**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Elmsdale Landscaping Ltd. v. Nova Scotia (Environment), 2010 NSSC 127

**Date:** 20100407
**Docket:** Hfx 314256
**Registry:** Halifax

**Between:**

Elmsdale Landscaping Limited, a body corporate
Basin Contracting Limited, a body corporate, and it's affiliated company,
Gallant Aggregates Limited, a body corporate

Appellants

v.

Nova Scotia (Minister of Environment) and
2514869 Nova Scotia Ltd.

Respondents

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| **Judge:** | The Honourable Justice Patrick J. Duncan |
| **Heard:** | November 9, 2009, in Halifax, Nova Scotia |
| **Written Decision:** | Re Costs - April 7, 2010 |
| **Counsel:** | Alan Hayman, Q.C. and Paul Thorne, for the Elmsdale Landscaping Limited<br>Charles Thompson, for numbered company<br>Aleta Cromwell, for the Minister of Environment |

**By the Court**:

**INTRODUCTION**

[1] Elmsdale Landscaping Ltd., Basin Contracting Ltd., and Gallant Aggregates Ltd. (Elmsdale) initiated a judicial review seeking to overturn the decision of the Nova Scotia Minister of Environment which decision granted governmental approval to the respondent, 2514869 Nova Scotia Ltd. (869 NSL) for the construction of a quarry in Lantz, Nova Scotia. Such approval is required by the combined effect of **Activities Designation Regulation** 13 (f) and Part V of the **Environment Act** SNS 1994-95, c. 1.

[2] In a decision reported at 2009 NSSC 358, I dismissed Elmsdale's application and invited the parties to tender submissions as to costs by correspondence in the event that they could not agree among themselves. I am advised that the issue was satisfactorily resolved as between Elmsdale and Nova Scotia (Minister of Environment) but there is a disagreement as between 869 NSL and Elmsdale.

[3] The relevant factual history is set out in the decision on the merits and I incorporate those facts into this decision by reference. 869 NSL has identified supplementary information it says is relevant to an award of costs. That

information includes the history of certain pre-hearing motions which I will review in the context of its arguments in support of an award of increased costs.

**APPLICABLE RULES**

[4] The court has a general discretion with respect to the payment of costs and may make any order that satisfies the court that will do justice as between the parties. *see,* **Nova Scotia Civil Procedure Rule** 77.02

[5] The court has a number of options available to it in exercising this general discretion. **Rule 77.03** provides that the court may make an order directing the parties to bear their own costs, pay costs to another on a party and party basis or on a solicitor and client basis. **Rule 77.06** directs that party and party costs must, unless otherwise ordered, be fixed in accordance with the tariffs determined under the **Costs and Fees Act** R.S. c. 104. **Rule 77.08** provides a discretion to the court to award lump-sum costs instead of tariff costs.

[6] 869 NSL argues that it should receive an award of costs made payable on a solicitor and client basis, and in the amount of $11,837.50 plus fees, disbursements

and HST for a total of $13,911.61. In the alternative, it requests an award of lump-sum costs in the total amount of $8,000 plus disbursements. In the further alternative it argues for the amount payable under **Tariff C** to be subject to a multiplier of 4, again resulting in an award of $8,000.

[7] Elmsdale rejects this position and requests that costs be awarded in the amount of $2,000 plus disbursements on the basis of a full-day hearing and pursuant to **Tariff C.**

**ANALYSIS**

**Solicitor and client costs**

[8] **Rule 77.03 (2)** authorizes a judge to order solicitor and client costs “in exceptional circumstances recognized by law”.

[9] I have been referred to and considered the decisions in *Smith’s Field Manor Developments Ltd. v. Campbell* 2001 NSSC 44, *Young v. Young* [1993] 4 S. C. R.

3, *National Bank Financial Ltd. v. Potter,* 2008 NSSC 213 and *Campbell v. Lienaux* (1997) 165 N.S. R. (2d) 356 (NSSC).

[10] The law is relatively clear. Solicitor and client costs are awarded only in "rare and exceptional circumstances" and should generally only be awarded where there has been "reprehensible, scandalous or outrageous conduct" by one of the parties. Solicitor and client costs are awarded to express the court's disapproval of such conduct.

[11] Courts have stated that "reprehensible" has been held to include "milder forms of misconduct" where it is "deserving of reproof or rebuke".

[12] Such conduct however, even if found to have taken place does not always mean that solicitor and client costs should result.

[13] Finally, I am reminded that there are some cases where such an award is appropriate as the circumstances show that the successful party should not be put to any expense for costs.

[14] 869 NSL does not take issue with the manner in which Elmsdale litigated the issue. Instead it argues that the pre-litigation conduct of Elmsdale is relevant to its position that solicitor client costs are appropriate. The evidence suggested that Elmsdale moved a building onto its property at a time and place that was intended to frustrate the application for quarry approval, and further that it was done for commercial purposes, not for reasons of environmental protection. That is, it was intended to eliminate 869 NSL as a potential competitor to its adjoining business.

[15] 869 NSL points to my decision which included the following:

> [59]...The timing and location of the arrival of this building could easily cause one to infer that it was put there as a purposeful and vexatious attempt by the neighboring quarry to block the establishment of this new business. The LRIS mapping shows that the appellants have substantial lands bordering two sides of the respondent company. It is worthy of comment that this particular location was chosen at that particular time to move this camp in.

[16] 869 NSL refers me to **The Law of Costs,** 2nd ed., (Orkin) (Aurora: Canada Law Book, 2006) at page 2-10, as authority in support of its position that pre-litigation conduct is relevant to the exercise of discretion in ordering costs.

[17] Elmsdale acknowledges that pre-litigation conduct may be relevant but that the authority relied upon by Orkin refers to a circumstance where the party's conduct was held to be reprehensible because it forced the other party to commence litigation in order to resolve the matter. That is not the case in this matter.

[18] The appellant correctly point out that its' conduct was not prohibited by the **Pit and Quarry Guidelines 1999** which were at the core of the legal dispute. It says that those guidelines were "vague and uncertain" and failed to provide guidance as to whether this building would be considered a "structure" under the guidelines. In the absence of clarity, or prior judicial interpretation, their actions were not "reprehensible, scandalous or outrageous".

[19] I agree with Elmsdale that the **Pit and Quarry Guidelines 1999** did not speak specifically to the facts of this case and there was nothing to prohibit the appellants, notwithstanding their aggressive acts to stave off competition, from acting as they did. I do not find this case to be one of those exceptional ones that attracts an order of solicitor and client costs.

**Costs payable under Tariff C**

[20] The parties agree that this matter falls under **Tariff C** appended to **Rule 77** and that since the matter took a full day it would normally result in an award of costs in the amount of $2,000. There is a discretion to vary from that amount in circumstances where it is "just and appropriate" to so. The relevant provision is:

> Tariff C
>
> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
>
> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>
> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.
>
> (such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals

> and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

[21] I have considered the position of 869 NSL and have concluded that it is appropriate to apply a multiplier to the **Tariff C** amount.

[22] The decision on judicial review was determinative of the entire matter at issue in the proceeding. *see*, s. 138 **Environment Act** SNS 1994-95, c. 1.

*Complexity of the matter*

[23] At issue were a number of questions that rendered the matter somewhat complex. There were prehearing applications by both parties to adduce fresh evidence on the judicial review.

[24] The standard of review in the post *Dunsmuir* era *i.e., New Brunswick (Board of Management) v. Dunsmuir* 2008 SCC 9, had not been previously resolved for the review undertaken in this case.

[25] There was, as Elmsdale has pointed out, a vague and uncertain meaning for the word “structure” contained in section IV (2) (c) of the **Pit and Quarry Guidelines**, which emboldened them to act in a manner intended to block the approval process. It is clear that while they were not prohibited from acting as they did, that same provision presented counsel with a somewhat complex interpretation argument in order to assess the reasonableness of the Minister’s decision.

*The importance of the matter to the parties*

[26] 869 NSL invested in the land acquisition and in undertaking a variety of steps to obtain the necessary approval to start up the quarry business. If the appeal was successful and the approval denied, 869 NSL would have suffered losses for these costs, and would have lost its opportunity to operate the business and to generate income. The result was determinative of its’ ability to do business.

[27] For the appellants, the inference is that it was a matter of considerable importance likely driven by the hope of keeping 869 NSL from entering into competition with them.

*The amount of effort involved in preparing for and conducting the application*

[28] In addition to the one day hearing for the judicial review, 869 NSL was required to seek approval to join the proceeding, which was necessitated by the failure of Elmsdale to name it as a respondent to the judicial review application.

[29] In one prehearing motion, 869 NSL successfully argued in favor of the admission of an affidavit on its behalf, and in opposition to a motion by the appellants to have two affidavits admitted.

[30] Following that court appearance, the appellants made another motion to admit additional affidavit evidence. The motion was denied after a telephone conference hearing.

[31] 869 NSL says that it is entitled to a substantial contribution to its' costs as a successful party and that $8,000 plus disbursements is the appropriate contribution.

[32] I have considered the position put forward by the appellants, but am satisfied having regard to my comments on the factors set out above that this a a case where a multiplier of 2 is appropriate, resulting in costs of $4000, plus disbursements.

**Lump Sum Award**

[33] As I am satisfied that costs are resolved appropriately by application of the provisions of **Tariff C**, it is unnecessary to consider 869 NSL's arguments in favor of such an award.

[34] **CONCLUSION**

[35] For the reasons set out herein I direct that a multiplier of 2 will be applied to the sum otherwise payable under **Tariff C**. In the result, Elmsdale will pay to 869 NSL the sum of $4,000 plus disbursements.

DUNCAN J.