SUPREME COURT OF NOVA SCOTIA
Citation: *Bishop v. Purdy*, 2015 NSSC 365

Date: 20151222
Docket: Amh, No. 430543
Registry: Amherst

Between:

Evelyn Bishop, Carole Black, Johanne Buchanan, Ruth Craib, Glenn Dodge, Richard Duchesne, Barbara Hines, Scott MacDonald, Careen McNeil, Ken Murray, Jennifer Quesnel, Elizabeth Retallack, Lynn Ryan, Fernand Tardif, Lloyd Trerice

Applicants

v.

Bruce Purdy and Frances Purdy

Respondents

Judge:	The Honourable Justice A. David MacAdam
Heard:	By correspondence
Final Written Submissions:	December 11, 2015
Counsel:	Leon (Dick) Ryan, representative for the Plaintiffs Douglas Tupper Q.C. and Chris Kierstead, for the Defendants

By the Court:

[1] This is a decision on costs. The main decision is reported at 2015 NSSC 364.

[2] The respondent relies on *Civil Procedure Rule* 77.06(2), which provides that "[p]arty and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with TARIFF A as if the hearing were a trial." In my view this is not an appropriate case for tariff costs, since it involved an application respecting property rights, rather than a claim for financial compensation or reimbursement. As such I propose to exercise my discretion under *Rule* 77.08 to consider awarding lump sum costs instead of tariff costs.

[3] Although self-represented litigants may not have an automatic right to recover costs, I am satisfied in the circumstances that the applicants are entitled to costs, having been successful in obtaining confirmation of their right to cross the lands of the respondents.

[4] In *McBeth v Dalhousie University, Governors of Dalhousie College and University* (1986), 72 N.S.R. (2d) 224 (S.C.A.D.), Morrison J.A., for the court, held that a common law rule denying costs to a self-represented litigant where

costs would have been granted to a litigant with counsel was incompatible with the equality guarantee under section 15 of the *Charter of Rights and Freedoms*. The Charter-based reasoning of *McBeth* was later invalidated by the Supreme Court of Canada's preclusion of "direct application of the *Charter* to common law rules governing litigation between private parties." The Court of Appeal later confirmed in *Crewe v Crewe*, 2008 NSCA 115, however, that "the principles underlying the awarding of costs could not justify a rule denying costs to self represented parties." The court adopted the following passage from *Fong v Chan* (1999), 181 D.L.R. (4th) 614, [1999] O.J. No. 4600 (Ont. C.A.):

> [24] A rule precluding recovery of costs, in whole or in part, by self-represented litigants would deprive the court of a potentially useful tool to encourage settlements and to discourage or sanction inappropriate behaviour. For example, an opposite party should not be able to ignore the reasonable settlement offer of a self-represented litigant with impunity from the usual costs consequences. Nor, in my view, is it desirable to immunize such a party from costs awards designed to sanction inappropriate behaviour simply because the other party is a self-represented litigant.
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> [25] I would add that nothing in these reasons is meant to suggest that a self-represented litigant has an automatic right to recover costs. The matter remains fully within the discretion of the trial judge, and as Ellen Macdonald J. observed in *Fellowes, McNeil v. Kansa*, [1997] O.J. No. 5130 *supra*, there are undoubtedly cases where it is inappropriate for a lawyer to appear in person, and there will be cases where the self-represented litigant's conduct of the proceedings is inappropriate. The trial judge maintains a discretion to make the appropriate costs award, including denial of costs.
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> [26] I would also add that self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As [*London Scottish Benefits Society v. Chorley* (1884), 13

> Q.B.D. 872] recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that, as a result, they incurred an opportunity cost by forgoing remunerative activity. As the early Chancery rule recognized, a self-represented lay litigant should receive only a "moderate" or "reasonable" allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a per diem basis to litigants who would ordinarily be in attendance at court in any event. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant, and accordingly, the trial judge should either fix the costs when making such an award or provide clear guidelines to the Assessment Officer as to the manner in which the costs are to be assessed. [Emphasis added.]

[5] Although the court referred to awarding costs in respect to the self-represented litigants, on account of their participation as their own counsel, on the basis of their foregoing remunerative activity, I am satisfied this would not exclude an award where the self-represented litigants were not otherwise engaged in remunerative activity. Such a limitation would exclude persons who were not otherwise financially gainfully employed, including students, unemployed people, homemakers and the retired. In this respect I would note the comments of Justice Hood in *Salman v. Al-Sheikh Ali,* 2011 NSSC 30, [2011] N.S.J. No. 68:

> 48 In some cases, the courts have recognized an opportunity cost which was lost, but in *Dechant v. Law Society of Alberta*, 2001 ABCA 81, the court concluded that it is not necessary to prove the actual value of any lost opportunity. The court said in that case in para. 19:
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> > 19 ... Nonetheless, whether a person has lost time from work to represent themselves is a relevant factor to consider. If any unrepresented litigant was not otherwise employed, the fee portion of costs attributable to lost

> opportunity may not exist or, at a minimum, would be significantly less than a person who has suffered a loss of income due to employment absences.
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> 49 In this case, Mariam Al-Sheikh Ali was not employed and did not lose income. Fawzi Al-Sheikh Ali used vacation time rather than lose paid time from work. In my view, that is a factor which merits consideration.

[6] The respondents note that both Mr. Ryan and Mr. Tardif, who acted on behalf of the applicants, are retired, and suggests that as a result of this, the applicants should only receive reasonable and necessary disbursements. With this submission I cannot agree. It is clear that the applicants spent a great deal of time both in preparation for court, at the hearing itself, and in respect to the submissions filed both pre-and post the hearings. As such, they were not able to engage in other activities that, as retired persons, they would normally be doing. Although this may not amount to a direct financial loss, these efforts involved time and effort taken away from their other activities. Their time has a value, even if they would not otherwise have been engaged in remunerative activities. They are entitled to costs on account of their efforts in this proceding.

[7] Although they do not put it in these terms, the applicants are seeking what in effect would be solicitor-client costs. In my view there was no basis for such an award here. They describe the respondents' approach to the dispute as being "malicious and in bad faith." I find that both the applicants and respondents acted

inappropriately at times over the course of the dispute. My recollection is that neither side strenuously disputed the allegations made by the other in respect to their own alleged improper conduct. The circumstances required for solicitor-client costs are not present, and therefore I will consider the awarding of a lump sum on the basis of party-and-party costs, only.

[8] Also, as noted in para. 26 of *Fong v. Chan, supra*, costs are to be awarded to lay litigants who demonstrate that they devoted time and effort that would ordinarily be done by a lawyer in conducting the litigation. They are not entitled to be reimbursed for the time that any party to a proceeding would have incurred where they had retained the counsel on their behalf.

[9] A further factor is that this was an application, not a trial. Although on a number of occasions during the hearing I commented that the proceeding was approaching the scale of a trial, the nature of an application is that the parties file affidavits, with a right to cross-examine the opposite parties' affiants on their affidavits. The full slate of pre-trial procedures is not available on an application. This is a further factor to consider in determining an appropriate lump sum.

[10] I have also considered the respondents' submission that the majority of the time spent in hearing related to a claim on which the applicants were not

successful, namely, their alleged prescriptive right to cross over the respondent's property, whether pursuant to the *Limitation of Actions Act* or by virtue of lost modern grant.

[11] In *Izyuk v. Bilousov*, 2011 ONSC 7476, [2011] O.J. No. 5814, Pazaratz J. provided a useful overview of the principles pertaining to costs and self-represented parties:

> 38 The emerging issue of costs claimed by self-represented litigants has been dealt with extensively in recent years, perhaps most comprehensively by Justice D.G. Price in *Jahn-Cartwright v. Cartwright* 2010 91 R.F.L. (6th) 301 (Ont. S.C.J.) and *Cassidy v. Cassidy* 2011 92 R.F.L. (6th) 120 (Ont. S.C.J.).
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> 39 Justice Price made the following observations of the Ontario Court of Appeal decision in *Fong v. Chan* [1999] O.J. No. 4600:
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> a. The Court of Appeal confirmed a self-represented litigant's entitlement to costs.
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> b. The Court gave some guidance on the method of quantifying those costs, but did not elaborate as to the methodology to be used.
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> c. Self-represented litigants are not entitled to costs calculated on the same basis as litigants who retain counsel.
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> d. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case.
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> e. Costs should only be awarded to those lay litigants who can demonstrate they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation.
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> f. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant.
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> 40 In *Jahn-Cartwright* and *Cassidy*, Justice Price expanded the analysis:
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> a. The entitlement to costs and the appropriate amount to be paid is within the court's discretion.
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> b. Rule 24(1) of the *Family Law Rules* creates a presumption of costs in favour of the successful party.

c. In setting the amount of costs, the court must try to indemnify the successful party while avoiding an overly onerous costs burden for the unsuccessful party which would jeopardize access to justice.

d. For many years indemnification of a successful party was considered the only objective, and this was held to preclude an award of costs to a successful self-represented litigant who had not paid fees for which they needed to be indemnified. But while indemnification remains a paramount consideration in awarding costs, it is not the only one.

e. In both *Fong v. Chan* and more recently in *Serra v. Serra* 2009 ONCA 395, the Ontario Court of Appeal confirmed that costs rules are designed to foster three important principles:

1. To partially indemnify successful litigants for the cost of litigation;

2. To encourage settlement; and

3. To discourage and sanction inappropriate behaviour by litigants.

f. Access to justice has been recognized as a further objective that the court should seek to achieve when awarding costs. (1465778 *Ontario Inc. v. 1122077 Ontario Ltd*, 2006 CanLII 35819, (2006) 82 O.R. (3d) 757 (Ont. C.A.)).

g. A party with counsel, opposite an unrepresented litigant, should not perceive that they are immune from a costs award merely because such opposite party is unrepresented. They should be discouraged from presuming they will face only nominal costs.

h. The right of a self-represented litigant to recover costs is not automatic. Quantification of those costs may be difficult. But without the option of awarding meaningful costs to self-represented litigants, the court's ability to encourage settlements and discourage inappropriate behaviour will be greatly diminished.

i. Determination of costs for self-represented litigants should take into account all of the objectives which costs orders should promote. Rules 18 and 24 of the *Family Law Rules* apply. Otherwise the resulting amount can render the entitlement to costs illusory; undermine access to justice by self-represented litigants; and frustrate the administration of justice.

j. If a self-represented litigant, in performing the tasks that would normally have been performed by a lawyer, lost the opportunity to earn income elsewhere, this may be a relevant factor. But costs for self-represented parties are not the same as damages for lost income. Remunerative loss is not a "condition precedent" to an award of costs. To require proof of lost income would disqualify litigants who are homemakers, retirees, students, unemployed, unemployable, and disabled; and deprive courts of a tool required re administration of justice.

k. Lost income may be one measure. But even if no income was lost, the self-represented party's allocation of time spent working on the case may still represent value.

l. The fact that a self-represented litigant is not a lawyer who charges a standard and commonly accepted hourly rate makes it more difficult - but not impossible - to assess their costs. However, the difficulty in valuing the time and effort of the lay litigant is not a good reason to decline to value it.

m. An "applicable hourly rate" should be taken into account when quantifying even a self-represented lay litigant's costs. But the appropriate hourly rate, once determined, is only one of several factors to be considered.

n. In considering the appropriate hourly rate, the court should consider what the lay litigant's reasonable expectations were as to the costs he would pay if unsuccessful. (*Boucher v. Public Accountants Council (Ontario)* [2004] O.J. No. 2634 (Ont. C.A.)).

o. Where one party is represented by a lawyer and the other is not, the hourly rate that the represented litigant's lawyer is entitled to claim on an assessment of costs should inform the reasonable expectations of both parties as to the costs that they will likely be required to pay if unsuccessful. Otherwise, litigants represented by lawyers would be less circumspect with regard to their conduct and their response to the opposing party's efforts to settle because that party is a self-represented litigant.

p. The hourly rate of the lawyer representing the unsuccessful party is only one of several factors to be considered. It does not necessarily entitle the successful self-represented party to claim the same rate for time spent. However, if the self-represented party was required to contend with a highly experienced lawyer whose years at the Bar would have entitled a higher hourly rate, that may be relevant in considering the calibre of the work the self-represented party had to do to effectively participate in the adversarial process.

q. As with counsel, the appropriate hourly rate may be affected by the level of indemnification or recovery deemed to be appropriate, given all of the Rule 18 and 24 considerations.

r. There are no automatic calculations. We should not simply use the hourly rate for the opposing lawyer, or the hourly rate the self-represented litigant earns outside of court. Fixing costs is not a mechanical exercise. (*Boucher*)

s. The quality of the self-represented litigant's work and documentation must be considered, and its impact on hearing time and trial results. The

> emphasis must be on the value of the work done. This encompasses both the value of the work to the Court and the value of the time spent to the litigant who performed the work, or who hired a lawyer to perform it.
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> t. Calculating the amount of time the self-represented litigant should be compensated for can be a complex endeavour. All litigants suffer a loss of time through their involvement in the legal process. A self-represented litigant should not recover costs for the time and effort any litigant would have to devote to the case, including attendances in court where the party would ordinarily attend.
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> u. But if the self-represented litigant demonstrates he/she did the work ordinarily done by a lawyer, then they will have justified receiving an award of costs - including time spent on communications, drafting documents and correspondence, preparation and compensation for time spent arguing their case.
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> v. Self-represented litigants may be held to the standards of civility expected of lawyers and a proper reprimand for failure to do so is an award of costs on a substantial indemnity basis. Where either a litigant or his/her lawyer acts unreasonably, by incivility or otherwise, it is a factor that may result in discounting the costs that should otherwise be awarded. This discounting is a necessary part of quantifying costs and is consistent with the overall purpose of costs awards in improving the efficiency of the administration of justice.
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> w. Ultimately, the overriding principle in fixing costs is "reasonableness."

[12] There are a number of the disbursements that are not reimbursable. Pazaratz J. held in *Izyuk, supra*, at para. 36, that a claim for “driving, parking, serving materials” was inappropriate; so to the claim by Mr. Tardif and Mr. Ryan for mileage in travelling to pre-hearing conferences and the hearing are similarly inappropriate. Absent unusual and exceptional circumstances, counsel are not entitled to claim mileage to travel to court, and self-represented litigants are also disentitled. Additionally, this would have been a disbursement they would likely have incurred in attending these proceedings as litigants themselves, whether or

not they were present acting as the applicants counsel. Additionally, the award of costs includes both reimbursement for the time they are entitled to claim as well as the time spent by the counsel they had retained early in the proceeding. The expenses relating to the lawyer would be subsumed in the award of counsel fees for the hearing and the preparation for the hearing itself. Additionally they have claimed gravel and delivery charges in respect to maintenance of the right away. This is not a matter for costs, but rather a claim to be made in the proceeding itself.

[13] Therefore, having considered submissions by both parties as well as the circumstances of the hearing itself, including the earlier interim injunction, I am satisfied that an award of $15,000, inclusive of disbursements, is both fair and in accordance with the objectives and guidelines relating to an award of costs. The applicants are also entitled to reimbursement of the $1000 paid into court in respect to the awarding of the interim injunction.

MacAdam, J.