NOVA SCOTIA COURT OF APPEAL

Citation: *Robinson v. Gallagher Holdings Limited*, 2019 NSCA 97

Date: 20191218
Docket: CA 487209
Registry: Halifax

Between:

Christopher I. Robinson

Appellant

v.

Gallagher Holdings Limited, a body corporate, Aldamad Investments Limited, a body corporate, Andrew Armstrong, James Williams, Michael Williams, Bruce Barteaux, Bonnie Barteaux, Michael Lund, Blaise Wilson, Unison Resources Incorporated, UWGC Limited, Stephen Patterson, and Genevieve Paquin

Respondents

Judge:	The Honourable Justice J.E. (Ted) Scanlan
Appeal Heard:	November 14 2019, in Halifax, Nova Scotia
Subject:	**Costs payable personally by solicitor. Nova Scotia *Civil Procedure Rule* 77.12**
Summary:	The hearing judge ordered the appellant solicitor to personally pay costs in the amount of $35,000 in relation to a hearing where he represented the respondents in a failed defence of a claim.
Issues:	(1) Did the hearing judge err in fact or in law in making the order pursuant to Rule 77.12? (2) Could the hearing judge have authority to order costs pursuant to the inherent jurisdiction of the court?

Result: Appeal dismissed. The hearing judge did not err in fact or in law. Although the judge could have ordered costs pursuant to the inherent jurisdiction of the court, it was not necessary or appropriate in this case.

Costs on appeal 40% of costs below. The appellant ordered to personally pay costs on appeal in the amount of $14,000

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 20 pages.

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Respondents

Judges:	Bourgeois, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	November 14, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Scanlan, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring.
Counsel:	Appellant in person Caitlin Regan and Kilian Schlemmer, for the respondents Gallagher Holdings Limited, Aldamad Investments Limited, Andrew Armstrong, James Williams, Michael Williams, Bruce Barteaux, Bonnie Barteaux, Michael Lund, and Blaise Wilson Respondents Unison Resources Inc., UWGC Limited not participating Respondents Stephen Patterson and Genevieve Paquin not appearing

Reasons for judgment:

[1] Christopher I. Robinson is a lawyer practicing law in the Province of Nova Scotia. He represented clients, Unison Resources Incorporated, UWGC Limited, Stephen Patterson and Genevieve Paquin in defending a claim made by Gallagher Holdings Limited, Aldamad Investments Limited, Andrew Armstrong, James Williams, Michael Williams, Bruce Barteaux, Bonnie Barteaux, Michael Lund and Blaise Wilson.

[2] In a decision dated January 31, 2019 (reported as 2019 NSSC 104), Nova Scotia Supreme Court Justice Gerald R.P. Moir ordered costs in the amount of $536,296 against Unison and Mr. Patterson, $44,117 against Ms. Paquin and finally, that "Christopher I. Robinson shall forthwith personally pay to the Applicants, costs in the amount of $35,000.00."

[3] Mr. Robinson is the sole appellant here and he appeals the order for $35,000.00 in costs to be paid by him personally.

[4] In the Amended Notice of Appeal, the appellant lists 27 grounds of appeal which can be distilled to a single question:

> Did the learned hearing judge properly apply the legal test for an award of costs personally against a solicitor, to the facts of this case?

[5] The respondents assert that the hearing judge properly awarded costs against the appellant pursuant to *CPR* 77.12. They have filed a Notice of Contention suggesting that the hearing judge could also have awarded costs against the appellant personally, pursuant to the Court's inherent jurisdiction.

[6] It should be noted while there was no cross-appeal filed by the respondents, they suggest in their Notice of Contention, and in their arguments on appeal, that the hearing judge may well have made an award payable by the appellant personally in the amount of $80,000.00. The respondents argue this could have been done pursuant to *CPR* 77.12 or pursuant to the inherent powers of the Court. They also suggested that, pursuant to *CPR* 90.48(2), this Court on appeal could increase the quantum of the award. I will return to this issue later.

Standard of review

[7] An award of costs is highly discretionary and subject to a high degree of deference (*Hayward v. Young*, 2013 NSCA 65, para. 8).

[8] In the voluminous notice of appeal the appellant asserts the hearing judge made numerous errors in his factual findings. To the extent that factual findings are challenged any such errors would have to amount to palpable and overriding errors (*McPhee v. Gwynne-Timothy*, 2005 NSCA 80, para. 31; *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2012 NSCA 33, paras. 59-60; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court*, 2018 NSCA 83, para. 18; and *Laframboise v. Millington*, 2019 NSCA 43, para. 14). There were none.

[9] When awarding costs the hearing judge was applying *CPR* 77.12 (2) and he was obligated to interpret and apply the rule correctly. Any error is to be reviewed based on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, paras. 8-9; *McPhee, supra*, para. 33; *Tapics v. Dalhousie University*, 2015 NSCA 72, para. 38; *Judges of the Provincial Court and Family Court, supra*, para. 18; and, *Laframboise, supra*, para. 18). A review of the record satisfies me the judge was correct in his interpretation and application of the law.

[10] I am satisfied the discretion to award costs of $35,000 to be paid personally by Mr. Robinson was exercised reasonably in this case and is deserving of deference. As regards the Notice of Contention, this Court has the authority to increase the award against the appellant. I decline to do so noting that the decision of the hearing judge is deserving of a high degree of deference and I defer to his decision to award the amount as noted above.

Background

[11] This appeal involves only the issue as to whether the appellant, Christopher I. Robinson, should be required personally to pay $35,000 in costs as awarded by the hearing judge. There were two decisions reported in this case. The decision of Justice Moir on the merits is reported as *Gallagher Holdings Limited v. Unison Resources Incorporated*, 2018 NSSC 251. As noted above, the decision on costs, now under appeal, is reported at 2019 NSSC 104.

[12] A basic review of the merits decision is helpful as it provides context. In that case, the court awarded the applicants (including the respondents on appeal) substantial recovery based on misrepresentation and fraud committed by the respondents, which had caused the applicants to suffer investment losses. The applicants were investors who blamed promoters of a company for their losses resulting from their purchase of promoted shares. As noted by the hearing judge:

> [2] …The company's worth consisted almost entirely in the promoters' connections with (1) an Israeli scientist said to own unique technology for extracting almost inaccessible hydro carbons from otherwise dry wells and (2) an oil and gas producer.
>
> [3] The promoters misrepresented the state of the development of the so-called technology, protection of it as intellectual property, and the readiness of the oil and gas producer to operate a pilot test in a Canadian oil well.
>
> [4] I inferred fraudulent intent by reconstructing what the promoters must have known and comparing that with the truth about development, property protection, and prospects for testing. Some other evidence added weight to the conclusion of fraud: other less central misrepresentations, **abuses of the litigation processes, and dereliction in duties of disclosure**.
>
> [Emphasis added]

[13] The hearing judge also stated at para. 6 "[t]here were alternative causes that would have been allowed against the promoters for breach of a settlement agreement and for shareholder oppression".

[14] The reference to breach of a settlement agreement is relevant to some of the comments made by the hearing judge in the decision related to the costs hearing. I will return to that issue below.

[15] The hearing on the original Application spanned nine days. In addition there were a number of prehearing applications related to disputes on disclosure and discoveries.

[16] The disposition by the hearing judge in the merits decision was as follows:

> Disposition
>
> [479] A reasonable expectation of continuous reporting of material changes about Unison is established. Oppression by all respondents, except UWGC, is established.

> [480] Had Unison reported important developments as they occurred, the investors would have known in January and February, 2014 that the prospects for a pilot were in serious decline and in May, 2014 that those prospects had failed. Had it reported financial changes, they would have seen that the president, the treasurer, and an undisclosed manager were taking large sums.
>
> [481] But for the oppression, the applicants could have sought to recoup investments through a winding-up. I would order Unison and the primary officer to repurchase the applicants shares, if it were not for the judgments for fraudulent misrepresentation.
>
> [482] Had the applicants received reasonable reporting, they could have enforced debts owed to Unison as part of the winding-up proceedings. The money paid directly by Unison to Ms. Paquin for doing nothing, and the money filtered to her through UWGC, would have been recoverable. It could have been used to repay the investments.

The hearing judge then proceeded to award varying amounts as against the different respondents involved, the total awards approximating $525,000.

[17] The comments of Justice Moir in relation to the litigation process and his comments in relation to Mr. Robinson are particularly germane to this appeal. I refer to Justice Moir's comments in the merits decision:

> **Part V - Fairness in Litigation and Truth in Promotion**
>
> Obligations of Fair Dealing in Litigation
>
> [332] The Nova Scotia Civil Procedure Rules of 1972 entrenched the abolition of trial by ambush and the institution of fair dealing between litigants through full disclosure, liberal discovery, and other rules of court requiring fairness. The obligations of fair dealing may be more explicit or detailed in the 2008 Rules, but the principles remain the same.
>
> [333] Few civil cases come to trial without parties having some grievance about how the opposite parties conducted their prosecution or defence. Even though the grievances may have some justification, we want to avoid distraction. So we sometimes encourage parties to resolve, or forget about, procedural differences.
>
> […]
>
> **[335] I have prosecuted, defended, and adjudicated civil cases for more than forty years. Never have I seen the abuses committed by the respondents in this case. Not in number. Not in import.**
>
> […]
>
> Simple Telephone Records

[337] Here we have a mundane but piercingly pointed example of unfairness.

[338] Mr. Patterson's telephone records are relevant to the extent that they show the date and duration of his telephone conversations with relevant persons, such as the investors, Mr. Soussana, Mr. Muise and others at Global Maxfin, Mr. Hall, and Mr. Somin.

[339] Mr. Patterson did not produce his telephone records. The applicants had to get an order from Justice Gabriel for various disclosure. Still the telephone records were not produced.

[340] The applicants had to come back to chambers again. Justice Wood ordered Mr. Patterson to produce his telephone numbers, Justice Wood ordered the telephone company to deliver the corresponding records to respondents' counsel, and he ordered Mr. Patterson to disclose the records subject to counsel's review for relevancy.

[341] Mr. Patterson disclosed records of calls with Mr. Hall. Others were excluded as irrelevant. During the hearing, when it was in his interest to prove the duration of his presentation by video conference with the Barteauxes, Mr. Patterson sought to prove the previously suppressed record.

[342] He ought to have made disclosure, or assisted with disclosure, of his relevant telephone records without bothering the court. Worse, he ignored the order for all relevant records and only did as he ought to have done when it suited his interests.

[…]

Abuse of the Witness, Bruce Hall

[344] On at least fifteen occasions over the course of a year, Mr. Patterson and Mr. Soussana recorded telephone calls with Mr. Hall. They did not ask his permission. They did not even tell him he was being recorded.

[345] Mr. Hall expressed annoyance when the respondents cross-examined him closely on some of his surreptitiously recorded remarks. He was right to be annoyed. It's like eavesdropping. It's a lowly act. (It is unethical for a lawyer to do that: Nova Scotia Barristers' Society. *Legal Ethics Handbook*, article 13.4 and the authorities footnoted there.)

[…]

[349] This failure to treat Mr. Hall fairly during business discussions spilled over into a failure to treat him, the applicants, and the court fairly in litigation.

[350] In early 2017, the respondents drafted an affidavit for Mr. Hall to swear, and sent it to him in Calgary. He swore the affidavit in Calgary, but it did not get filed for a month.

[…]

[353] The respondents filed Mr. Hall's affidavit on February 22, 2017 after they claim to have discovered the recordings. Even then, they had not told him of their surreptitious behavior. He did not know there were recordings in which he may have spoken unguardedly, from which he might refresh his memory, and which he might have used to make corrections to a draft affidavit before providing evidence to the court.

[354] The respondents gave explanations through counsel when the recordings were disclosed to the applicants for the first time on February 15, 2017. Counsel wrote, "My clients only recently discovered the phone call recordings and their obligation to disclose same." and "[I]t was simply human error." I accept that Mr. Patterson or Mr. Soussana told counsel those things. I find they are untrue.

[…]

[357] I do not see how one person, let alone two people, fifteen or more times surreptitiously recorded business discussions with a senior executive of an oil and gas producer, and forgot that after just a couple years. I find they suppressed the recordings.

[358] Worse still, the respondents were prepared to let their witness face cross-examination, under penalty for perjury, without telling him of their recordings. Mr. Hall found out about the surreptitious recordings from applicants' counsel. Mr. Patterson expressed annoyance this had happened. **I find that astonishing.**

[…]

<u>Pretended Affidavits</u>

[360] The respondents filed pretended affidavits of Mr. Soussana and Ms. Paquin in December, 2016. The appellants only found out they were pretended during discoveries in February, 2017.

[361] The applicants were forced to go to chambers to get the pretended documents expunged. Justice Gabriel's decision is in evidence.

[…]

[363] Again, we encounter a profound disrespect for truth and fairness. There was no "evidence", there were no "affidavits", and nothing got "sworn". On the contrary, a document was made to look like it got sworn, like it provided evidence, like it was subject to the laws of perjury.

> **[364] Courts and others must be protected from acting on what appears to be sworn evidence, but which is not. That is why pretended affidavits are illegal. See, *Criminal Code*, s. 138.**
>
> Failures to Make Disclosure
>
> […]
>
> [366] Mr. Patterson claims to have destroyed a worn out computer at some point without having saved or copied the hard drive. It is unlikely today to lose control over electronic communications. Others, like Mr. Soussana, are regularly copied. Calls for assistance to third parties are possible, as are orders compelling disclosure by third parties. Unison managed to retrieve electronic documents it chose to put in evidence.
>
> [367] An e-mail from Mr. Soussana dated November 4, 2013 and the attached version of the PowerPoint presentation, an e-mail dated April 29, 2013 and nine attached documents, Mr. Patterson's e-mail of May 2, 2013, an e-mail and attachments for Cyril Muise dated October 9, 2013, Mr. Patterson's e-mail of September 16, 2013, same for November 29, 2013, an e-mail chain on January 15, 2014, Mr. Patterson's e-mail of October 2, 2013, an e-mail to Mr. Patterson on September 27, 2013, an e-mail chain dated January 15, 2014, an e-mail to Mr. Patterson on August 21, 2013, Mr. Patterson's e-mail of July 29, 2013 attaching a version of the offering memorandum, Mr. Patterson's e-mail of March 27, 2013, **and two confidentiality agreements were disclosed after the hearing began. In order they were disclosed on January 3, 5, 7, and 15, 2018**.

[Emphasis added]

[18] One of the things the hearing judge considered was the settlement agreement. I indicated above that I would be returning to that issue. It stands out as one example of Mr. Robinson asserting a fact he knew not to be true. Prior to the hearing commencing, a settlement had been reached and when the date for payment of the monies came it was not paid. The hearing judge noted what occurred then, in terms of the litany of excuses or explanations for non-payment:

> Non Payment
>
> [418] On the day payment came due Mr. Robinson wrote, "The financing required to take out your clients' positions in Unison has been completed, however, payment will not be able to be wired to my Trust Account until next week." He explained, "The funds are being transferred from Europe and there are a series of money-laundering and other requirements that must be managed...".
>
> [419] Ten days later Mr. Robinson wrote "there was a signature missing on the documentation the bank required". Funds are supposed to be released in three

> business days. Almost a week later, "Mr. Patterson and Unison have every intention (and will) of concluding this transaction as agreed, albeit at a date later than anticipated".
>
> [420] On January 4, 2016 the excuse expanded beyond a missing signature. Now, "the funds... are part of a larger financing which involved multiple (8 or 9) different entities." "The Paymaster received the final approvals... but was therefore not scheduled to act... until the week of January 4, 2016."
>
> [421] In an e-mail sent on January 5, Mr. Robinson took the position that the settlement was merely an agreement to forebear. Mr. Keith disagreed.
>
> [422] On January 20, Mr. Robinson wrote, "I am expecting the wire transfer as planned". On February 4, "My client tells me that the transfer was scheduled to be effected either today or tomorrow". This time the funds were to come from a United States lender backing European investors.
>
> [423] On February 12, a Connecticut lawyer advised Mr. Robinson, "there has been an ongoing tax dispute between the funding party in Romania and the relevant tax authority". The issue has been resolved. "[I]t is his confident understanding that the transfer will be initiated Monday or Tuesday, Feb. 15 or 16". On March 14, "I just got off the phone with the US attorney in Connecticut. The news is positive... In brief, a few more days is all we need". Mr. Robinson refused to put Mr. Keith in touch with the attorney. On April 4, "Funds were to have begun their move to the US and then to us today, however... today is a state holiday in Hong Kong... so tomorrow is the day when the transfer commences."
>
> [424] Nothing was paid. The applicants decided to sue. Breach of the settlement agreement is one of their causes.

[19] At the original hearing and on appeal before this Court, Mr. Robinson then asserted that the agreement referred to above was not a settlement contract but merely a forbearance agreement. The hearing judge determined that the agreement was a settlement contract and not a forbearance agreement. Moreover, the hearing judge said Mr. Robinson's own billing records show that even he knew it was a settlement agreement (costs decision, para. 85).

[20] Mr. Robinson complains of the evidence the hearing judge used in his determination that it was a settlement agreement. I explain this as follows: Subsequent to the original hearing, but while Mr. Robinson continued to represent the respondents, Mr. Robinson taxed his account against those clients. As part of that taxation process Mr. Robinson filed detailed accounts of work he did on behalf of those clients.

[21] The public filings before the taxing court included communications or information that may have been privileged. None of his clients have appealed any aspect of the merits decision or the costs decision. Nor have they asserted privilege claims related to the material Mr. Robinson placed in the public domain. For Mr. Robinson to now complain that the hearing judge used privileged communications rings hollow. Those records help expose the depth of his abuses.

[22] *Civil Procedure Rule* 77.12(2) governs awards of costs against solicitor:

> 77.12 (2) A judge who determines that expenses are caused by the improper or negligent conduct of counsel may order any of the following:
>
> (a) counsel not recover fees from the client;
>
> (b) counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
>
> (c) counsel personally pay costs.

[23] Mr. Robinson is a person whose acts or omissions could be considered in relation to the main proceeding when awarding costs (*CPR* 77.12(1)). The judge considered what expenses were caused by the improper or negligent conduct of Mr. Robinson (*CPR* 77.12(2)) and ordered Mr. Robinson to personally pay some of those costs (*CPR* 77.12(2)(c)).

[24] The hearing judge's decisions, both the merits decision and the costs decision, are replete with illustrations of Mr. Robinson's inappropriate conduct. The decisions also include assessments as to how it impacted the litigation. The hearing judge appropriately noted there were expenses related to the litigation process that were directly attributable to Mr. Robinson's actions.

[25] Costs pursuant to *CPR* 77.12 differ from costs that may be ordered pursuant to the Court's inherent jurisdiction. Courts may award punitive amounts under the inherent powers of the court. There should be no punitive aspect to costs awarded under *CPR* 77.12(2) (*Galganov v. Russell (Township)*, 2012 ONCA 410). That does not mean that actions which might warrant punishment or discipline are not part of the overall considerations the court may take into account when assessing costs under that provision. I see nothing in the hearing judge's decision which suggests that punishment was the goal or an aspect of the costs Mr. Robinson was ordered to pay.

[26] The main issue to be addressed under *CPR* 77.12(2) must be related to an assessment or determination as to what expenses are caused by improper or negligent conduct of counsel. Once that is ascertained a judge has discretion to order any one, or a combination of three things:

- Counsel not recover fees from the client;
- Counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
- Counsel personally pay costs.

In the context of this appeal we are dealing only with the latter. Mr. Robinson was ordered to personally pay part of the costs owing to the applicants in their original application.

[27] On appeal Mr. Robinson continues his refusal to meaningfully acknowledge the part he played in causing the costs in the original Application to have skyrocketed. It has not gone unnoticed that while Mr. Robinson had been ordered to pay $35,000 in costs, his clients have been ordered to pay solicitor-client costs in excess of $580,000 ($536,296 against Mr. Patterson and Unison, $44,117 against Ms. Paquin). This is an astounding amount of costs when viewed in relation to the amount of the original claim approximating $600,000.

[28] Mr. Robinson argues there will be double recovery if he pays costs on the original application and the costs are also recovered from the respondents in the primary application. The respondents on this appeal have made it clear that they are not seeking double recovery. Any costs recovered from the appellant will be deducted from the amount the respondents can recover from the respondents in the primary application. That will be reflected in the order issued in this appeal.

[29] Mr. Robinson asserts he did no wrong and should not have to pay any costs. I detail below some of the issues that concerned the hearing judge. The materials filed by Mr. Robinson in the taxation of his client's accounts disclosed that Mr. Robinson was unprofessional in his communications, even with his clients. This relates to the descriptions of opposing counsel and even judges of the trial court. The lack of awareness and concern he demonstrates respecting the impact those comments may have had on this litigation and his profession is concerning. He chalks it up to banter between himself and a long time friend/client. The comments may well help explain the tortuous course of this litigation. Such

cavalier and unprofessional assessments of other litigation participants can lead to a false sense of optimism for clients.

[30] His clients continued with this hugely expensive litigation as Mr. Robinson continued to portray himself as being the only professional involved in that application process with the ability to predict or influence the outcome. Others were variously described by him as "a…holes", "idiots" or "pansies". These statements were more than unprofessional. They represented what the hearing judge described as "abject disrespect for counsel opposite and the judges". The ill-founded bravado by the appellant would have done nothing to deter his clients from continuing down into the abyss that awaited them, with Mr. Robinson's assessment of himself lighting the way.

[31] I chronicle below only some of the evidence which justified the hearing judge's findings, but pause here to say the decision shows the hearing judge was cognizant of the extremely cautious approach required when ordering counsel to pay a portion of the total costs award. In his Costs decision he discussed the law as it related to ordering costs against counsel. He noted that under the inherent jurisdiction of courts, punishment may be part of the objective when awarding costs (para. 18). He then referenced *CPR* 77.12(2) and compared it to Ontario Rule 57.01 which is similar. The Ontario rule was considered in *Young v. Young*, [1993] 4 S.C.R. 3. Justice McLachlin (as she then was) held that a combination of abusive proceedings and bad faith may lead to an award against counsel. In saying so Justice McLachlin urged extreme caution, given the duties of lawyers to guard confidentiality. I am satisfied Justice Moir used extreme caution and he did not exercise his discretion with the objective of punishing Mr. Robinson. He referenced the improper conduct and was convinced that it caused costs to be incurred unnecessarily (*Galganov*, *supra*). His second step was to consider, as a matter of discretion, who should pay the costs.

[32] More recently the Supreme Court of Canada (SCC) dealt with the issue of a court's jurisdiction to award costs personally against a lawyer, albeit in the context of a criminal case, in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26. The comments therein are worth noting in relation to the exercise of powers to award costs pursuant to the inherent jurisdiction of the court.

[33] In that case, a criminal defence lawyer was representing 10 clients with respect to drinking and driving offences. Before a scheduled hearing in the Court of Quebec relating to disclosure, the lawyer presented a series of motions alleging

bias of the judge who was scheduled to preside over the hearing. Before the lawyer was able to serve the motions, the parties learned that a different judge would be presiding over the disclosure motions. During the hearing of the disclosure motion, the replacement judge ruled that certain expert evidence presented by the Crown would be admitted, despite the lack of required notice. During the lunch break, the defence lawyer drew up a new series of motions challenging the replacement judge for bias. This resulted in the disclosure proceeding being adjourned. The Superior Court eventually dismissed the motions, and, at the request of the Crown Attorney, awarded costs against the lawyer personally. Although that costs award was set aside by the Court of Appeal, the Supreme Court of Canada restored it.

[34] The Court said:

> [16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41 (CanLII), [2014] 2 S.C.R. 167, at para. 58). **A court therefore has an inherent power to control abuse in this regard** (*Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 136) **and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute**": *Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63 (CanLII), [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53 (CanLII), [2009] 1 F.C.R. 629, at para. 35).
>
> [17] **It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts** (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 126.
>
> [18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, 1979 CanLII 201 (SCC), [1979] 1 S.C.R. 842, at p. 845; *Cronier*, at p. 448; *Pearl v. Gentra Canada Investments Inc.*, 1998 CanLII 12881 (QC CA), [1998] R.L. 581 (Que. C.A.), at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they

> fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121)
>
> [Emphasis added].

[35] The Supreme Court of Canada went on to lay out the requirements to award costs against a lawyer personally using the court's inherent jurisdiction to do so, beginning at para. 25 of its decision in *Jodoin*:

> (2) Applicable Criteria
>
> [25] While the courts do have the power to award costs against a lawyer personally, the threshold for exercising it is a high one. It is in fact rarely exercised, and the question whether it should be arises only infrequently: *Cronier*; *Young*; *R. v. 974649 Ontario Inc.*, 2001 SCC 81 (CanLII), [2001] 3 S.C.R. 575, at para. 85; *R. v. Trang*, 2002 ABQB 744 (CanLII), 323 A.R. 297, at para. 481; *Fearn v. Canada Customs*, 2014 ABQB 114 (CanLII), 586 A.R. 23, at para. 121; *Smith*, at para. 43. Only serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients:
>
> Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.
>
> [26] The type of conduct that can be sanctioned in this way was analyzed in depth in *Cronier*. L'Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier*, and the Court of Appeal also endorsed the principles stated in it.
>
> [27] Several courts across the country have adopted the requirement of conduct that represents **a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system**: *Bisson*; *R. v. Ciarniello* (2006), 2006 CanLII 29633 (ON CA), 81 O.R. (3d) 561 (C.A.), at para. 31; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16 (CanLII), 240 C.C.C. (3d) 181, at para. 62; *Fearn*, at para. 119; *Smith*, at para. 58. Also, as the House of Lords stated in a case that has been cited by Canadian courts, including in *Cronier*, **a mere mistake or error of judgment will not be**

> **sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy** (*Myers*, at p. 319)
>
> [Emphasis added].

[36] Therefore, in terms of requirements, a court may only award costs against a lawyer personally in exceptional circumstances in which "the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice" through litigation tactics or arguments that are "unfounded, frivolous, dilatory or vexatious" or through "dishonest or malicious conduct on his or her part, that is deliberate." (*Jodoin*, paras. 29 and 24).

[37] The Supreme Court of Canada provided the following examples of cases in which courts appropriately ordered costs against a lawyer personally in *Jodoin,* at para. 28:

> [28] There are in this Court's jurisprudence examples of conduct that has led to awards of costs being made against lawyers personally. In *Young*, the Court held that such a sanction is justified if "repetitive and irrelevant material, and excessive motions and applications, characterized" the conduct in question and if this was the result of a lawyer's acting "in bad faith in encouraging this abuse and delay" (pp. 135-36). In *Pacific Mobile*, the Court awarded costs against a company's solicitors personally in a bankruptcy case. The solicitors had been granted a number of adjournments and had instituted proceedings that were inconsistent with directions given by the trial judge. On the issue of costs, Pigeon J. stressed that he did "not consider it fair to make the debtor's creditors bear the cost of proceedings which were not instituted in their interest: quite the contrary". He added that such an award of costs, "far from appropriately discouraging unnecessary appeals occasioning costly delays, tends on the contrary to favour them" (p. 844). In the circumstances, he determined that "the Court should [therefore] make use of its power to order costs payable by solicitors personally" (p. 845).

[38] An appellate court must show great deference to a costs award, only intervening where it is established that the discretion was exercised "in an abusive, unreasonable or non-judicial manner" (*Jodoin,* at para. 52).

[39] The respondents sought costs in their costs brief both under the *Civil Procedure Rules* and under the court's inherent jurisdiction. I am satisfied that while the court could well have exercised its power in this case pursuant to the

inherent jurisdiction of the court. It did not do so and I defer to the decision as rendered by the court fixing the amount that Mr. Robinson was to pay at $35,000.

[40] In the context of this case, the hearing judge had access to many previously privileged documents allowing him to assess the extent of the role Mr. Robinson had in the incursion of costs by the applicants. His contribution was extensive and justified the discretionary costs award that was made.

[41] The hearing judge concluded in the costs decision at para. 98:

> [98] In the many circumstances discussed under stage one and the instances of disrespect discussed in this stage two, this is a case where an award of costs against counsel is warranted despite the need for extreme caution. **It is more than warranted. It is necessary.**
>
> […]
>
> [100] Trial lawyers have to understand the law, both substantive and adjectival. When law school, articles, bar admission, personal efforts, one's practice, one's colleagues, and the courts fail to teach the need for understanding, including the sense of humility that goes with it, the power of a trial lawyer causes harm.
>
> [101] I am satisfied Mr. Robinson caused more pecuniary harm than the applicants are asking to be compensated for.
>
> [Emphasis added]

[42] From the above-noted passages I understand the hearing judge to have focused on the pecuniary harm and how it related back to the appellant's bravado described above. Indeed the "power to cause harm" was on full display in this litigation. It is fitting that a lawyer who wields that power carelessly, abusively, or negligently not leave his clients alone to face the consequences when expenses are directly attributable to his actions.

[43] Mr. Robinson submitted to the court, as evidence, affidavits of witnesses which he knew were 'pretend'. He knew the affidavits in question were not signed in the presence of himself. In one case he forwarded just a jurat for a client to sign, the client not even knowing what was in the affidavit. At appeal he dismissed this as being no big deal, not unlike a lawyer who he says has a property instrument executed at a front desk of a lawyer's office and the jurat signed later by a lawyer. To that I say, and Justice Moir communicated as well (costs decision, paras. 71-76; merits decision, para. 360); **it is a big deal.** Here witnesses were testifying, under

threat of perjury, as to the veracity of their sworn affidavit, while Mr. Robinson knew full well that in some cases the witness could not have been aware of the contents of the affidavit when they signed a single page without seeing the contents of the affidavit to be filed. Mr. Robinson should now recognize the seriousness of the situation in which he placed the affiants. He was an integral part of misleading the court as to the veracity of the filed affidavits.

[44] I am also concerned as to the circumstances related to secret recordings of phone calls of a witness, Mr. Hall. At some point Mr. Robinson became aware that there were numerous phone calls involving Mr. Hall which were recorded without Mr. Hall's knowledge. Mr. Robinson received the recordings in relation to those phone calls and during the time he had the recordings Mr. Hall prepared an affidavit for submission to the Court. This was done prior to Mr. Robinson advising Mr. Hall as to the existence of the recorded phone calls. This resulted in a waste of time by the respondents who were reviewing Mr. Hall's affidavit looking for deficiencies by comparing the affidavit to the telephone recordings. The lack of disclosure to Mr. Hall also exposed him to possible criticism based on deficient affidavits. Some of the deficiencies of Mr. Hall's affidavit were discussed in para. 352 of the original decision. Justice Moir in paras. 357-358 of the merits decision discussed the import of Mr. Hall not having been informed as to the surreptitious recordings (costs decision, paras. 77-83 the hearing judge discussed the impact this had on the litigation).

[45] Mr. Robinson says for example, which I paraphrase for the sake of economy, that as a lawyer he was entitled to be wrong in some of his objections on discovery. In other instances, as referred to above, he blamed non-disclosure of documents on his clients as opposed to acknowledging the role he played in the failed discovery or disclosure process. I agree with Justice Moir's assessment of Mr. Robinson's approach to discovery:

> [62] In oral submissions, Mr. Robinson argued, "This is how it is done." Counsel for a party objects to a question and, if both counsel could not resolve the issue, they go to court.
>
> [63] **Emphatically, Mr. Robinson's approach is not how discovery is to be conducted in this province. Inventing far-fetched objections undermines his client's obligations to make disclosure and wastes time**. Efforts at preparation are wasted. The expense of extracting answers by court intervention is incurred, unless the questioning party gives up and goes to trial knowing full disclosure has not been made.

[Emphasis added]

[46] This is more than a lawyer being entitled to make a mistake in the law. A review of the record confirms that Mr. Robinson used the process as a vehicle to frustrate disclosure instead of it being a vehicle intended to facilitate disclosure. On this appeal Mr. Robinson blamed the partial disclosures and non-disclosures of documents, including timely disclosure of emails or other records, on anybody but himself. Mr. Robinson has to share much of the blame for how the litigation process failed his clients, the respondents, and the administration of justice.

[47] As stated by the respondents in their factum, the hearing judge noted that:

(a) Mr. Robinson's obstruction of discovery examinations is "emphatically…not how discovery is to be conducted in this province";

(b) Mr. Robinson obstructed the fairness of the hearing with "far-fetched arguments about what Justice Wood meant to order and what relevancy means";

(c) Mr. Robinson had made the pretended affidavit(s) "look like it got sworn, like it provided evidence, like it was subject to the laws of perjury" when in fact, his clients could not have known what their affidavits said when they signed them;

(d) Beyond making the Hearing far less efficient, Mr. Robinson exposing Mr. Hall "to cross examination on the concealed recordings was also seriously abusive";

(e) Mr. Robinson's "billing records show even he, himself, knew it was a settlement agreement. Again, Mr. Robinson encouraged waste. The applicants had to endure a series of stories made up to explain the delay in payment, then a costly defence of the agreement just to prove it an agreement".

[48] Time was wasted on more than the discoveries and proving the settlement agreement. While it is not always easy on appeal to discern from the record the minutiae of who was at fault in each and every step, in most aspects of the case it is clear who was at fault: Mr. Robinson.

[49] How the appellant conducted himself leading up to and during the merits hearing and also in this appeal goes to the heart of the integrity of the justice system, demonstrating conduct that is beyond reasonable contemplation, even in the context of the most contentious litigation.

[50] The hearing judge's findings are well supported in the record, I find no palpable and overriding error nor any error in principle. I find no merit to Mr. Robinson's appeal. I would dismiss the appeal.

Costs on this Appeal

[51] The Court asked the parties to address the issue of costs on this appeal during submissions. The appellant asked for time to file a post-hearing brief on the issue and the Court agreed. We have now received the parties' submissions on costs.

[52] The respondents asked that costs be set based on 40% of the costs awarded below. That is 40% of the $35,000 ($14,000) the court ordered Mr. Robinson to personally pay to the respondents (plaintiffs in the court below). The appellant suggests that $14,000 is not an appropriate amount on this appeal, saying $1,500 would be the typical amount on an appeal such as this.

[53] In many ways this is a unique appeal. The appellant (who was the solicitor for the respondents in the original hearings) is the sole appellant. None of the original parties have appealed or cross-appealed although the respondents have filed a Notice of Contention.

[54] This Court noted in *Frank George's Island Investments Ltd. v. Shannon*, 2016 NSCA 24 the "40% rule" is the norm:

> [23] It is obvious that this appeal demanded very substantial effort, including the need to address the arguments either not made or not pressed before the application judge. Absent compelling reasons, successful parties in civil litigation should be entitled to a substantial indemnity. This Court has applied the 40 percent rule in such cases: *Belton Farms Ltd. v. Campbell,* 2016 NSCA 1; *Gallagher v. Gallagher*, 2016 NSCA 2.

[55] The present appeal could have, and should have been quite straight forward with narrow, defined issues. The appellant's approach to this appeal meant there was nothing simple about it. The Notice of Appeal set out 27 meritless grounds of appeal. The appellant argued that the trial judge made "palpable and overriding errors" in just about every meaningful finding. The record does not support his assertions.

[56] This Court afforded the appellant substantial extra time for him to advance his arguments, yet still he complained that he had insufficient time to argue his appeal.

[57] Costs on appeal are set at 40% of the costs below; $14,000 inclusive of disbursements, to be paid forthwith, personally by the appellant. The order on this appeal will also reflect the fact that Mr. Robinson is required to personally pay the $35,000 ordered by Justice Moir and, as noted above, that amount may not be recovered again from Mr. Robinson's former clients.

Scanlan, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.