

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** Doncaster v. Field, 2013 NSSC 110

**Date:** 20130319  
**Docket:** Tru 393916 / 398333  
**Registry:** Truro

**Between:**

Ralph Ivan Doncaster

Appellant

v.

Jennifer Lynn Field  
Attorney General of Canada

Respondents

**DECISION ON COSTS**

**Judge:** The Honourable Justice Cindy Bourgeois

**Heard:** September 18, 2012, in Truro, Nova Scotia

**Final Written Submissions:** February 20, 2013

**Written Decision:** March 19, 2013

**Counsel:** Ralph Ivan Doncaster, in person  
Lori A. Hill, for the Respondent Jennifer Lynn Field  
Edith Campbell, for the Attorney General

**By the Court:**

## **INTRODUCTION**

[1] This Court recently heard two Summary Conviction Appeals and a motion for fresh evidence brought by Ralph Ivan Doncaster. In a decision reported as 2013 NSSC 18, those appeals, and the motion, were dismissed. I have been asked to now address the issue of costs.

[2] By way of background, Jennifer Lynn Field and Mr. Doncaster are spouses, who are currently separated. In early 2012, Ms. Field successfully sought a peace bond against Mr. Doncaster pursuant to Section 810 of the *Criminal Code*. He appealed that decision, along with a subsequent decision of the Provincial Court declining jurisdiction to hear a sought variation.

[3] Because Mr. Doncaster raised the issue of the constitutionality of Section 810 of the *Criminal Code*, the Attorney General of Canada was added as a party. The Attorney General does not seek costs in relation to this matter. Ms. Field, as a successful respondent, does.

## **POSITION OF THE PARTIES**

[4] This Court has received written submissions from both Ms. Field and Mr. Doncaster in relation to this matter, and I have considered their respective positions.

[5] Ms. Field is seeking solicitor-client costs against Mr. Doncaster in the amount of \$5,282.00, reflective of her actual costs in responding to the appeals. In the alternative, Ms. Field seeks a lump-sum award of \$4,000.00. Ms. Field argues that Mr. Doncaster's conduct has been vexatious, and points to the numerous meritless grounds of appeal to which she was forced to respond.

[6] Mr. Doncaster submits that costs should not be awarded against him on two basis. Firstly, as this is a criminal matter, costs cannot or should not be awarded; and secondly, that he is impecunious with no ability to pay costs.

[7] In terms of the Court's ability to make a costs award, Mr. Doncaster relies on two decisions as noted in his submissions:

In *R. v. Cole*, 2000 NSCA 42, the Nova Scotia Court of Appeal considered an appeal from a decision of Justice Suzanne Hood of the Supreme Court ordering the Crown to pay costs to the respondent, Damon Cole, an accused who had succeeded on an application for a stay of proceedings. At para. 50, the Honourable Justice Batement [sic] stated, “As I have already stated, an award of costs in a criminal proceeding is a rare and exceptional remedy.” Justice Batement [sic] concluded the judge erred in ordering costs against the Crown.

The Court only has jurisdiction to make a meaningful costs award against the Crown, and not against the defendant. The issue of costs against a defendant was considered in *R. v. Maleki*, 2007 ONCJ 430. The Honourable Justice M. Lane concluded, “In the face of this jurisprudence, I have concluded that this court has no jurisdiction to make any meaningful order for costs against Mozafar.”

[8] He asserts that even if the Court concludes it has jurisdiction to consider an award of costs, that this proceeding did not justify “such a rare and exceptional remedy”.

## **DISPOSITION**

- a) Is a cost award an available or appropriate remedy in the present instance?

[9] With respect, the two authorities relied upon by Mr. Doncaster have no applicability to the present case. Although I will reference the two decisions later in this decision, the starting point for the analysis is within the *Criminal Code*, which clearly contemplates an award of costs in summary conviction matters.

[10] Section 809 contemplates costs being available at the conclusion of a summary conviction proceeding. As is apparent from the section, the trial judge's discretion to award costs is limited by fees established elsewhere in the *Code*. It reads:

809. (1) The summary conviction court may in its discretion award and order such costs as it considers reasonable and not inconsistent with such of the fees established by section 840 as may be taken or allowed in proceedings before that summary conviction court, to be paid

(a) to the informant by the defendant, where the summary conviction court convicts or makes an order against the defendant; or

(b) to the defendant by the informant, where the summary conviction court dismisses an information.

[11] Costs are also clearly contemplated in summary conviction appeal proceedings, without a restriction as found in the provision above. Section 826 provides:

826. Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.

[12] Neither of the decisions relied upon by Mr. Doncaster relate to Section 826, the *Code* provision relevant to summary conviction appeals. In **R. v. Cole**, 2000

NSCA 42, the Court was addressing whether an award of costs against the Crown was appropriate following a successful application for a stay of proceedings. As such, the Court did not consider Section 826. In my view, a full reading of the decision supports that Bateman, J.A.'s direction that "an award of costs in a criminal proceeding is a rare and exceptional remedy" was primarily directed towards costs against the Crown.

[13] In **R. v. Maleki**, 2007 ONCJ 430, the trial judge, at the conclusion of trial, was asked by the Crown to consider an award of costs against a defendant and his agent. There, the Court considered Section 809 of the *Code* and the inadequacy of the fees provided for in Section 840. The Court, as a provincial trial court, considered it had no further authority to make a costs award against the defendant. This decision cannot be taken as blanket authority, as Mr. Doncaster suggests, that this Court lacks jurisdiction to make an award of costs. Firstly, I do not interpret the trial judge as saying she could not make an award of costs, but rather she questioned the meaningfulness of such an award based on the limitations of Section 840. More importantly, however, is that this decision in no way impacts upon the application of Section 826 of the *Code*.

[14] Having concluded that this Court is not prohibited from considering an award of costs, I agree with the suggestion of Ms. Field that this Court should approach the determination of costs by referencing the Civil Procedure Rules, and in particular, the provisions of Rule 77.

[15] A summary conviction appeal, although a criminal matter, clearly involves the Civil Procedure Rules, most notably Rule 63. Other Rules also have applicability, provided they are not inconsistent with provisions of the *Criminal Code*. Rule 63.03 provides in this regard:

63.03 (1) All Rules outside this Rule apply to the extent that they provide procedures that are suitable to a summary conviction appeal, and are not inconsistent with the provisions of the Criminal Code or this Rule.

[16] From the above, and seeing no apparent inconsistencies with either the *Code*, or Rule 63, the cost provisions contained in Rule 77 are applicable in the present instance.

[17] Costs are ultimately in the discretion of the Court. I find Rule 77.06(3) to be helpful. It provides:

77.06(3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

[18] Turning to Tariff C, I take particular note of provision (4) which provides:

(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.)

[19] I am satisfied that this matter, including the two appeals, took in excess of one full day, thus providing “base” costs of \$2,000.00. I am further satisfied that it is appropriate to increase that amount by a multiplier of two. This is due primarily to the extensive grounds of appeal raised by Mr. Doncaster, both in his Notice of Appeal and by virtue of his written submissions. A review of the appeal decision discloses well in excess of a dozen arguments advanced by Mr. Doncaster, in addition to his challenge of the constitutionality of Section 810 of



the *Criminal Code*. Other than the constitutionality issue, Ms. Field was required to respond to these arguments. Notwithstanding that many of Mr. Doncaster's submissions were meritless, Ms. Field was still put to the expense of responding. Additionally, Ms. Field was put to the expense of arguing against the motion to adduce fresh evidence.

[20] In the circumstances, I find an award of costs in the amount of \$4,000.00 to be reasonable and appropriate.

- b) Should Mr. Doncaster be immune from a cost award based upon his impecuniosity?

[21] In considering the above issue, the Court has been guided by Rule 77.04. It provides:

77.04 (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.

(2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:

- (a) the party is notified of a proceeding the party wishes to defend or contest;

(b) a claim made by the party is defended or contested.

(3) An order against paying costs may be varied when the circumstances of the party change.

(4) An order against paying costs does not apply to costs under Rule 88 - Abuse of Process, Rule 89 - Contempt, or Rule 90 - Civil Appeal.

[22] Although Mr. Doncaster has not made a formal motion under Rule 77.04 or otherwise, I am prepared to consider the merits of his argument.

[23] The extent of Mr. Doncaster's submission in relation to this issue is as follows:

As well, after having spent thousands of dollars in legal fees defending myself in Provincial Court, I am now impecunious. As proven in the enclosed financial disclosure, I live on an income of \$720 per month. My liquid assets are insignificant. If the Court were to order I pay costs in this matter, I would be unable to pay them.

[24] Mr. Doncaster enclosed for the Court's reference, a Statement of Expenses, a Statement of Income, and a Statement of Property, all filed in relation to Divorce proceedings in October of 2012. None of these statements are accompanied by supporting documentation. Additionally, correspondence from the Canada Revenue Agency, showing an "amount owing" of \$443,773.33, was provided.

[25] Wright, J in **MacBurnie v. Halterm Container Terminal Limited**

**Partnership**, 2011 NSCC 322, considered Rule 77.04. He writes:

6 Costs are an important element of the litigation process. The purposes of costs can be summarized as follows (see *Orkin on The Law of Costs* (2 ed.) Vol. I at page 2-1):

- (a) As partial indemnity or, in some limited circumstances, full indemnity to the successful party for the legal costs it incurred;
- (b) To encourage settlement;
- (c) To deter frivolous actions or motions;
- (d) To discourage unnecessary steps that unduly prolong the litigation; and
- (e) To facilitate access to justice.

7 These purposes are undermined when a party has an exemption from costs exposure. In the words of Justice Gruchy in *Rafuse v. Zinck's Bus Co.* (1992), 122 N.S.R. (2d) 183 (when considering the predecessor Rule 5.17 under our 1972 Rules), "... when a party has such an exemption, it becomes a very significant tool. A party with such an exemption may then pursue an adversary with financial immunity."

8 Justice Gruchy concluded in that case that the exercise of judicial discretion in awarding costs was best left to the trial judge after the case had been fully exposed and the relative merits of both sides evaluated.

9 Because of the imbalance that a costs immunity order would create, the court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in Rule 77.04 should be stringently applied and only where there is a comprehensive body of evidence adduced in support.

10 Those two criteria are:

- (1) That the party cannot afford to pay costs, and

(2) The risk of an award of costs is a serious impediment to litigating a claim.

11 In my view, the stringent application of these criteria requires that the court be satisfied that without an order granting immunity from costs, the applicant would not be able to pursue the claim because of impecuniosity and the action would have to be abandoned. This in turn requires that the court have a full picture of the applicant's financial situation, a requirement articulated and applied by the Ontario Superior Court of Justice in *Farlow v. Hospital for Sick Children*, [2009] O.J. No. 4847, 2009 CarswellOnt 7124.

[26] I am unable to conclude that “there is a comprehensive body of evidence” to establish either of the above criteria. The material provided by Mr. Doncaster is insufficient to establish that he cannot pay costs. He clearly has assets, including a bank account in excess of \$72,200,00 and an unmortgaged home he holds with Ms. Field with a value of \$464,000.00. His stated investment income is modest, yet there is no evidence to suggest that Mr. Doncaster is unable to obtain employment income. Although it appears that Revenue Canada has levied a significant account against him, it is unclear whether this amount has been conclusively determined or how re-payment would effect his over all financial picture.

[27] I cannot conclude that an award of costs would prevent Mr. Doncaster from pursuing this litigation. Other than the possibility of an appeal, it is concluded.

Further, there is no evidence before the Court that an award of costs would create an insurmountable impediment to Mr. Doncaster for advancing his divorce proceeding or any other matter he may have before the Court.

## **CONCLUSION**

[28] Based on the above, costs in the amount of \$4,000.00 shall be payable by Ralph Ivan Doncaster to Jennifer Lynn Field, forthwith.

J.