indemnity fees would be reduced by \$29,385.00 plus GST. As such, the \$131,041.00 would be reduced to \$101,656.00 (with a corresponding reduction in GST).

[32] These fees are still too high. The most staggering numbers are those spent in preparation of the supplementary motion materials (163.3 hours), and after the March

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14th, 2008 Offer to Settle (169.1 hours). These latter hours accrued in the six days before the motion before me when 28.3 additional hours were spent.

[33] The fees shall be set at \$60,000.00 plus disbursements (reduced by \$875.18 to reflect elimination of indexes etcetera – properly overhead; meals after hours, and travel). As such, the disbursements shall be set at \$15,605.27 for a total of \$75,605.27 plus GST.

[34] The respondents' asked to have any costs award deferred. As well, they asked, in the eleventh hour, to have the costs paid by different parties than those named in the title of proceeding.

[35] This was the first that I had heard of this argument – it was not raised at the motion nor addressed in the written costs argument tendered in support of this application. As such, and given that we were already at the end of the afternoon slotted for this costs argument, I required further written submissions by both parties on this point.

[36] Despite this unique argument, I have not been convinced that I have the power to award costs against anyone other than the named respondents at this stage. If this was an issue for the respondents, I would have expected them to raise it either at the motion that I heard more than a year ago, or some other motion before or after that time frame.

[37] I accept the argument of the applicants that they would be prejudiced if I were to make a costs award payable by anyone other than the named respondents. If

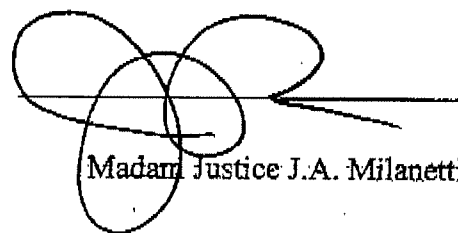
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they were improperly named, issue should have been taken – it may well be required in future.

[38] This argument fails, given its late and inappropriate emergence at the hearing to ascertain the quantum of costs payable to the successful party.

[39] So too, the costs shall not be “in the cause”. The Rules of Civil Procedure contemplate the assessment of costs at each stage of the proceeding. I see no reason to deviate from same.

[40] While the respondents argue both impecuniosity, and that the good works of the parish will be imperilled, such aspects should be considered when the parties to any litigation decide how to conduct themselves, and whether a compromise can be achieved. The respondents shall pay the applicant’s costs in the total amount of \$75,605.27 plus GST.



Madam Justice J.A. Milanetti

Released: May 27, 2009

COURT FILE NO.: 08-01105

DATE: 20090521

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DENISON, MARTIN JONES and JEFF
KENDALL**

**BEFORE: The Honourable Madam Justice J.A.
Milanetti**

**COUNSEL: Mr. John Page, Mr. Gerald Aggus,
and Ms. Eunice Machado, counsels
for the Plaintiffs (Moving Party)**

**Mr. Peter Jarvis and Mr. Stanley
Martin counsels for the Defendants
(Responding Party)**

REASONS ON COSTS

Madam Justice J.A.Milanetti