



Financial Services Tribunal

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DECISION NO. 2019-FIA-003(b)

In the matter of an appeal under section 238(2)(b) of the *Financial Institutions Act*, RSBC 1996 c 141

BETWEEN: TruNorth Warranty Plans of North America, **APPELLANT**
LLC

AND: Superintendent of Financial Institutions **RESPONDENT**

BEFORE: Michael Tourigny, Panel Chair

DATE: Conducted by way of written submissions
concluding on June 30, 2020

APPEARING: For the Appellant: Lynda K. Troup, Legal Counsel
For the Respondent: Jessica S. Gossen, Legal Counsel

DECISION ON COSTS OF APPEAL

The application

[1] On May 22, 2020 I issued my decision dismissing this appeal. The successful Respondent Superintendent of Financial Institutions ("Superintendent") had sought costs in its appeal submissions. Written submissions were requested and exchanged, with the final submissions received on June 30, 2020.

[2] The Superintendent seeks an order for costs against the Appellant in the range of \$2,500 to \$3,500 on the basis it was wholly successful on the appeal and the matter was complex.

[3] The Appellant submits that no costs should be awarded in this matter. In the alternative, if costs are to be awarded, they should amount to no more than \$550.

Power to award costs

[4] By virtue of section 242.1(7)(g) of the *Financial Institutions Act*, RSBC 1996, c 141 ("FIA"), section 47 of the *Administrative Tribunals Act*, SBC 2004, c 45,

("ATA") applies to this tribunal ("FST") giving the FST the power to award costs as sought here by the Superintendent.

[5] Section 47 of the *ATA* states:

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party to pay all or part of the costs of another party or an intervener in connection with the application;

(b) requiring an intervener to pay all or part of the costs of a party or another intervener in connection with the application;

(c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay all or part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

[6] The power to order costs is a matter of discretion.

[7] The FST has issued Practice Directives and Guidelines ("Guidelines") which include criteria that the FST member considering a costs application may consider in exercising her or his discretion in determining whether a party is liable to pay the costs of another party.

[8] Guideline 3.24 states:

The criteria for awarding costs

In determining whether a participant is liable to pay the costs of another participant or the tribunal, the FST may consider:

- whether there was conduct that was improper, vexatious, frivolous or abusive;
- whether the participant submitted a position that was manifestly unfounded;
- whether the participant unreasonably delayed or prolonged the proceeding, including any failure to comply with an FST undertaking or order;
- whether the participant assisted the Tribunal in understanding the issues;
- whether the participant unreasonably failed to cooperate with other parties during the appeal;
- whether the participant failed to attend a hearing or other proceeding, or to send a representative, despite receiving notice
- the degree of success in the proceeding; and
- any other matter the Tribunal considers relevant.

If the tribunal member hearing the case makes an order requiring a participant to pay part of the costs of another participant the FST will calculate these costs using the BC Supreme Court Rules as a general guideline.

[9] Submissions of the parties have made reference to previous FST costs decisions *Brewers' Distributor Ltd. v Superintendent of Pensions*, Decision No. 2010-PBA-001(c) ("*Brewers*") and *Kadioglu v real Estate Council of British Columbia and Superintendent of Real Estate*, 2015-RSA-003(c) ("*Kadioglu*") for the uncontroversial proposition that the Guidelines are just that, and the decision on costs is a matter of discretion.

[10] I note also that sections 12(2) and 13(2) of the *ATA* provide that a tribunal (such as the FST) is not bound by its practice directives. While not being bound by them, I will consider the Guideline 3.24 criteria in exercising my discretion on this costs application.

[11] Both parties also refer to the more recent FST costs decision in *Zou v Insurance Council of British Columbia and British Columbia Financial Services Authority*, 2019-FIA-001(b) ("*Zou*"). The Appellant submits that *Zou* supports its position that costs should not be awarded in this case and emphasizes that costs in an appeal before the FST are not routinely awarded (at para 16):

[16] While costs are not routinely awarded, even for a successful party, it falls to each decision-maker to determine what factors bring the matter outside the parameters of routine to result in an order of costs being made...

[12] There is a sound policy justification for the FST practice of not routinely awarding costs, even for a successful party.

[13] In civil court proceedings in Canada the rule that "costs follow the event" generally applies wherein the losing party is responsible to pay at least some of the winning party's legal costs (typically based on a tariff). The underlying rationale for this civil court practice is that a litigant (whether bringing or defending a civil claim) is entitled to legal representation and, if successful, should not be left out of pocket by reason of her or his own legal fees, bearing in mind that in civil litigation, damages are the primary remedy which are typically compensatory in nature.

[14] The underlying rationale for the practice concerning costs in civil proceedings does not fit the context of appeals before the FST. In contrast, proceedings before the FST do not involve claims for damages. Rather, appeals before the FST are in relation to decisions of BC financial services regulators impacting those whom they are mandated to regulate. These decisions are primarily disciplinary in nature driven by the public protection objectives of the statutes under which the decisions are made.

[15] It is important to note that the rights of appeal of these decisions by the aggrieved party to the FST are mandated by statute. Access to these appeal rights has thereby been acknowledged as an important element of procedural fairness to be afforded to the aggrieved party by the applicable legislation. In these circumstances, having "costs follow the event" as a matter of course could potentially put a chill on an appellant's decision to pursue what may be a legitimate

appeal. The practices of the FST should accommodate access for meritorious appeals, not discourage it.

[16] Accordingly, as was done by the presiding member in *Zou*, I accept and adopt the reasoning underlying the FST practice of not awarding costs based solely on success on appeal. In exercising my discretion, I will determine if there are factors, (including those set out in Guideline 3.24), to be considered in this appeal that place it outside the routine and convince me to award costs against the Appellant as sought by the Superintendent.

Consideration of factors bearing on costs

[17] The Superintendent distinguishes *Zou* on the facts. In *Zou* neither party was entirely successful, while here the Superintendent was.

[18] The Superintendent further distinguishes *Zou*, pointing to the complex and somewhat unique issues dealt with on this appeal that had not been squarely before the FST previously.

[19] The Superintendent refers to the fact that the decision of the SCC in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") was released in December 2019 (after the time for original submissions had closed and before the decision was made), and I sought and received further submissions from the parties as to how *Vavilov* impacted their original submissions on the standard of review to be applied on the appeal.

[20] I agree with the Superintendent that there were somewhat complex and "first time" issues addressed in the appeal and that helpful submissions were received from both parties on those issues. However, while the complexity of the issues might be relevant to the determination of the quantum of a cost award, I find the complexity and uniqueness of the issues addressed on appeal to be irrelevant or at most neutral to my determination of whether costs should be awarded at all. I do not accept the logic of the Superintendent's submission that complexity and uniqueness of the issues should lead to costs being assessed against one of the parties to the appeal.

[21] Considering the criteria set out in Guideline 3.24, I agree with the Appellant that, with the exception of success, every specified criterion militates in the Appellant's favour and a finding that no costs should be awarded against the Appellant in this appeal. The Appellant's conduct was neither improper, vexatious, frivolous or abusive. While the Appellant's submissions were ultimately unsuccessful, they were not manifestly unfounded, and they were of assistance in my understanding of the issues. The Appellant was not guilty of delay or any other improper behaviour in its conduct of the appeal.

[22] In the exercise of my discretion I find that the Superintendent has failed to convince me that an order for costs against the Appellant would be fair or reasonable in the circumstances of this appeal. I decline to make an order for costs.

[23] Given that I have decided against ordering costs against the Appellant I need not address the parties' submissions on either the quantum of costs or the appropriate methodology to apply in calculating costs.

[24] The Superintendent's application for costs against the Appellant is dismissed.

"Michael Tourigny"

Michael Tourigny
Panel Chair, Financial Services Tribunal

August 28, 2020