

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Chisholm v. Nova Scotia (Attorney General), 2009 NSSC 29

**Date:** 20090202

**Docket:** Pic No. 269506

**Registry:** Halifax

**Between:**

Agnes Lillian Chisholm

Plaintiff

and

The Attorney General for the Province of Nova Scotia,  
representing Her Majesty The Queen in right of the Province of Nova Scotia,  
and Harry Alexander Rudolph and Diane Lyn MacLeod

Defendants

and

M. G. Ventures Limited

Third Party

**And Between:**

Harry Alexander Rudolph and Diane Lyn MacLeod

Plaintiffs by Counterclaim

and

Agnes Lillian Chisholm and James Daniel Chisholm

Defendants by Counterclaim

**Judge:**

The Honourable Justice John D. Murphy

**Heard:**

October 20, 21, 22, 23; 30, 2008, in Pictou, Nova Scotia

**Final Written**

**Submissions:**

November 21, 2008

**Counsel:**

Frank E. DeMont, for the plaintiff and defendant by  
counterclaim

John T. Rafferty, Q.C., for the defendants and plaintiffs  
by counterclaim

Jill Graham-Scanlan, for third party

**By the Court:**

[1] The parties have asked the Court to determine the basis upon which costs should be awarded following dismissal of the Plaintiff's claim, to direct responsibility for third party costs, and to set amounts payable.

**BACKGROUND**

[2] During August 2006 the Plaintiff, who owns a residential property in the Town of Pictou, commenced action under the *Quieting of Titles Act*, R.S.N.S. 1989, c.382, claiming possessory title to part of an adjoining lot. The Defendants hold "paper title" to that lot, acquired by warranty deed from the third party during 2003. The Plaintiff's claim was based upon use of the disputed land between 1973 and 2006.

[3] After engaging in extensive pre-trial procedures, all parties presented evidence and submissions during four-days of trial at Pictou in October 2008. The parties reconvened the following week to receive an oral decision, which rejected all bases upon which the Plaintiff advanced her claim and ruled that the Defendants' "paper title" prevailed. The reasons provided for the decision

indicated that where the evidence given by the Plaintiff and her husband conflicted with that advanced on behalf of the Defendants and Third Party, the Court preferred the testimony of the Defendants and Third Party.

[4] The disputed land has a modest market value history, forming a relatively small portion of the lot purchased by the Defendants from the Third Party for approximately \$15,000.00. The disputed portion, however, is essential to that lot's suitability for residential construction. Both Plaintiff and Defendants have a strong emotional bond with the property - the Plaintiff's family regularly accessed the disputed area for many years while occupying the adjacent home, and the Defendants, after a substantial search, had selected the lot as an especially suitable site for their retirement home.

[5] After hearing the oral decision and reasons for dismissing the claim counsel for the Defendants and Third Party were prepared to speak to costs, but the Plaintiff requested an opportunity to make written submissions, and it was agreed that costs issues would be addressed in writing. The Plaintiff and Defendants each provided extensive briefs, and the Plaintiff made a reply submission. The Third

Party seeks costs in the Court's discretion from either of the other parties, and did not make a written submission.

### **The Position of the Parties**

[6] The Plaintiff acknowledges responsibility to pay costs to the Defendants, but maintains that because of the land's relatively low value and the absence of complex issues, the award should reflect the Basic Tariff Scale for a two and a half to three-day trial involving \$20,000.00. The Plaintiff denies responsibility for third party costs, and suggests those costs should be borne by the Defendants because the Third Party was added unnecessarily.

[7] The Defendants seek solicitor-client costs against the Plaintiff and request that the Court order the Plaintiff to pay the Third Party's costs directly. In the alternative, if solicitor-client costs are not recovered, the Defendants suggest the "amount involved" should be set in the range of \$60,000.00, and they seek increased party-party costs by way of a gross sum in lieu of or in addition to an award based upon the Tariff of costs and fees.

[8] The Third Party does not request enhanced costs.

## **ANALYSIS**

### **Solicitor and Client Cost**

[9] In requesting an award on solicitor-client basis, the Defendants emphasize the Court's discretion under **Civil Procedure Rule 63**, and the principles recognized in **Orkin**, The Law of Costs, 2<sup>nd</sup> ed. 2-9 to 2-10, **National Bank Financial Limited v. Potter**, [2008] N.S.J. No. 291, **Young v. Young**, [1993] 4 S.C.R. 3, and **Petten v. E.Y.E. Marine Consultants**, [1998] N.J. No. 37 (Nfld. S.C.T.D.). Those authorities support awarding solicitor-client costs against a party responsible for reprehensible, scandalous or outrageous conduct. The Defendants argue that the Plaintiff deserves rebuke for such action because a lawsuit which had no possibility of success was pursued. In their brief, the Defendants identify the following activity by the Plaintiff as warranting the Court's censure by ordering her to fully indemnify the Defendants' legal expenses:

Commencing action based upon adverse possession, when the Plaintiff knew consent to enter and mow grass on the disputed land had been provided by the owners.

Commencing action after making requests to purchase the property, which acknowledged title in the Third Party and Defendants.

Commencing action when there was no mistake regarding the boundary line.

Use of intimidation by the Plaintiff's husband, including implying that his authority as a public employee could impede Defendants' construction on the property.

Employing tactics such as filing statutory declarations and delaying service to invoke the cost of legal proceeding as a club to discourage Defendants from asserting their rights.

Filing pleadings that did not constitute a cause of action.

Advancing inflated and unsustainable claims which were later withdrawn.

[10] The Plaintiff maintains that her case was conducted within the bounds of appropriate conduct, and that if any impropriety took place, it occurred prior to trial when the Plaintiff had different counsel and has already been addressed by substantial interlocutory cost award.

[11] Although the Defendants achieved complete success, this is not a case where the Plaintiff's conduct was so egregious as to warrant a solicitor-client costs award. Decorum and courtesy prevailed in the courtroom during trial. While it may have been misguided for the Plaintiff to pursue the claim, I am not convinced it was advanced maliciously or recklessly, or that the Plaintiff fully appreciated that the claim was groundless. In reaching this conclusion, I find support in **Petten**, *supra* at paras.87 and 88, where the Newfoundland Supreme Court offered the following guidance when considering whether to award solicitor-client costs:

87 The analysis of this issue must be undertaken from the point of view, reasonably assessed, of the party who is potentially subject to the award, and not

from the judge's point of view with the benefit of hindsight after having heard the case. To do otherwise would expose potential litigants to a significant risk of costs, dissuade the development of the law by the submission of novel claims and discourage or impede litigants' access to the courts. The deliberate, or even possibly the reckless, pursuit of a claim known or believed to be unfounded will often be good evidence of having taken the action out of malice or for other improper motive and thereby constitute an abuse of process which would fall within the notion of reprehensible, scandalous or outrageous conduct. The importance of examining whether a claim is in fact unfounded is with respect to the inferences which may be drawn concerning the motivation of the claimant. It is for this reason that when examining the question of whether a claim is unfounded the focus must be on the knowledge base of the claimant and his solicitor rather than on the basis of hindsight. The correct approach is exemplified by the following comment of Hardinge, J. in **Shedwill v. Wilson** (1991), 48 C.P.C. (2d) 70 (B.C.S.C.) at p.73:

With the benefit of hindsight I have decided the allegation was unfounded. However, looking at the matter from the point of view of the plaintiffs when they commenced their action and even at trial, I am not prepared to go so far as to say the allegation was obviously unfounded, made recklessly or out of malice.

88. The distinction must be drawn, when viewing cases from the point of view of the claimant, between those which have "little merit" which Young tells us does not form a basis for awarding solicitor-client costs, and those which have obviously no merit. This distinction explains comments in some of the Newfoundland Court of Appeal cases which assert that solicitor-client costs are appropriate where a party has commenced or defended an action "on an obviously frivolous or groundless basis" and where there is a "deliberate advancing of a frivolous claim" which would normally require, additionally, "fraud or other malicious, wanton or scandalous conduct". The advancing of a weak case or one which becomes clear, only with the benefit of hindsight, that it was groundless, will not be sufficient....

[12] Solicitor-client costs awards are reserved for very limited circumstances, and

I do not find the Plaintiff's conduct fell so far short of the norm as to attract censure by requiring full indemnity of the Defendants' expenses.



## **Party and Party Costs**

[13] Tariff 'A' for party and party costs established under the *Costs and Fees Act*, R.S.N.S. 1989 c. 104, includes three fee scales for consideration in relation to the amount involved or at issue in the claim. The disputed property represents a portion of a lot which sold for \$15,000.00 in 2003, after being on the market for some time. The Defendants maintain that this case involved non-monetary issues recognized by the Tariff as relevant to a costs award because of the complexity of the proceeding and the importance of the property to the parties. They request that the Court adjust the "amount involved" and attribute a \$60,000.00 value, based on using a rule of thumb of \$15,000.00 per day of trial in order to address those considerations, and to recognize that a cost award should substantially indemnify a successful party for expense incurred.

[14] The "basic" Tariff 'A' Scale "2" prescribes a \$4,000.00 cost award if the amount involved is under \$25,000.00, \$6,250.00 if it is between \$25,000.00 and \$40,000.00 and \$7,250.00 if the case involves between \$40,000.00 and \$65,000.00. The tariff also prescribes an award of \$2,000.00 for each day of trial.

[15] The Defendants submit that as well as basing costs on \$60,000.00 “amount in issue”, the Court should award an additional lump sum pursuant to authority under *Rule 63.02*. The Plaintiff maintains that the “amount involved” should be deemed as less than \$25,000.00, costs should be assessed on the basis the trial should have taken no more than three days, and when making the award the Court should recognize that the Plaintiff and her husband have modest means.

[16] The Defendants’ testimony described the efforts they have expended designing a home which adapts to the topographical irregularities of their property, and explained the particular features of the waterfront lot which make it especially suitable for pursuit of their recreational activities. It is apparent that the disputed portion is essential to the lot’s development, and the basis of its value. Because the Defendants have invested substantial time and resources acquiring and preparing the property for construction, which has been delayed by the Plaintiff’s action, the “amount in issue” in the principal claim should not be limited to the property’s purchase price in 2003, or to a value of “no more than \$20,000” advocated by the Plaintiff. However, I do not subscribe to the Defendants’ theory that amount in issue should be a *per diem* value based on trial length - that factor is addressed in

the \$2,000.00 daily costs component in the tariff and its use to determine “amount involved” would be artificial. In my view, the amount in issue for determination of costs recoverable by the Defendants is substantially more than the sale price for the lot approximately six years ago, and I fix it at \$30,000.00.

[17] No significant departure from the Basic Scale “2” is warranted when assessing costs recoverable by the Defendants. Although the issues were very important to the parties, they were not extraordinarily so, nor was the proceeding so complex or so simple that movement to a scale higher or lower than basic is warranted.

[18] I reject the Plaintiff’s suggestion that costs should be assessed based on a reduced trial time. The trial was not extended as a result of any conduct on behalf of the Defendants or the Third Parties, who responded efficiently to address all the aspects the claim advanced by the Plaintiff.

[19] In both the original and reply submissions, Plaintiff’s counsel emphasizes that his clients are litigants of modest means and suggests that the Court should not make costs awards which limit access to justice. The information provided to the

Court indicates the Plaintiff is employed as a hairdresser and that her husband has a long-term responsible position with the Town of Pictou. Fees prescribed in the tariff are modest relative to the real cost of litigation, and no reduction in a costs award is warranted based on the Plaintiff's circumstances. Unless there are exceptional reasons for doing so, successful defendants should not be penalized because they have been sued by persons who do not have extensive resources.

[20] The Plaintiff should pay the Defendants' costs in accordance with the basic scale prescribed in the Tariff of Fees for a case involving \$30,000.00. Because the "length of trial" included, in addition to the four days of testimony and submissions, additional attendance by Defence counsel for at least one interlocutory motion without a costs award and a "decision day" when the Defendants and their counsel necessarily travelled from Truro to Pictou, and because the Plaintiff requested that costs determination be postponed pending written submissions despite Defence counsel's readiness on the day decision was rendered, I fix the "length of trial" for purposes of Defendants' costs award to be five days. Accordingly, the Defendants shall recover the following amount from the Plaintiff:

<b>Tariff A (Scale 2) \$30,000.00.....</b>	<b>\$ 6,250.00</b>
<b>Five days trial x \$2,000.00.....</b>	<b>\$ 10,000.00</b>
<b>Total.....</b>	<b>\$ 16,250.00</b>

[21] Defendants shall also be entitled to recover from the Plaintiff all disbursements reasonably incurred, including costs for travel from Truro to Pictou arising from the litigation.

**Third Party Costs**

[22] The Third Party seeks its costs; the Plaintiff maintains they should be paid by the Defendants and the Defendants submit the Plaintiff should be held responsible.

[23] A plaintiff may be responsible for costs of a third party if the joinder of the third party by the defendant was reasonable in the circumstances. Courts exercise discretion to require an unsuccessful plaintiff to pay third party costs when the issues raised in a third party proceedings are closely linked to or interrelated with those in the main action. Courts determine liability for third party costs after assessing what is fair in the circumstances (see **Orkin**, The Law of Costs at 2-119;

**Inglis Limited v. South Shore Sales and Service Limited**, [1979] N.S.J. No. 561 (A.D.); **N.S. Tractors and Equipment Ltd. v. G.A. Redmond Trucking and Demolition Ltd.**, [1978] N.S.J. No. 30; **Cox v. Murphy** (1990), 97 N.S.R.(2d) 406; **Dartmouth v. Acres Consulting Ltd.**, [1995] N.S.J. No. 181; **Milina v. Bartsch**, 1985 CarswellB.C. 136.

[24] It was reasonable and necessary for the Defendants to join the Third Party in this case. Defendants obtained a warranty deed for the property in dispute from the Third Party in 2003, approximately three years before the Plaintiff started a proceeding based on a possessory title claim which spanned a period during which the Third Party held “paper title” longer than did the Defendants. The Plaintiff had direct contact with the Third Party concerning the property. The evidence related to conveyances of the property, with the Defendants relying upon warranty of ownership from the Third Party. The Third Party proceedings followed inevitably from the principal action, and the joinder of the Third Party was consistent with procedure encouraged by rules of court to avoid multiple proceedings. The decision reflects findings of fact based upon testimony from the directing mind of the Third Party, who was thoroughly cross examined by the Plaintiff.

[25] Issues among all parties in this litigation involved related conveyances of the same property and arose inevitably from pursuit of the Plaintiff's claim. It was reasonable and not over-cautious in the circumstances of this case for the Defendants to join the Third Party and the unsuccessful Plaintiff should bear the Third Party's costs.

[26] Because the Defendant led the response to the Plaintiff's allegation, the Third Party acknowledged liability to the Defendant if the Plaintiff's claim succeeded, it did not make a substantive submission with respect to costs, and because it was not an owner whose use of the land was interfered with by the litigation, I have concluded that the costs recoverable by the Third Party should be assessed differently than those payable to the Defendants. That finding should not be construed as criticism of the Third Party or its counsel - it reflects only my assessment of the complexity and importance of the proceeding from different parties' perspectives and the less onerous preparation and travel requirement imposed on the Third Party.

[27] The Plaintiff shall pay to the Third Party costs in the amount of \$12,688.00 based on an “amount involved” of \$30,000.00 assessed on Scale “1” for four days of trial, together with reasonable disbursements.

[28] I direct that the Defendants prepare an Order reflecting the decision given October 30<sup>th</sup>, and this ruling respecting costs. The procedure set out in *Rule 78.04(3)(a)(b)(c) and (d)* of the **Nova Scotia Civil Procedure Rules** should be followed.

J.