

SUPREME COURT OF NOVA SCOTIA

Citation: MacDonald v. Holland's Carriers Ltd., 2011 NSSC 436

Date: 20111125

Docket: Hfx. No. 263296

Registry: Halifax

Between:

Frank MacDonald, Troy McCarthy, Jeffrey McPhee, ING Insurance Company of
Canada and First Communication Contractors Limited

Plaintiff

v.

Holland's Carriers Limited, Raymond Edward Murray, Nova Enterprises Limited
and Valley Trailers Inc.

Defendants

v.

Nova Enterprises Limited and Valley Trailers Inc.

Third Parties

Judge: The Honourable Justice Arthur W.D. Pickup

**Last Written
Submission:** October 20, 2011, in Halifax, Nova Scotia

Counsel: Robert Carter, for Frank MacDonald
Tim Hill, for Jeffrey McPhee and Troy McCarthy
Dennise Mack, for Holland's Carriers Ltd.

(Decision on Costs)

By the Court:

[1] This matter was heard between January 17 and 19, 2011 in Halifax, Nova Scotia. In a decision rendered March 31, 2011 I found in favour of the plaintiffs and ordered costs in their favour. The parties cannot agree on the appropriate quantum of costs and the plaintiffs seek a determination.

[2] Costs are in the discretion of the court. Costs of a proceeding generally follow the result. *Civil Procedure Rule 77.01(1)* codifies the general rule:

77.01(1) The court deals with each of the following kinds of costs:

- (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
- (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
- (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.

[3] Party-and-party costs are determined by reference to *Civil Procedure Rule 77.06(1)*, which provides:

- (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[4] Another means of awarding costs is the lump sum approach. Rule 77.08 provides that a judge "may award lump sum costs instead of tariff costs".

The Plaintiffs' Position:

Troy McCarthy and Jeffrey McPhee

[5] Mr. McCarthy and Mr. McPhee seek a lump sum award of costs, asserting that costs awarded pursuant to the tariff, would not result in a substantial

contribution to their reasonable expenses in respect of this action. These plaintiffs seek a lump sum of \$40,000.

[6] This was a trial on liability only and as such there is no “amount involved”. Therefore, these plaintiffs suggest that I apply the “rule of thumb approach” and that an amount of \$20,000 per day be applied which would reflect an “amount involved” of \$60,000.

[7] Under Tariff A, Scale 2, this would allow an award of costs of \$7,250. Additionally under Tariff A these plaintiffs would be entitled to \$2,000 per day, for a total of \$6,000, which would increase their final tariff costs to \$13,250. Both plaintiffs stated that under Tariff A, Scale 2, with an amount of \$60,000, the tariff amount would be \$9,750 plus \$2,000 per day. This is obviously in error.

[8] The total amount of costs and disbursements actually incurred by the plaintiffs to the end of trial was \$56,979.18 plus HST. They say that a costs award of \$13,250 would equate to less than 25% of their actual costs and therefore, does not represent a substantial contribution toward their reasonable expenses.

Frank MacDonald

[9] Frank MacDonald’s counsel also calculates Tariff A costs of \$13,250. Mr. MacDonald’s counsel suggests that this only represents 15% of the total legal fees and disbursements incurred by his client. Counsel indicates that Mr. MacDonald is “prepared to accept \$34,750 all inclusive in costs from Holland’s/Murray to resolve this issue”. This, according to counsel, is approximately 40% of the amount of time and disbursements incurred at trial. These additional amounts are being sought on a lump sum basis.

The Defendant’s Position:

[10] The defendant, Hollands Carriers Limited’s position is that there is no reason to depart from the tariff in this case as only liability was tried and a damages hearing remains outstanding.

[11] Rule 77.07(2) provides a list of factors that may be relevant to an increase or decrease in the tariff amount:

- (a) The amount claimed in relation to the amount recovered;
- (b) A written offer of settlement; whether made formally under Rule 10 - Settlement of otherwise, that is not accepted;
- (c) An offer of contribution;
- (d) A payment into court;
- (e) Conduct of a party affecting the speed or expense of the proceeding;
- (f) A step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
- (g) A step in the proceeding a party was required to take because the other party unreasonably withheld consent;
- (h) A failure to admit something that should have been admitted.

[12] The defendants submit that none of these criteria apply. They point out that the plaintiffs' legal counsel uses the amount of their legal bills submitted to their clients as a justification for deviating from the tariff amount and substituting a lump sum. The defendants highlight that these accounts represent legal services to prepare for both the liability trial and the damages trial which has not yet been heard. The defendants say they should not be penalized for acting reasonably in having the liability issue tried first. Moreover, the defendants note that Mr. McCarthy's claim involved a number of pre-trial motions with respect to disclosure and discovery including:

- (1) An appearance day motion on November 20, 2009 to compel disclosure of medical information and order discovery of Mr. McCarthy resulting in an Order compelling the disclosure and awarding the defendants client costs of \$300.
- (2) A motion on April 20, 2010 to excuse Mr. McCarthy from submitting to an examination for discovery resulting in an Order requiring Mr. McCarthy's discovery take place on or before April 30, 2010 and disclosure of psychological materials.

- (3) A motion to find Mr. McCarthy in contempt of court on July 15, 2010 resulting in a finding that Mr. McCarthy was in contempt of court and ordering Mr. McCarthy to submit to discovery on or before July 03, 2010, with costs to be paid by Mr. McCarthy.

[13] The defendants point out that none of the fees associated with these motions have been deducted from the total fees and disbursements incurred by both plaintiffs.

[14] In summary, the defendants say that the plaintiffs are seeking to have costs awarded based on a consideration of their total bills with no deduction for the fees incurred to prepare aspects of their case which did not proceed to trial including the damages issue and services for pre-trial motions.

Disposition:

[15] I agree with the defendants that this is an appropriate case to award party-and-party costs pursuant to the tariff.

[16] I am satisfied that the fees submitted by plaintiffs' counsel to justify a lump sum award include legal services rendered respecting damages, an issue which has not yet been litigated and also include time spent on pre-trial motions, including a finding of contempt against Mr. McCarthy. As a result I decline to award a lump sum amount.

[17] Costs are in the discretion of the court. I award party-and-party costs to the plaintiffs, Troy McCarthy and Jeffrey McPhee, in the amount of \$13,250 and to Frank MacDonald in the amount of \$13,250. Disbursements will be in addition to these costs. Claimed disbursements by the plaintiffs do not appear to be in issue but, if they are, I direct the parties to tax these disbursement costs.

Pickup, J.