**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** Millbrook First Nation v. Wilmot Drywall, 2008 NSSC 25

**Date:** 20080123
**Docket:** SCT 200367
**Registry:** Truro

**Between:**

Millbrook Band Council

Plaintiff/
Defendant by counterclaim

and

Kelly Wilmot, carrying on business as
Wilmot Drywall

Defendant/
Plaintiff by counterclaim

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**DECISION ON COSTS**

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| **Judge:** | The Honourable Justice Kevin Coady |
| **Submissions:** | October 22, 2007 & November 13, 2007 |
| **Written Decision:** | January 24, 2008 |
| **Counsel:** | Joseph M.J. Cooper, Q.C., for the plaintiff<br>Dennis James, for the defendant |

**By the Court**:

[1] This case was heard at Truro, Nova Scotia over five full days in June, 2007. A decision was released on August 24, 2007 (2007 NSSC 253). This litigation involved a dispute over a drywalling contract. The plaintiff, Millbrook Band Council, brought an action against Mr. Wilmot to recover a $25,014.18 overpayment. Mr. Wilmot filed a defence and advanced a counter-claim for the following:

(A) $22,933.50 for unpaid invoices.

(B) $12,500 for unpaid treaty entitlement monies that had been withheld by the plaintiff.

(C) Damages for breach of fiduciary duty.

(D) Damages for interference with the defendants economic relations.

(E) Damages for the plaintiffs abuse of their public office.

[2] The decision of this court was as follows:

- The plaintiff's claim for overpayment was dismissed.
- The defendant recovered $6,511.76 in unpaid invoices.

- The defendant was awarded $12,500 in unpaid treaty entitlement monies.
- The defendants counterclaims for damages were dismissed.

[3] I invited the parties to provide written submissions on costs. The defendant argues that he is the successful party and is therefore entitled to a costs award. That position is not challenged by the plaintiff and the court concurs with the defendant.

[4] The plaintiff's position is that costs should be awarded on the basis of the tariff. They argue that the "amount involved" is $19,011.76 and that scale 3 to scale 5 should be applied. That would result in a costs award of between $2,625 to $3,675. The plaintiff does not challenge the defendants disbursements of $2,233.19.

[5] The defendant's position is that I should depart from the tariff and make a lump sum award in the amount of $17,500.00.

[6] I agree with counsel that the old tariff applies.

[7] There can be no question but that the cornerstone of costs is discretion. Civil Procedure Rule 63.02(1) gives me wide discretion with respect to party and party costs. The rule permits an award of "a gross sum in lieu of, or in addition to any taxed costs". In this case I am awarding a lump sum. There is good authority for such and the facts of this case warrant the exercise of this discretion.

[8] I adopt the language of Saunders J. in *Landymore* v. *Hardy* (1992), 112 N.S.R.(2d) 410:

> "The recovery of costs should represent a substantial contribution towards the party's reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity."

[9] In *Williamson* v. *Williams*, [1998] N.S.J. No. 498 (C.A.) Freeman, J.A. stated:

> "In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[10] The *Williamson* v. *Williams* case resembles the case at bar. It is one of those cases where the tariff is insufficient and a middle ground must be found between party and party tariff costs and solicitor and client costs. In these types of cases the amount involved is such that a tariff award cannot be said to be a substantial contribution. These cases are also unique in that the amount involved is not reflective of the complexity of the case and the resources required to bring the matter to trial.

[11] I accept that there should be deference paid to the tariff and a court should only depart from the tariff in limited circumstances. I believe this is one of those cases.

[12] There were a number of factors in this trial which contributed to Mr. Wilmot's $28,855 legal bill.

[13] The most significant factor was the defendant's efforts to settle very early in the dispute. These efforts were spurned by the plaintiff notwithstanding Mr. Bernard's acceptance of the final offer. The original outstanding account stood at

$22,933.50. Mr. Bernard took this account to Mr. Cope, the Band administrator, who refused to pay it. Mr. Cope then sent Mr. Bernard back to Mr. Wilmot seeking a further reduction.

[14] Mr. Wilmot then agreed to reduce the outstanding account to $15,341.34. Mr. Bernard took this account to Mr. Cope who rejected it and directed him to return to Mr. Wilmot seeking a further reduction. Mr. Wilmot agreed to further reduce the account to $6,511.76. Mr. Cope refused to pay this third account.

[15] In my decision I stated at paragraph 56:

> "I am satisfied that when Mr. Wilmot reduced these accounts, he was not acknowledging that they were excessive. He was engaged in settlement discussions with Band Council representatives. Their goal was to arrive at a without prejudice settlement of the outstanding account. While Mr. Bernard accepted the $6,511.76 on behalf of Band Council, they refused to pay the account."

[16] There was nothing else that Mr. Wilmot could do to resolve the dispute short of walking away from the claim. This was not feasible given that the plaintiff was suing him for a $25,014.18 overpayment, an overpayment I found to have no basis in fact.

[17] I found that the “changes and extras” were anticipated in the original agreement between the parties. I also found that they were approved by Mr. Bernard on behalf of the plaintiff. It is my estimation that the majority of the pre-trial procedures related to “changes and extras”. I further estimate that most of the trial time was spent analysing and dissecting same. This is another factor supporting the exercise of my discretion in relation to costs.

[18] The report and evidence of the plaintiff’s expert, Mr. Campbell, dealt with items that were not helpful to the court. I found in my decision at paragraph 41 that “I did not find Mr. Campbell’s expert evidence to be of assistance in resolving these issues.” This evidence did not consume a great deal of trial time. It did, however, contribute to an expansion of the entire litigation process.

[19] A further factor supporting the exercise of my discretion was the plaintiff’s position that the $48,114.10 paid to Mr. Wilmot was paid by mistake. The evidence at trial did not support that position. I stated at paragraph 50 of my decision:

> “In light of my findings, it is not necessary to address the arguments concerning “payment by mistake”. There is no evidence to support an argument that the

> $48,114.10 was paid to Mr. Wilmot by mistake. This is an argument designed to deal with the litigation. It has no substantive support."

[20] This position was developed by the plaintiff to the point of alleging fraud on the part of Mr. Wilmot. These allegations inflamed the litigation, did little to promote settlement and extended the process.

[21] The plaintiff argues that I should limit the cost award because the defendant failed on his damage claims. While this may be the case, I do not find that these issues lengthened the pre-trial or trial process. Mr. Wilmot included these in his counterclaim but did little to develop evidence in support of damages. The plaintiff had little to respond to at trial.

[22] I award the plaintiff a lump sum of $15,000. The defendant will have his disbursements in the amount of $2,233.19. Pre-judgment interest is set at 3.3 per cent.

J.