

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Nova Scotia Power Inc. v. AMCI Export Corporation, 2009 NSSC 142

**Date:** 20090428

**Docket:** Hfx. No. 219171

**Registry:** Halifax

**Between:**

Nova Scotia Power Incorporated

Respondent/Plaintiff

v.

AMCI Export Corporation

Applicant/Defendant

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**DECISION ON COSTS**

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**Judge:** The Honourable Justice Arthur J. LeBlanc.

**Heard:** May 12, 2008, June 20, 2008,  
September 12, 2008, October 23, 2008,  
January 22, 2009, February 6, 2009  
in Halifax, Nova Scotia

**Final Written  
Submissions On Costs:** February 20, 2009

**Counsel:** Craig Garson, Q.C., for the applicant  
David Coles, Q.C., with Rebecca Hiltz-LeBlanc  
for the respondent

**By the Court:**

[1] This is an application for costs arising out of an application for summary judgment. The plaintiff/applicant (hereafter the plaintiff) applied for summary judgment in respect of a portion of the defence filed by the defendant/respondent (hereafter the defendant). The application resulted in the striking of para. 8 of the defendant's Second Amended Defence (the "shipping defence). That decision can be found at 2008 NSSC 49.

[2] After the summary judgment application, the court was required to undertake a detailed review of certain documents, specifically, notebook entries the possession of certain officials of the plaintiff, whose significance came to light too late to be considered in the summary judgment application. The purpose of this review was to determine whether they had a semblance of relevancy to the issues in the proceeding or were subject to solicitor-client privilege. The review was done over three days in October and November 2008, in addition to time spent determining the procedure to be followed. As a result of this review, I ordered the plaintiff to produce additional documents to the defendant.

[3] Subsequent to the document review, in February 2009, I dealt with an application by the defendant to recuse myself on the basis of reasonable apprehension of bias or to declare a mistrial as a result of the plaintiff's inadequate disclosure of documents. I dismissed this application on both counts. I asked counsel to file written submissions on costs in respect of three distinct applications: the summary judgment application, the application to have the documents reviewed by the court and the bias/mistrial proceeding.

### **Principles of costs**

[4] This proceeding was dealt with under the *Civil Procedure Rules 1972*, which addressed costs in *Rule 63*.

[5] The fundamental principle is that “the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court”: *Rule 63.02(1)*. Unless the court otherwise orders, costs follow the event: *Rule 63.03(1)*. Unless otherwise ordered, costs are fixed in accordance with the *Tariffs*, with the “amount involved”

determined by the court: *Rule 63.04(1)*. Pursuant to *Rule 63.04(2)*, in fixing costs the court may also consider:

- (a) the amount claimed;
- (b) the apportionment of liability;
- (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;
- (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
- (g) the neglect or refusal of any party to make an admission which should have been made;
- (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;
- (i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and

(j) any other matter relevant to the question of costs.

[6] There is no dispute that the applicable tariff is the 2004 *Tariffs of Costs and Fees*, specifically *Tariff C*, which applies to costs arising from chambers applications.

### **Costs of the summary judgment application**

[7] The plaintiff says this was a complex proceeding, requiring two days of hearings, cross-examination on affidavits and argument. The plaintiff says the summary judgment application resolved a significant area of dispute between the parties and simplified the issues for trial. Submitting that costs are intended to compensate a successful litigant by providing a substantial contribution towards their costs, the plaintiff asks the court to multiply the *Tariff* amount of \$4,000.00 by three on account of the alleged complexity of the subject matter, the importance of the issues and the effort required to prepare for the application.

[8] The plaintiff refers to paras. (3) and (4) of *Tariff C*, which provide the following guidelines:

(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.

[9] According to *Tariff C*, the range of costs is subject to the length of time required for hearing the application. For less than one hour, costs are between \$250.00 and \$500.00. For more than one hour but less than a half-day, costs are between \$750.00 and \$1,000.00. For more than a half-day but less than a full day, costs are between \$1,000.00 and \$2,000.00, and for one day or more, \$2,000.00. The summary judgment application involved two days of hearing, suggesting a range of \$2,000.00 per day.

[10] The defendant notes that the plaintiff sought costs of \$4,000.00 in correspondence dated March 7, 2008, and again on November 24, 2008. The defendant acknowledges the plaintiff's entitlement to costs, and does not take issue with an amount of \$4,000.00. I see no basis to multiply the amount of costs as requested by the plaintiff. Contrary to the plaintiff's view, this was a typical summary judgment application. As the plaintiff says, the application disposed of a defence and simplified the issues for trial, but this is not unusual for a summary judgment application. There was nothing unusual or exceptional about the application. The deponent of one affidavit was cross-examined by the defendant. The defendant did not file any reply affidavits. This was not a case, for instance, where there were more than two parties involved.

[11] On the summary judgment application, the plaintiff shall have costs in the amount of \$4,000.00, all-inclusive.

**Costs of the disclosure application**

[12] On April 2, 2008, the defendant applied for disclosure of documents, pursuant to *Rules* 20.02(b) and 20.07(1), seeking full production of notebooks in

the hands of Barrie Fiolek and Colin Thompson, who were officials of the plaintiff. The defendant sought a court review of documents whose significance only became evident during discovery examinations of two of the plaintiff's witnesses, Mr. Thompson and Mr. Fiolek. The need for the application was well established in the circumstances, given the obligation to produce any documents that had a semblance of relevancy and the additional disclosure that was sought and ordered. Mr. Garson attended on multiple occasions to deal with this application. While the documents ordered disclosed did not include any items that had a substantial effect on the proceeding, nevertheless the proceeding was justified and occupied a significant quantity of time for counsel. Mr. Garson had pursued disclosure from the plaintiff throughout the proceeding – during the summary judgment application and at discovery – and was justified in seeking further disclosure. It is unclear whether Mr. Thompson and Mr. Fiolek did a careful review of their books and records prior to the summary judgment application or prior to discovery. What is clear is that there were more than 65 pages of additional disclosure produced by the plaintiff or ordered by the court after the summary judgment application was heard. This omission goes beyond simple error or oversight, and caused additional proceedings and delay that would not have been necessary had the plaintiff conducted an adequate review in the first place.



[13] The plaintiff calls for a reduction of costs, due to the absence of a “bomb” favouring the defendant among the documents that I ordered produced, and seeks a set-off of costs incurred in reproducing some 3,868 documents, those being the contents of the lists and supplemental lists of documents, which were supplied to the court before the review at the defendant’s request. Such a set-off would be authorized by *Rule* 63.02(1)(c). The plaintiff requests a set-off of \$1,097.42 in disbursements for photocopying and binding, plus \$300.00 in legal fees incurred in reviewing the lists of documents in order to remove notations from the documents before they could be copied. I am not persuaded that such a set-off would be appropriate in the circumstances.

[14] Mr. Garson attended court on this aspect of the application on at least four occasions, on May 12, 2008, for less than a half-day; June 20, 2008, for less than a half-day; September 12, 2008, for one day; and October 23, 2008, for less than a half-day. The plaintiff suggests that the defendant should receive costs of \$2,000.00, minus a set-off of \$1,397.42. In this instance, based on the time required and the necessity of the court reviewing the documents, I award costs to the defendant under *Tariff C* in the amount of \$3,500.00.

**Costs on the reasonable apprehension of bias/mistrial application**

[15] Approximately half a day was required for this aspect of the proceeding. The plaintiff says the circumstances demand an award in excess of the *Tariff C* amount, which, it is submitted, do not represent a “substantial contribution” to the actual costs incurred. Unlike the plaintiff, I would not characterize this application as a “surprise” application, nor am I convinced that it was unusually complex. However, the defendant’s application failed, and I therefore award costs to the plaintiff in the amount of \$1,000.00.

**Conclusion**

[16] I accordingly award costs on the three applications as follows:

- a) On the summary judgment application, \$4,000.00 to the plaintiff;
- b) On the disclosure application, \$3,500.00 to the defendant;

c) On the reasonable apprehension of bias/mistrial application, \$1,000.00 to the plaintiff.

[17] All costs in this proceeding are payable in the cause.

**J.**