**SUPREME COURT OF NOVA SCOTIA**
**Citation:** Leigh v. Belfast Mini-Mills Ltd., 2011 NSSC 23

**Date:** 20110125
**Docket:** Hfx. No. 272748
**Registry:** Halifax

**Between:**

Gillian Leigh, Wanda Cummings and Toltech Holdings Incorporated

Plaintiffs

v.

Belfast Mini-Mills Ltd. and International Spinners Ltd.

Defendants

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| **Judge:** | The Honourable Justice Arthur J. LeBlanc. |
| **Final Written Submissions:** | July 29, 2010 |
| **Counsel:** | Gillian Leigh, Self-Represented<br>Wanda Cummings, Self-Represented<br>Toltech Holdings Incorporated represented by Gillian Leigh and Wanda Cummings<br>Robert Dickson, Q.C., for the Defendants |

**By the Court**:

[1] Should the Court award costs to the defendant when the applicant sought and obtained an adjournment of a 2 day application in Chambers, three days prior to the hearing, or should the Court award costs to the plaintiffs for claiming that there has been an improper use of documents?

[2] The plaintiffs, Gillian Leigh, Wanda Cummings and their business Toltec Holdings Inc., are self-represented. The plaintiffs are suing the defendants for breach of contract, negligence and negligent misrepresentation relating to issues arising from the purchase of wool processing machinery that they purchased from the defendants. The proceedings were initiated on October 17, 2006.

[3] At the outset, the plaintiffs were represented by counsel. In 2008 the plaintiffs' counsel attained Court approval to withdraw.

[4] Since the withdrawal of the plaintiffs' counsel, the matter has been mixed in procedural issues, this being caused in part by the plaintiffs' difficulty in understanding the provisions of the *Nova Scotia Civil Procedure Rules*.

[5] The plaintiffs filed a motion to convert their action to an application late. The motion was adjourned and the defendants filed their responding materials. The plaintiffs then filed a new motion to convert the proceedings from an action to an application, in conjunction with a motion for summary judgment, together with an application for an interlocutory injunction to prevent the defendants from seeking further documentary production. In support of these combined applications, the plaintiffs filed an additional supporting affidavit, and in the case of the motion to convert, extensive submissions requiring additional response from the defendants. As the new motion and supporting materials were filed with the Court outside the time requirements mandated by the Rules, the hearing was adjourned to July 20 and July 21, 2010, from May 4, 2010.

[6] The plaintiffs withdrew their first motion to convert the proceedings but maintained their second motion to convert from an action to application.

[7] On May 6, 2010, the defendants filed a further motion to seek further documentary disclosure and further discovery. In support of this motion, the defendants filed copies of documents from ongoing civil proceedings the plaintiffs had outstanding against the Department of Community Services, the Capital

District Health Authority, the Department of Justice and the Royal Canadian Mounted Police (under the *Freedom of Information and Protection of Privacy Act*) concerning the release of information relating to the plaintiffs Leigh and Cummings, but unrelated to the underlying action in these proceedings that these government related agencies and departments possessed.

[8] Alleging that this information was privileged, and unlawfully relied upon by the defendants in their May 6, 2010, motion, the plaintiffs sought to have the defendants' motion dismissed, which was denied. In her decision, Robertson, J. determined that the material was not privileged and would not be sealed and, consequently, that it was publically available to anyone, including the defendants.

[9] The plaintiffs were successful in obtaining an adjournment of the May 6 motion to July 20, 2010. On June 3, the plaintiffs filed additional affidavits and submissions in support of their second conversion motion, for summary judgment and an injunction to prevent further discovery.

[10] By letter dated June 15, 2010, I informed the plaintiffs that if they felt aggrieved by the decision of Robertson, J., that they may wish to make a motion

prior to July 20. The plaintiffs filed a Notice of Motion for injunction on June 21, 2010. The Notice requested a hearing prior to July 20 so that the claim of privilege could be dealt with before the other matters. As no available dates were identified, the Prothonotary scheduled the injunction for July 20, 2010 as a "preliminary matter". However the plaintiffs did not take the necessary steps to either complete the materials required or serve the notice or supporting documents on the defendants.

[11] The plaintiffs attempted to have the matter heard earlier than July 20 and on June 30, filed an application to be heard at Appearance Day seeking an injunction to prevent the defendants from relying on allegedly privileged material. Smith, A.C.J., who presided at Appearance Day on June 30, determined that the application in question was not one authorized to be made at Appearance Day and the matter was removed from the docket.

[12] In a letter of July 8, 2010 and July 14, 2010, I informed the plaintiffs of the procedure to be followed in having an expert testify at the hearing, including the procedure for commission evidence.

[13] On July 7, the plaintiffs requested that their expert be able to testify without filing an affidavit at the hearing of July 20. The issue was deferred to July 20 for further argument.

[14] At a pre-hearing conference held Friday, July 18, 2010 with the plaintiffs and counsel for the defendant, the plaintiffs acknowledged that they had not served the defendants with the Notice of Injunction application that they were pursuing at the July 20 hearing. The plaintiffs claimed that the failure to serve the defendants with the injunction application was due to the date provided for the injunction application.

[15] As a result, I adjourned (1) the motions to convert the action to an application; (2) the application for summary judgment; (3) the application for the injunction; (4) for an Order to prevent the defendants from conducting further discovery; and (5) the defendants' motion for further disclosure and discovery, filed May 6, 2010. At the time of granting the adjournment, I pointed out that the reason for the adjournment was due to the plaintiffs seeking an adjournment and that the granting of an adjournment might lead to the defendant seeking costs.

[16] Both the plaintiffs and the defendant now seek costs.

**Issue**

[17] Should costs be awarded to either the plaintiffs or the defendants and, if so, in what amount?

**Position Of The Parties**

[18] The plaintiffs take the position that they should be awarded costs because they allege that the defendants improperly relied on unrelated civil proceedings that contained private personal information which is privileged. The plaintiffs rely on *R v. Hall*, (1977), 163 N.S.R. (2d) 106 for the proposition that improper reliance on privileged information should attract serious costs consequences.

[19] They argue that the responsibility for the adjournment falls on the defendants because of their reliance on allegedly privileged information and that this necessitated the injunction filed June 21, 2010.

[20] The plaintiffs also argue that they were prepared to proceed with the other motions, however the need for an injunction was fundamental to respond to the defendants motion. The plaintiffs claim costs in the amount of $5000: $1000 for a half day hearing pursuant to *Tariff C* multiplied by four because of the factors listed in 4(a) - (c) of *Tariff C,* plus $1000 for costs of injunction to prevent reliance on the allegedly privileged information.

[21] The defendants claim that, as the plaintiffs caused a number of adjournments, costs should be awarded against the plaintiffs, in particular, on account of their adjournment of their motion filed on March 9, 2010, which was scheduled to be heard on July 20. The defendants rely on *Barthe v. National Bank Financial Ltd.*, 2010 NSSC 220 for the proposition that costs can be awarded to a party when a motion is abandoned and then re-filed, requiring that party to prepare unnecessarily for the abandoned motion and expending additional time to respond to the re-filed motion. The defendants also claim that they should be awarded costs for the various adjournments granted to the plaintiffs. The defendants rely on *Morris v. Stuckless* (1994) 138 N.S.R. (2d) 397 for the proposition that costs can be awarded where adjournments are sought by a party and this results in lost preparation time for the opposing party. The defendants are seeking costs of

$6000: $2000 for one day pursuant to *Tariff C* for the abandoned motion, plus $4000 for two days pursuant to *Tariff C* for the adjourned motions scheduled for July 20 and 21, 2010.

**Decision**

[22] A trial judge does not have an inherent jurisdiction to award costs: *Halifax Regional Municipality v. Nova Scotia (Human Rights Commision)* 2005 NSCA 70 However, Rule 77 provides statutory authority for the provision of costs following the resolution of an interlocutory or final proceeding. Rule 77.02 grants a trial judge a wide discretion to award costs in the interest of justice.

[23] Rule 77 permits judges to award costs in the circumstances of this case: (1) for the motions that are abandoned; Rule 77.05; (2) and for motions that do not finally resolve a proceeding: Rule 77.03(4).

[24] Rule 77.03 governs who should be liable for costs as follows:

> Liability for costs

77.03 (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.

...

(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

(4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:

(a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;

(b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;

(c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;

(d) any other way the judge sees fit.

[25] The plaintiffs abandoned their conversion motion filed March 9, 2010 and then re-filed it, in conjunction with other requests, on April 26, 2010. In *Barthe supra*, the plaintiffs filed a motion for a summary judgment, abandoned that motion, and then filed a new motion for summary judgment with more extensive submissions. The plaintiffs were ultimately unsuccessful on their motion for summary judgment. In assessing costs, Hood, J. commented on the impact of the original motion which the applicant had abandoned at para. 29:

> Nova Scotia *Civil Procedure Rule 77.05 (2)* allows costs to be awarded for abandoned motions and NBFL seeks $2,000.00 therefor. NBFL claims this amount pursuant to Tariff C for a full day in Chambers. I do not agree that the additional time and effort in preparing for a summary judgment application which was abandoned should be equated to a full day in Chambers. However, it is clear that there were costs thrown away and additional work required. In all the circumstances, I conclude that $2000.00 is a reasonable amount to be awarded to NBFL for the abandoned motion.

[26] The abandonment by the plaintiffs of their original conversion motion is very similar to the circumstances in *Barthe*. In the matter before me, the plaintiffs filed a motion that was set down for one full day of Chambers. Both parties filed their material for the motion. The plaintiffs then abandoned their motion and re-filed it with more extensive material. That motion has been scheduled on two

different Chambers dates and adjourned at the request of the plaintiffs. The actions of the plaintiffs in abandoning and re-filing their motion and seeking and obtaining the adjournment of the motion of July 20 and July 21, have resulted in costs being thrown away by the defendants and additional work required.

[27] Rule 77.05(2) permits costs to be awarded to the defendant when a motion is withdrawn or abandoned. Following the analysis in *Barthe, supra*, it is my view that the defendants are entitled to costs on this basis, however, before finalizing the amount of costs, I must consider other factors.

[28] Goodfellow, J., in *Morris* (1984), 138 N.S.R. (2d) 397 granted the defendant's adjournment request on the condition that some of the preparation time incurred by counsel and experts be recovered and therefore an award of party and party costs was appropriate and reflected as for as possible the preparation time that has been lost.

[29] Consequently, it appears to me that there is a basis upon which to award party and party costs where an adjournment is sought by a party and this results in lost preparation time for the opposing party.

[30] I am mindful that there is a disagreement between the parties over who was ultimately responsible for the plaintiffs' adjournment request. The plaintiffs claim that the defendants are responsible because they improperly accessed privileged information from unrelated civil proceedings and attempted to rely on this information, which forced the plaintiffs to bring an injunction motion and have it heard before the outstanding motions. The plaintiffs also add that the scheduling issues were beyond their control and this prevented them from having be injunction heard before the other motions, leading them to seek an adjournment of the motions so that the injunction application could be heard first in the sequence of motions. The defendants, on the other hand, argue that the plaintiffs have repeated requests for adjournments on account of their failure to comply with the specific provisions of the *Civil Procedure Rules.*

[31] After careful review, I am unable to agree with the plaintiffs that the cases upon which they rely support their contention that the defendants are responsible for the adjournment. I point out that in *Hall, supra,* the police had seized and later relied on documents that the defendants claimed were protected by solicitor-client privilege. In fact, the Crown admitted that one of the documents in question was

indeed protected by solicitor-client privilege. The defendant asked the Court to award solicitor and client costs against the Crown. Gruchy, J. rejected the request but held that the Crown's failure to consider the defendant's claim for solicitor-client privilege necessitated the vast majority of legal expenses incurred by the defendant and made necessary the application in question adversely affected the manner of the proceeding. At para.15, Gruchy, J. stated that the Crown's decision to open the documents and make them public was "improper and in the circumstances vexatious and unnecessary". This was a factor the that he took into account when assessing the amount of costs awarded.

[32] Although *Hall, supra* may stand for the proposition that improperly obtained documents should mandate an award of costs, this is not the situation that is before me. In this case, Robertson, J. ruled that the documents in question were not privileged or confidential. It is possible that the injunction may be granted but that does not mean that is a basis upon which the plaintiffs can rely on to excuse their many request for last minute adjournments.

[33] It is clear after a careful reading of all of the documents and the court logs that the many adjournments sought and granted to the plaintiffs were on account of

the plaintiffs' inability to comply with the *Civil Procedure Rules* in bringing the matter before the Court on a timely basis. On any reasonable reading of *Hall*, supra, I do not believe it supports the proposition that adjournments resulting from noncompliance with the Rules militate against a party's exposure to costs consequences for the failure to comply with the Rules.

[34] It is important to consider that the plaintiffs are self represented litigants. Self-representation is not an infrequent occurrence where many parties are unable to finance or choose to act without legal counsel. Chief Justice of Canada has made reference to the frequency with which matters are before the courts where there are no counsel for the parties, in remarks made at *The Empire Club of Canada* on March 8, 2007.

[35] From a review of the file, the plaintiffs have experienced difficulty in navigating the complex demands of the Rules. The plaintiffs have appeared on three occasions before this Court and they yet to have their motions heard. Whenever difficulties have presented themselves, it appears that the plaintiffs have recognized and acknowledged that their difficulty in bringing matters forward and

seeking adjournments was because that they were unaware of the provisions of the *Civil Procedure Rules*.

[36] The plaintiffs' inability to fully understand and apply the Rules is highly problematic. This is because the Rules act as a gateway between filing a proceeding and bringing the proceeding to a hearing or trial. It is obvious that without these Rules, parties such as the plaintiffs would not be in a position to get matters to a hearing.

[37] The question that has to be determined is whether courts should be more lenient in awarding costs against self-represented litigants. There are instances where leniency is warranted and, on the other hand, there are situations where no leniency should be extended to the self-represented parties.

[38] In the case of *Manufacturers Life Insurance Co v. Crowe*, 2010 ONSC 3302, at paras. 13 - 15, Brown, J. held that courts should approach costs against self-represented litigants on a case-by-case basis taking into consideration the specific conduct of the particular self-represented litigants:

Fixing of the costs of the motion for proceeding against the self – represented party is always a challenging task. Courts struggle to balance the facts of the lack of skilled technical advice available to litigants who are not represented by lawyers against the need for the courts, as adjudicators, to be, and appear to be indifferent between the interests of both parties to a lawsuit, represented or not.

That task is facilitated, to some extent, by recognizing the reality that self represented litigants do not form a homogeneous group. On the contrary, their characteristics vary widely. Based on my observations from the Bench over 3+ years, I have discerned for broad groupings of self represented litigants in civil matters:

> (i) Those self – represented litigants who are truly lost in the system – generally persons against whom legal proceedings have been commenced, but who lack the education to understand the nature of the proceeding or how to advance the defense;
>
> (ii) Those whom the law describe as parties under disabilities and who suffer from some form of mental illness or mental impairment;
>
> (iii) self – represented parties who lack the resources to hire a lawyer, but who have arguable claims or defences; and
>
> (iv) Those who think they can do better job than a lawyer to proceed within an unreasonable zeal and narrowness of focus in their claims or defences. Although some process claims or defences with merit, there are a large number who, when faced with adverse rulings, tenaciously persist in disregard of the ruling, attempting to vindicate what they perceive as a righteous position.

On a purely impressionistic basis, I would say that the first two groups constitute a small proportion of the self-represented litigants will. Before our court, with the last two groups forming the majority, in the last will perhaps the most numerous of all.

> Given the lack of homogeneity amongst self – represented litigants, it is necessary for the court, in each case involving self-represented a party, to pay close attention to the factors enumerated in rule 57.01 (1) of the Rules of Civil Procedure, particularly those dealing with the reasonable expectations of many a successful party, the conduct the party, and whether any steps were improper, vexatious or necessary: Rule 57.01 (1) (O.b), (e) and (f) fixing costs in such circumstances would be an individualized process, focusing on the characteristics and conduct of the particular self represented litigants, not measured against some abstract notion of the "typical self – represented litigant"

[39] It must be noted, however, that other courts have been less sympathetic to self – represented litigants. In *Ross v. Charlottetown (City),* 2008 PECAD 6the Prince Edward Island Supreme Court Appeal Division stated that the Rules do not discriminate against impecunious litigants and therefore they should be mindful to fight and win motions on pretrial matters that they are likely to clearly win.

[40] In another case, *Mills v. Jemmott,* 2005 Carswell Ont 157 (Ont. S.C.J.) the Court addressed the problems facing self-represented litigants with the application or interpretation of the Rules, at para. 10:

> I am also concerned about determining an amount for costs against an unrepresented litigant. I indicated earlier in these reasons that I am satisfied that much of the delay was brought about by the manner in which the plaintiff conducted for trial, and that much of this case was due to her refusal to accept adverse interlocutory decisions and her determination to proceed in the manner she thought best notwithstanding rulings from the bench that she do otherwise. However some of the delay can, in my view, be attributed to the fact that Mrs. Mills is professionally unskilled in the *Rules of Civil Procedure* and of trial evidence. She is no stranger to the courts and has some other experience in

> conducting a trial. However, some of the mistakes she made were clearly ones brought about by her lack of experience and knowledge of these professional amount is. With the ever-increasing number of unrepresented litigants appearing before the court, the judge, fixed with the responsibility of fixing costs, must take into account the delays and false starts which almost certainly will present themselves in the course of the trial.

[41] I am mindful of these comments, and although I have taken that into consideration, it is important to remember that successful parties who have counsel should not be asked to subsidize the justice system's failure to ensure access to justice or a self-represented litigant's choice not to hire counsel.

[42] I acknowledge that the plaintiffs in this case are not deliberately trying to prolong the civil process. The plaintiffs recognize that they need counsel, but say they simply cannot afford to retain counsel. The plaintiffs say they have already lost their farm because of this litigation. One plaintiff is currently on social assistance while the other is on a meager fixed income. Additionally, the plaintiffs seem incapable, with all the extraneous matters occurring in their lives, to be able to comprehend the Rules. They have attempted to understand. For example, the plaintiffs properly filed the notice of motion for injunction, but could not navigate the process of scheduling this motion and properly serving it on the opposite side. With the exception of their attempt to schedule an injunction on Appearance Day

and the abandonment and refiling of the motion for conversion, the plaintiffs' actions have not been shown to be improper, vexatious or unnecessary. Nonetheless, the results of the plaintiffs' ineptitude with the Rules is repeated non-compliance with the Rules, unnecessary delay of the civil process, waste of judicial resources and lost effort and increased work for the defendants.

[43] In my view, a costs award against the plaintiffs is appropriate, however, it is also proper to take into consideration the fact that they are self-represented litigants, and, more importantly, their lack of financial resources. I acknowledge their efforts to comply with the Rules, as well as their lack of misconduct. I also acknowledge that the counsel for the defendants have had to do some extra work because of the various abandonments and adjournments, but the defendants have not lost the work proudct in its entirety. Although I have referred to the various adjournments caused by the plaintiffs, my award of costs is in relation to the adjournment of the July 20 and 21, 2010 hearing. I come to that conclusion on the basis of the principle set out *Polish National Union of Canada Inc. - Mutual Benefit Society v. Palais Royale Ltd.* 1998, 163 DLR (4th) 56 at para. 61 (Ont. C.A.):

> It was not open to the judge to award costs of a segment of the proceeding with respect to which there was an existing order providing, in effect, that the plaintiff was not entitled to those costs. This principle would not deprive a party who had been awarded costs of a motion on a party and party basis from having the costs provision "topped up" in an order at the end of the proceeding fixing costs of the proceeding on a solicitor and client basis. [emphasis added]

[44] Although Pickup, J. did not make an award of costs at the time he adjourned the hearing of the motions, I believe an award of costs for that event is best left to the trial judge.

[45] In the circumstances of this case, taking all of the above into consideration, I award costs in the amount of $1000, payable in any event of the cause and payable at the end of this proceeding.

**J.**