NOVA SCOTIA COURT OF APPEAL
Citation: *MacGillivary v. Smith*, 2003 NSCA 113

Date: 20031022
Docket: CA 189018
Registry: Halifax

Between:

Donald MacGillivary and Brian Heron

Appellants

v.

Charles A. Smith

Respondent

Judge: Bateman, J.A. (in Chambers)

Application Heard: October 16, 2003, in Halifax, Nova Scotia

Held: Application granted.

Counsel: Gary Corsano, for the appellant, Donald MacGillivary
appellant, Brian Heron, not appearing
John E. MacDonell, for the respondent

Reasons for judgment:

[1] This is an application for costs by the respondent Charles Smith on the dismissal of an appeal on account of the appellant, Brian Heron's, failure to post security for costs. (Decision ordering security reported as **Smith v. Heron**, [2003] N.S.J. No. 314 (Q.L.)).

[2] On October 9th, 2003, I granted Mr. Smith's application to dismiss the appeal, security for costs not having been posted, and adjourned hearing on the application for costs to October 16, 2003.

[3] This matter has been in the Nova Scotia courts for a number of years. This is the second appeal by Mr. Heron. His first appeal was from an order of the Supreme Court permitting registration of two California money judgments against Mr. Heron and in favour of Mr. Smith. The background is concisely summarized in this Court's judgment dismissing that appeal (reported as **Smith v. Heron** (2001), 194 N.S.R. (2d) 287; N.S.J. No. 233 (Q.L.)). In that decision, dated June 20, 2001, this Court held that "[t]he correctness of the California orders is not open for debate in this jurisdiction" and that "all of the prerequisites for the enforcement of a foreign order by the courts of Nova Scotia have been satisfied ..." (per Roscoe, J.A. at ¶ 3). Mr. Heron's application to the Supreme Court of Canada for leave to appeal the decision of this Court was denied (**Smith v. Heron**, [2001] S.C.C.A. No. 510). Notwithstanding clear and final findings of this Court, Mr. Heron has continued to challenge the jurisdiction of the Nova Scotia Courts on the registration of the California judgments.

[4] Mr. Smith had registered the California judgments in this jurisdiction because Mr. Heron owns property in Cape Breton, Nova Scotia. He intended to execute against the land to wholly or partially satisfy the money owing. Before Mr. Smith could act on the registered judgments, Mr. Heron transferred the land to Donald MacGillivary. In an action commenced in the Supreme Court, Mr. Smith challenged that conveyance of land as fraudulent.

[5] By decision dated September 18, 2002 (and a supplementary decision dated September 25, 2002), Justice Gerald Moir of the Supreme Court of Nova Scotia ordered that the defence of Mr. Heron and Mr. MacGillivary in that action be struck and that judgment be entered in favour of Mr. Smith against them jointly and severally. The judge declared that the deed whereby Mr. Heron conveyed the

Cape Breton real property to Mr. MacGillivary was void and ordered that the conveyance be set aside. (**Smith v. Heron,** S.H. No. 171875 dated 20020918, unreported) In his decision Moir, J. held that Mr. Heron and Mr. MacGillivary had "deliberately obstructed" the course of that litigation. Messrs. Heron and MacGillivary appealed that judgment to this Court.

[6] Mr. Heron, who is a retired member of the Florida Bar has, with Mr. MacGillivary's written consent, conducted this appeal for both himself and Mr. MacGillivary. Commencing with the late service of the Notice of Appeal, rather than move the appeal forward to hearing, Mr. Heron has made misguided and unnecessary interlocutory applications at every turn, wasting considerable court time and resulting in substantial unnecessary legal expense to Mr. Smith. The appeal, as conducted by Mr. Heron, has required constant attention and intervention by counsel for Mr. Smith and by the Registrar and the judges of this Court. Mr. Heron has filed volumes of unhelpful, unfocussed and inappropriate material in support of his many applications. He has repeatedly and continuously tried to re-litigate or otherwise revisit the issues long ago decided in the first appeal (¶ 3, above). An abbreviated chronology of some of the events in this appeal to date gives the flavour of the proceedings:

> On October 18, 2002, the Appellants filed, by fax to this Court, the Notice of Appeal from Justice Moir's decision. That Notice listed thirteen grounds of appeal ranging from lack of jurisdiction, procedural unfairness, ineffective assistance of counsel and failure to provide the appellants with an opportunity to be represented by counsel;
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> On October 24, 2002, the Registrar wrote to Mr. Heron advising that he had not filed the original of the Notice of Appeal, as is required, nor paid the requisite filing fees;
>
> The Notice of Appeal was not served on Mr. Smith or his counsel necessitating correspondence from Mr. Smith's solicitor to the Registrar so advising;
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> The Notice of Appeal, eventually served on Mr. Smith on November 6, 2002, was served out of time;
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> On November 13, 2002, the Registrar again wrote to Mr. Heron advising that the original documents had not been filed with the Court and noting that the appellants were required to apply to Chambers to set at date for the hearing of the appeal;

Not until February 5, 2003, did Mr. Heron arrange a Chambers telephone conference to set dates for the hearing of the appeal;
During that telephone conference, which took place on February 12, 2003, Mr. Heron advised that he intended to represent both himself and Mr. MacGillivary on the appeal. The Court requested that he provide evidence of his status with the Florida Bar and confirmation that Mr. MacGillivary wished to be represented by Mr. Heron on the appeal;
There followed several pieces of correspondence and/or affidavits from Mr. Heron either directed to counsel for Mr. Smith and copied to the Court or directed to the Court and copied to counsel for Mr. Smith wherein Mr. Heron raising complaints about Mr. Smith's counsel's conduct of the file;
Not until March 20, 2003, did Mr. Heron provide the Court with confirmation that Mr. MacGillivary consented to Mr. Heron acting on the appeal on his behalf;
On March 21, 2003, counsel for Mr. Smith gave Notice of an application for security for costs;
In an affidavit faxed to the Court on March 24, 2003, purportedly in response to Mr. Smith's application for security for costs, Mr. Heron continued to question the jurisdiction of the Nova Scotia Court to register the California judgments;
As Notice of Appeal had not been served upon Mr. Smith within the time period provided in the **Civil Procedure Rules**, Mr. Smith applied to quash the appeal. It was Mr. Heron's position that service had been timely;
By telephone conference on March 27, 2003, Justice Hamilton, after hearing the parties and considering the written material submitted, rendered an oral decision concluding that Mr. Heron had not established that the Notice of Appeal had been served within the time required by the **Civil Procedure Rules**, but extending the time for service to the actual date that the Notice of Appeal was served on Mr. Smith;
By letter and affidavit dated April 4, 2003, Mr. Heron requested reconsideration of Justice Hamilton's finding that the Notice of Appeal was served out of time - notwithstanding that she had extended the time for service. That letter refers to Mr. Smith's objection to the late service of the Notice of Appeal as "another

disingenuous attempt on his part to stack up solicitor's costs", and alleges bias on the part of the Court - “Thus once again as can be seen from the details of the affidavit I am subjected to a procedure that favors Mr. Smith and is not applied equally.” The April 4th affidavit contains additional allegations of bias by the Court and improper conduct by both Mr. Smith and his counsel;

On April 7, 2003, Mr. Heron faxed a letter and affidavit to the Court again requesting that Justice Hamilton reconsider her March 27, 2003, oral decision that the Notice of Appeal had not been served in time;

On April 8, 2003, there was a further teleconference with Justice Hamilton, at which time she adjourned the security for costs hearing to April 15, 2003, and gave Mr. Heron a deadline of April 11, 2003, to file information in support of his request that she revisit the March 27, 2003, oral decision holding that the Notice of Appeal had not been served in accordance with the **Rules**. This teleconference was summarized in Justice Hamilton’s letter of April 11, 2003;

On April 11, 2003, Mr. Heron filed a further lengthy, rambling affidavit directed at the “late service” issue;

On April 15, 2003, Justice Hamilton rendered a written decision confirming her March 27, 2003, oral decision extending the time for serving the Notice of Appeal (reported as **Smith v. Heron** (2003), 214 N.S.R. (2d) 217; N.S.J. No. 137 (Q.L.)).

In an April 15, 2003, teleconference, Justice Hamilton gave directions with respect to the security for costs application, and denied Mr. Heron’s request for reconsideration of the March 27 oral decision that the Notice of Appeal had not been served within the time set out in the **Rules**. This teleconference was summarized by Justice Hamilton in a letter to the parties dated April 16, 2003. This was followed on April 25, 2003 by written reasons from Justice Hamilton refusing reconsideration of the late filing (**Smith v. Heron** (2003), 214 N.S.R. (2d) 217; N.S.J. No. 137 (Q.L.)). She ordered that costs of the application dealing with the extension of time to serve the Notice of Appeal would be costs on the appeal;

Commencing on June 30, 2003, Justice Hamilton heard Mr. Smith’s application for security for costs. On that application Mr. Heron conducted a lengthy cross-examination of Mr. MacDonell, counsel for Mr. Smith. That cross-examination necessitated Mr. MacDonell’s

retention of counsel. That decision is reported as **Smith v. Heron** [2003] N.S.J. No. 314 (Q.L.).

On July 10, 2003, Mr. Heron filed a notice purporting to appeal certain evidentiary rulings made by Justice Hamilton in the course of the security for costs application. That matter came before Justice Saunders of this Court on July 31 and August 7, 2003. Justice Saunders decision dismissing that attempted appeal is reported as **Smith v. Heron** [2003] N.S.J. No. 288 (Q.L.). He ordered costs of that application against Mr. Heron and Mr. MacGillivary;

On July 25, 2003, Mr. Heron wrote to Justice Hamilton and enclosed a Notice of Appeal purporting to appeal certain aspects of Justice Hamilton's conduct of the security for costs hearing and requesting "an opportunity to brief the Court on this interlocutory appeal after meeting with their anticipated Nova Scotia associate counsel . . .";

On July 28, 2003, Mr. Heron filed another lengthy affidavit titled "APPELLANT BRIAN HERON'S AFFIDAVIT RE SERVICE AND JUDGMENT IN SUPPORT OF APPELLANTS' REQUEST FOR INTERLOCUTORY APPEAL RE LIMITATION OF DEFENDANTS' OPPORTUNITY TO FULLY AND FARLY [SIC] CROSS EXAMINE AFFIDAVITS OF COUNSEL WITH RESPECT TO PLAINTIFF'S APPLICATION FOR SECURITY FOR COSTS PENDING APPEAL FROM THE JUDGMENT";

On August 14, 2003, Mr. Heron filed another unsolicited, unhelpful and rambling affidavit consisting of fifty-five paragraphs titled as a document in opposition to the application for security for costs;

On August 21, 2003, independent counsel, newly retained by Mr. MacGillivary, filed a Notice of Discontinuance on his behalf;

On August 22, 2003, Mr. Heron again wrote to Justice Hamilton;

On August 25, 2003, Mr. Heron filed documents purporting to appeal the decision of Justice Saunders dismissing his attempted appeal of the evidentiary rulings of Justice Hamilton during the security for costs hearing and seeking, *inter alia*, "a stay of enforcement of all judgments and awards outstanding". This filing included another lengthy, unhelpful, unfocussed affidavit;

On August 27, 2003, Mr. Heron filed another Notice of Application "for extension of leave to apply for injunctive relief on constitutional grounds . . . on the basis of fresh evidence that the proceedings upon

which action, was taken and continues to be taken, in proceedings in Nova Scotia were and continue to be in excess of jurisdiction" and seeking to appeal the original appeal judgment of this Court. He sought, as well, an order staying enforcement of all "judgments and awards outstanding" and providing "[t]hat all costs awarded Respondent to date in all related proceedings in Nova Scotia, be reversed . . .". Filed with the Notice was a lengthy written submission purporting to be in support of the application;

On September 9, 2003, Justice Hamilton issued a decision ordering that security for costs be posted and including an award of costs and disbursements of that application payable forthwith by Mr. Heron and Mr. MacGillivary (reported as **Smith v. Heron**, [2003] N.S.. No. 314 (Q.L.));

On September 15, 2003, Justice Hamilton issued a decision and Order dismissing the application for an extension of time to appeal Justice Saunders' decision and dismissing the application to vacate and set aside all Canadian court decisions made to date in these proceedings (reported as **Smith v. Heron** [2003] N.S.J. No. 330 (Q.L.)). She ordered costs of that application to be payable by Mr. Heron and Mr. MacGillivary, in the amount of $2000.00;

On September18, 2003, Mr. Heron fax filed a "NOTICE AND/OR NOTICE OF LEAVE TO APPEAL" with respect to Justice Hamilton's September 9, 2003, decision fixing security for costs. The Notice includes a request that "a stay of execution, on all orders related to costs, be granted the appellant, pending the appeal".

On September 19, 2003, Mr. Heron fax filed a notice purporting to amend the September 18 notice, including "[t]hat the grounds of appeal include bias in favor of respondent" and giving notice of a September 25, 2003 application to set down the intended appeal from Justice Hamilton.

On September 22, 2003 Mr. Heron fax filed another affidavit;

Mr. Smith's counsel prepared and filed a substantial amount of material in opposition to the September 25, 2003 application, and attended Chambers at the designated date and time. At the hearing, Mr. Heron attempted to file additional documents in support of an application for injunctive relief. I directed that until the costs of the application for security for costs were paid, I would not entertain further applications from Mr. Heron. Mr. Smith's counsel asked to

> reserve, to a later date, submissions on the costs of the September 25 appearance;
>
> That same day Mr. Heron filed a "NOTICE AND/OR NOTICE OF LEAVE TO APPEAL" relating to Justice Hamilton's September 15, 2003 decision and also seeking to appeal "the judgment and orders of Justice Bateman delivered from the bench in Chambers, dated September 25, 2003 . . .". Mr. Heron set a return date of October 2, 2003;
>
> Counsel for Mr. Smith appeared in Chambers on October 2, 2003 in response to Mr. Heron's Notice. Mr. Heron confirmed that the costs and disbursements relating to the security for costs application still had not been paid. Mr. Heron attempted to bring an application for injunctive relief, which application I declined to hear until the costs of the application for security for costs were paid as I had advised Mr. Heron in Chambers the previous week. Mr. Smith's counsel asked to reserve submissions on costs of the October 2 appearance until determination of the main appeal.

[7] As stated above, Mr. Heron did not post the security for costs as ordered by Justice Hamilton. Mr. Smith applied, *ex parte*, to dismiss the appeal as was authorized by Justice Hamilton. On October 9, 2003, I dismissed the appeal.

[8] Costs have been fixed by this Court on the security of costs application, on the application, *inter alia*, to extend the time for appealing the decision of Justice Saunders (Justice Hamilton's decision of September 15, 2003) and on the applications heard by Justice Saunders. Mr. Smith asks that I fix the amount of the costs payable by Mr. Heron and Mr. MacGillivary on the application to extend time to file the Notice of Appeal of the interlocutory applications, which were ordered by Justice Hamilton to be costs on the appeal. In addition, he requests that I order costs payable by Mr. Heron and Mr. MacGillivary related to the remaining matters raised by Mr. Heron with the Court and in relation to which costs were not ordered. This would include, where applicable, any or all of counsel's perusal of documents filed by Mr. Heron; preparation of submissions and appearances in relation to the documents/applications filed on July 25, 2003; July 28, 2003; August 14, 2003; August 22, 2003; August 25, 2003; August 27, 2003, September 18, 2003; September 19, 2003; September 22, 2003; September 25, 2003; October 2, 2003 and October 16, 2003. In addition to the foregoing dates, I am satisfied that costs were not assigned on Mr. Heron's many continuing "applications" and

"submissions" (referred to, generally, in the chronology above at ¶ 6), after the judge's oral decision on March 27, 2003, in relation to the extension of time for filing the Notice of Appeal and the reconsideration of that decision.

[9] Of particular relevance here are the following provisions of the **Civil Procedure Rules**:

> 63.04 (2) In fixing costs, the court may also consider
>
> . . .
>
> (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
> (d) the manner in which the proceeding was conducted;
> (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
>
> . . .
>
> 63.15 (1) Where any thing is done or an omission is made, improperly or unnecessarily, by or on behalf of a party, the court may order,
>
> . . .
>
> (b) the party to pay the costs of any other party occasioned by the act or omission;

[10] Mr. Smith submits that, in setting the amount of costs attributable to the appellants' application to extend the appeal period, this Honourable Court should consider:

> • the application involved three lengthy teleconferences (parts of which related to the security for costs application for which costs have already been awarded);
> • the application also involved a request for reconsideration, which consumed more of the Court's and Respondent's time and attention;

[11] Mr. Smith's counsel prepared and filed a substantial amount of material in opposition to the September 25, 2003, application, and incurred additional time of almost two hours in the attendance itself on September 25.

[12] Throughout this appeal, Mr. Heron has repeatedly raised what he calls the "jurisdiction issue", in a relentless and time-consuming attempt to re-litigate matters

settled by this Court in the 2001 judgment (¶ 3). For example, Mr. Heron deposed in his March 24, 2003, affidavit:

> 13. . . . Where no jurisdiction could attach to the common law action in the underlying case before Justice Goodfellow, in the Supreme Court of Nova Scotia, it could not by fiat now attach in the instant case brought by Mr. Smith with the full knowledge of his counsel that the judgment was not and is not yet conclusive in the United States. To do so would throw legal procedure between independent jurisdictions and principles of jurisprudence into chaos and subject unsuspecting litigants to vexatious complaints based upon piecemeal and interlocutory judgments in foreign jurisdictions. The right to raise jurisdiction at any time in proceedings is the only protection against such outrageous forum shopping in search of solicitor ad attorney costs.

[13] It was the appeal from Justice Goodfellow's order which was dismissed by this Court in 2001.

[14] Justice Hamilton made reference to the "jurisdiction issue" in her decision on security for costs, September 9, 2003:

> [10] . . . [Mr. Heron] wants me to consider and determine what he characterizes as the "jurisdiction issue." His position is that all prior Canadian decisions between himself and Mr. Smith are null and void, and should be declared so by me. This would include the decision of Justice Goodfellow which this Court previously confirmed on appeal, and on which the Supreme Court of Canada refused to grant Mr. Heron leave to appeal. It would also include the present appeal. His basis for this position seems to be the same as it was when he argued it before Justice Goodfellow, that the orders for costs in California were not final and are subject to change. As I indicated to Mr. Heron long before the hearing of this application, that issue is not before me on this application.

[15] She cautioned Mr. Heron on the consequences of continuing to raise such matters:

> [19] Here the costs awarded by Justice Moir were $7,435.00, plus disbursements. 40% of this amount would be approximately $3,000. Mr. Heron's continuing failure to focus on the relevant issues and

> continuing attempts to re-litigate matters already adjudicated, if it continues, has the potential to cause costs awarded to be significantly higher than normal. Given this and the long history of unpaid costs, I am satisfied $3,000 would be too small an amount to order as security for costs. I am satisfied the security for costs should be double that amount, $6,000, rather than the $20,000 requested by Mr. Smith. ...
>
> (Emphasis added)

[16] In **Solomon v. Smith** (1987), 45 D.L.R. (4th) 266 (Man. C.A.), Lyon, J.A. referred to re-litigation as "a classic example of abuse of process – a waste of the time and resources of the litigants and the court and an erosion of the principle of finality so crucial to the proper administration of justice."

[17] Additionally, Mr. Heron has repeatedly raised allegations of bias by the judges of this Court and has made unfounded allegations of misconduct against Mr. Smith's counsel. Mr. Heron, as a former member of the Florida Bar and trained in the law, must be taken to be aware that such unsubstantiated allegations are improper, have no place before the court and are deserving of sanction.

[18] Mr. Smith seeks costs of the appeal against Mr. MacGillivary and Mr. Heron. Donald MacGillivary is no longer an appellant, having file a Notice of Discontinuance on August 21, 2003.

[19] Mr. Smith submits that Mr. MacGillivary should remain jointly and severally liable with Mr. Heron for costs of this appeal up to and including the October 16, 2003, application, notwithstanding the formal discontinuance of his participation on August 21, 2003. He says that there are at least four reasons for this:

> First, the Appellant MacGillivary gave written consent to Mr. Heron acting as his representative in this appeal. He cannot now dissociate himself from Mr. Heron's conduct of this proceeding on his behalf.
>
> Second, this appeal has been ongoing for almost a year. The Appellant MacGillivary did not file his Notice of Discontinuance until over ten months had elapsed. He and Mr. Heron were thus formally co-Appellants for approximately 83% of the time.
>
> Third, it would be inequitable to not hold both Appellants jointly and severally liable for costs, where the Appellants' submissions and affidavits leave no doubt as to the reasons for the discontinuance. The

discontinuance was an attempt by the Appellants to create a situation where:

- the Appellant MacGillivary could escape liability for cost consequences;
- the Appellant Heron could nonetheless continue the appeal in which the relief sought would benefit the Appellant MacGillivary, i.e. a reversal of Justice Moir's order setting aside the conveyance from the Appellant Heron to the Appellant MacGillivary;
- if the appeal were unsuccessful, any costs awarded to the Respondent would be meaningless, because they would only be payable by the Appellant Heron, who has no assets in the Province save the subject property (and, as stated by Justice Hamilton at para.13 of her September 9 Decision, "there is a good chance this real property will not be sufficient to cover all debts already owed").

Fourth, even after the Notice of Discontinuance, Mr. Heron continued to bring applications and make submissions on behalf of the Appellant MacGillivary. The record makes it clear that the repeated applications for injunctive relief and "a stay of enforcement of all judgments and awards outstanding" were an effort to shield the Appellant MacGillivary from execution on costs orders already outstanding. Application documents were copied to the Appellant MacGillivary, who made no effort to communicate with the Court or to otherwise stop Mr. Heron from bringing these applications which, if successful, would have benefitted the Appellant MacGillivary. Indeed, it appears that on September 10, 2003, almost three weeks after the Notice of Discontinuance, Mr. Heron applied "on behalf of Mr. MacGillivary, protesting any action by Mr. Smith to access Mr. MacGillivary's bank account . . .". The grounds of this application were "that the Court awarding the judgment of costs, was acting in excess of jurisdiction in the proceedings", i.e. a further abuse of process by attempting to re-litigate the "jurisdiction" argument.

[20] In support of the argument counsel draws an analogy to a situation where a non-party (Mr. MacGillivary) has a "straw man" (Mr. Heron) take his place in the proceedings in order to avoid liability for costs, as in **Sturmer v. Beaverton (Town)** (1912), 2 D.L.R. 501; O.J. No. 194 (Q.L.) (Ont. Div. Ct.).

[21] Finally, submits Mr. Smith, the appeal from Moir J.'s order could not have occurred but for Mr. MacGillivary's acquiescence. The order under appeal set aside the deed into Mr. MacGillivary. It is Mr. Smith's submission that Mr. Heron does not have standing to appeal that order. Indeed, says counsel, had the appeal not been dismissed on account of the failure to post security for costs, he would have made application to the court to terminate the appeal, on the basis that Mr. Heron lacked standing. In support of this argument counsel cites **Bank of Montreal v. Prescott**, [1993] B.C.J. No. 3029 (Q.L.). If this is the case, he argues, Mr. MacGillivary should be responsible for all of the consequences of the appeal proceeding which he alone facilitated and should not be permitted to insulate himself, through discontinuance, from the costs associated with its continuation by Mr. Heron.

[22] This is an interesting and attractive argument. I am not satisfied, however, that the standing on appeal of a person in the position of Mr. Heron should be settled, collaterally, on an application for costs on dismissal.

[23] I am not persuaded that Mr. MacGillivary should be held liable for any costs award which is attributable to the actions undertaken by Mr. Heron during the period after discontinuance.

[24] Mr. Smith is entitled to an award of costs for those aspects of this appeal, in relation to which costs have not already been awarded, and to have the amount of the costs of the application to extend time to serve the Notice of Appeal, fixed.

[25] Mr. Heron is not a "self-represented litigant" in the usual sense. He should not be insulated from costs or costs reduced simply because he is not a member of the Nova Scotia Barristers' Society. He is trained in the law and is a retired member of the Florida Bar. He professed to have sufficient skill to represent Mr. MacGillivary's interests on this appeal.

[26] Additionally, although I do not consider Mr. Heron to be an "unrepresented litigant, I agree with the comments of Plantana, J. in **Baziuk v. Dunwoody** (1997), 13 C.P.C. (4th) 156; O.J. No. 2374 (Q.L.) (Ont. Gen. Div.):

> **[18]** The problem of unrepresented parties, who may not be familiar with law and procedure, is one which is facing courts today with an ever increasing frequency. Courts are mindful of a degree of

> understanding and appreciation which should appropriately by extended to such parties. However, notwithstanding the difficulty with such parties attempting to properly represent themselves, courts must also balance the issues of fairness and be mindful of both, or all parties. Issues of fairness of course must always be determined in accordance with accepted legal principles and the law which has developed. A sense of fairness and understanding granted to unrepresented parties ought never to extend to the degree where courts do not give effect to the existing law, or where the issue of fairness to an unrepresented litigant is permitted to over ride the rights of a defendant party.

[27] Indeed, Mr. Heron has used his training in the law to unnecessarily prolong and complicate this appeal. He has pursued many futile and frivolous applications and has attempted appeals therefrom which actions have substantially impacted upon the expense of this matter. He has persistently attempted to re-litigate matters long ago settled in this Court. He has not conducted the litigation in a way which indicates concern for the efficient use of the court's time.

[28] The stated object of our **Civil Procedure Rules** is to "secure the just, speedy and inexpensive determination of every proceeding." (**Rule** 1.03) Mr. Heron's misuse of the **Rules** has had the opposite effect. He has abused the process of the Court. Mr. Heron and Mr. MacGillivary have been free to pursue this appeal, as they did the litigation before the trial court, principally without concern for legal fees. For persons of ordinary means, the expense of litigation is a reality which promotes sober second thought in the decision to litigate and impacts on the way in which the proceeding is conducted. It is clear that that element has been absent from this appeal.

[29] On the application to extend the time for filing the Notice of Appeal and the requested "reconsideration" of that issue, I fix costs at $1500.00 inclusive of disbursements. These are payable by Mr. Heron and Mr. MacGillivary, jointly and severally.

[30] For the September 25 and October 2 appearances and preparation of and perusal of the materials by Mr. MacDonell I award costs of $2000 inclusive of disbursements payable by Mr. Heron.

[31] I award a further global costs figure of $2000 inclusive of disbursements relating to the many other submissions and applications by Mr. Heron and attempts to revisit closed issues in relation to which costs were not yet ordered. Of this amount, $1000 is payable jointly and severally by Mr. Heron and Mr. MacGillivary and $1000 payable by Mr. Heron alone.

[32] For clarity, the total amount of costs payable pursuant to this decision, which are in addition to all other costs ordered by this Court, is $5500.00. Of this amount, Mr. Heron and Mr. MacGillivary are jointly and severally liable for $2500.00 with the balance being the responsibility of Mr. Heron.

[33] I award no additional costs on the application for costs on the dismissal of the appeal.

Bateman, J.A.