COURT OF APPEAL FOR ONTARIO

CITATION: Costa v. Seneca College of Applied Arts and Technology,
2023 ONCA 673
DATE: 20231020
DOCKET: COA-23-CV-0016

van Rensburg, Nordheimer and George JJ.A.

BETWEEN

Mariana Costa, Crystal Love, Alexandra Badowich and Angelina Mandekic

Applicants (Respondents)

and

Seneca College of Applied Arts and Technology

Respondent (Respondent)

and

Justice Centre for Constitutional Freedoms

Appellant

Jonathan Roth for the appellant, Justice Centre for Constitutional Freedoms

Howard Levitt, Kathryn Marshall and Jeffrey Buchan for the respondent, Seneca College of Applied Arts and Technology

Sujit Choudhry for the interveners, Canadian Civil Liberties Association, Canadian Constitution Foundation, and Democracy Watch

James Manson for the respondents, Mariana Costa, Crystal Love, Alexandra Badowich and Angelina Mandekic[1]

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[1] Mr. Manson was present at the hearing of the appeal but did not file materials or make any submissions.

Heard: August 28, 2023

On appeal from the order of Justice William Black of the Superior Court of Justice, dated November 24, 2022.

Nordheimer J.A.:

[1] Justice Centre for Constitutional Freedoms (JCCF) appeals from the order by which the motion judge ordered it to pay costs of $156,461.99 following an unsuccessful motion for an injunction.

[2] In June 2021, Seneca College of Applied Arts and Technology had advised all of its students and employees that Seneca was making proof of vaccinations against Covid-19 a condition for all students and employees to come on Seneca's campus for the fall term commencing September 7, 2021. Seneca confirmed the policy in a series of emails leading up to the start of the 2021 fall term.

[3] The respondents, Ms. Costa and Ms. Love, are both students enrolled in educational/training programs at Seneca. They sought an interlocutory injunction to prevent Seneca from enforcing its policy requiring all students who attend Seneca's campus to be fully vaccinated for Covid-19. The motion for an injunction did not succeed.[2]

[4] Thereafter, the motion judge sought submissions on the disposition of the costs of the motion. Seneca filed written submissions on costs in which it sought

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[2] *Costa v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111.

its costs on a substantial indemnity basis. In its submissions, Seneca said that JCCF “brought this case”, that it advertised it extensively on its website, and that it fundraised to support the case. Seneca concluded its costs submissions by saying that JCCF should be required to pay its costs.

[5] Ms. Costa and Ms. Love filed responding costs submissions. They contended that the motion was public interest litigation and that no costs should be awarded against them. Failing that result, Ms. Costa and Ms. Love made submissions regarding the amount of costs sought, including that they were sought on a substantial indemnity basis whereas the appropriate scale of costs should be partial indemnity costs. No mention was made regarding Seneca’s request that JCCF pay the costs.

[6] On November 24, 2024, the motion judge released an endorsement in which he ordered JCCF to pay the costs of the motion fixed in the amount of $110,000 on a partial indemnity basis together with disbursements in the amount of $46,461.99. In the course of his endorsement, the motion judge found that JCCF had ridden “the twin horses of advocate and interested party”. He said that JCCF had actively and continuously promoted the case on its website and had inserted itself in the cause being litigated rather than maintaining “the posture of dispassionate advocate”.

[7] JCCF appeals from the costs order. It complains that it did not receive notice that the motion judge was contemplating making an award of costs against it and it was improper, as a consequence, to make the order. In any event, JCCF says that the motion judge did not apply the proper tests for deciding whether a non-party should pay costs and that those tests, properly applied, would not justify an award in this case.

[8] In response, Seneca says that in communications between it and JCCF prior to the costs submissions, it made it clear to JCCF that it would be seeking costs against JCCF. Seneca also says that it is appropriate to award costs against JCCF because it was the "motivating force" behind the litigation. It also points to the fact that JCCF persistently refused to advise Seneca whether it was indemnifying the students against any costs award.

[9] Three organizations, Canadian Civil Liberties Association, Canadian Constitution Foundation and Democracy Watch, were granted leave to intervene in this appeal. The interveners collectively express alarm that the motion judge's award of costs, among other things, is rooted, at least in part, in the fact that JCCF raised funds for the litigation. They are concerned that the award, if upheld, could deter public interest organizations from raising funds for such litigation to assist with the costs of retaining counsel or, for that matter, from acting as counsel themselves in such litigation. The interveners say that the mere fact of fund raising

should not expose a public interest organization to a costs award nor should it be so exposed if it provides, or assists in providing, counsel.

Analysis

[10] At the outset, I will say that I am satisfied that JCCF had notice that an award of costs was being sought against it by Seneca. The communications between those parties prior to the costs submissions, and the costs submissions themselves, clearly put JCCF on notice that costs were going to be sought against it. That, in my view, is sufficient to satisfy the notice requirement. I reject the suggestion made by the interveners that such notice must emanate from the court. I do accept that the court must be satisfied that the non-party was put on notice of the request, but the court itself is not required to give the notice.

[11] That said, in my view, the costs award here is fundamentally flawed and cannot stand. First, the motion judge failed to make any finding whether the litigation constituted public interest litigation. This was a necessary initial step in considering the proper disposition of costs. If the litigation was public interest litigation, then the principles applicable to awards of costs in such litigation had to be considered: see e.g., *Friends of Toronto Public Cemeteries Inc. v. Ontario (Public Guardian and Trustee),* 2020 ONCA 509, at para. 23. None of that took place. I would add that, since there was no determination by the motion judge of whether this case involved public interest litigation, it would be inappropriate to use

this case to restate or refine the test for determining public interest litigation, as the interveners ask us to do. Any decision about whether the test needs to be altered in any way should await a case where it is squarely raised.

[12] Second, there are established bases for determining when it is appropriate for an award of costs to be made against a non-party. As set out in *1318847 Ontario Ltd v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, 134 O.R. (3d) 641, there is both statutory jurisdiction to award costs and inherent jurisdiction to do so. These jurisdictions have different tests to be satisfied. For the statutory jurisdiction, the court must be satisfied that the “person of straw” test is met. That test is set out in *Laval Tool*, at para. 60:

> The "person of straw" test is satisfied if:
>
> 1. The non-party has status to bring the action;
>
> 2. The named party is not the true litigant; and
>
> 3. The named party is a person of straw put forward to protect the true litigant from liability for costs.

[13] This test could not be made out in this case and Seneca does not suggest otherwise. JCCF would not have had status to bring the injunction motion nor was there any evidence that the students were put forward to protect JCCF from liability for costs.

[14] The inherent jurisdiction to award costs against a non-party invokes a different test. As set out in *Laval Tool*, at para. 66:

> In particular, apart from statutory jurisdiction, superior courts have inherent jurisdiction to order non-party costs, on a discretionary basis, in situations where the non-party has initiated or conducted litigation in such a manner as to amount to an abuse of process.

[15] It is on this basis that Seneca says that the motion judge was justified in awarding costs against JCCF.

[16] The difficulty with that submission is that the motion judge not only fails to make reference to the test for awarding costs under the court's inherent jurisdiction, he also does not make any finding that JCCF engaged in an abuse of process. Rather, the motion judge appears to justify his award of costs against JCCF simply on the basis that it encouraged the case and then participated in it. As noted earlier, the motion judge appears to have found that it was problematic that JCCF inserted itself in the litigation and did not maintain "the posture of dispassionate advocate".

[17] It is not clear what the motion judge was intending to mean by his reference to JCCF not being a "dispassionate advocate". In any event, it is difficult to see how the actions taken by JCCF, and referred to by the motion judge, could amount to an abuse of process. Fund raising would not satisfy that requirement nor would promoting the case on a website. JCCF was entitled to let the public know about the case and it was also entitled to raise funds to defray the costs of the case. As the interveners correctly point out, to hold otherwise would have a very chilling effect on the work of public interest organizations.

[18] If there was evidence that JCCF had instigated the motion for an improper purpose, that would satisfy the abuse of process requirement. Similarly, if there was evidence that JCCF was in the position of a "maintainer", within the meaning of the tort of maintenance, that would also satisfy the abuse of process requirement: *Laval Tool*, at para. 75. However, there is insufficient evidence of either.

[19] If JCCF had agreed to indemnify the students against any costs award, that could be a proper factor for the motion judge to consider in deciding to make an award of costs against the students as parties, such as occurred, for example, in *Servatius v. Alberni School District No. 70*, 2022 BCCA 421. However, that fact would still not have justified an award of costs directly against JCCF.

[20] This raises a final issue. JCCF persistently refused to advise whether it was indemnifying the students against any costs award. In my view, JCCF was obliged to reveal that information and the motion judge ought to have required it to do so before making his costs award. I do note, on that point, that Seneca did not ask the motion judge to require JCCF to reveal that information, but the motion judge ought to have done it on his own. It was a relevant consideration in the proper disposition of costs in this type of proceeding. On that point, I agree with the general proposition set out in *Servatius*, at para. 276:

> Therefore, where as here, a party is seeking to avoid the ordinary costs rule on the basis that the litigation is public

> interest litigation and on the basis that the named party cannot afford costs, it is necessary for the courts to know who is truly financing that party's lawsuit and who is truly at risk for the potential costs award.

[21] The basis for the costs order is fundamentally flawed. The order must be set aside. I would return the issue of costs to the motion judge to be determined afresh in accordance with these reasons and so that any additional information relevant to the proper disposition of costs can be put before the motion judge.

[22] The appeal is allowed, the costs award is set aside, and the matter is remitted to the motion judge to determine whether a costs award is appropriate in this case and, if so, against whom it should be made. I would not make any order as to the costs of the appeal. While JCCF was successful, its conduct in this case significantly contributed to the confusion over costs. I would note, in any event, that there would not be any order as to the costs of the appeal for or against the interveners.

Released: October 20, 2023 KMvR

Zarnett j.a.

I agree. K. van Rensburg J.A.

I agree. J. George J.A.