

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** *Oickle v. Briggs*, 2019 NSSC 380

**Date:** 20191126

**Docket:** SFPAMCA-101474

**Registry:** Port Hawkesbury

**Between:**

Keisha Danielle Oickle

Applicant

v.

Evan David Briggs

Respondent

**Judge:**

The Honourable Justice Moira C. Legere Sers

**Heard:**

October 21, 2019, in Port Hawkesbury, Nova Scotia

**Counsel:**

Keisha Danielle Oickle, Counsel Tracy Bannier  
Evan David Briggs, Meghan MacGillivray Case  
for Counsel Kalysa Kirk

## **By the Court:**

[1] This is a costs decision arising on the Courts motion relating to the last-minute cancellation of a Settlement Conference.

[2] On June 24<sup>th</sup>, 2018 both Counsel appeared before the court to request a settlement conference.

[3] A Settlement Conference was scheduled for October 21, 2019 at the Port Hawkesbury Court site. Filing dates were set as follows; the Applicant to file 6 weeks in advance (September 9<sup>th</sup>) and the Respondent to file 4 weeks in advance (September 23<sup>rd</sup>).

[4] A Justice of the Family Division was assigned to travel to Port Hawkesbury to conduct the settlement conference. The file was sent by staff to the Justice to review and prepare.

[5] First, I wish to make it clear this costs decision has nothing to do with the fact that the original counsel of record for the Applicant, Mr. Briggs, was unavailable due to being on leave.

[6] This is not about the need to grant a lawyer an adjournment due to a family related issue. In my experience Courts in this area are quick to allow adjournments on compassionate grounds when medical issues arise with counsel or their family. Cost are rarely, if even considered, when such unavoidable crises arise.

[7] This costs decision focuses on the last-minute cancellation of the Settlement Conference without reasonable notice or consent of the Court after briefs were prepared, a Justice assigned, and all had prepared for the Settlement Conference.

[8] The Applicant's original counsel filed her brief on September 9, 2019. The Respondent filed her brief on September 10, 2019.

[9] Subsequent to setting the Settlement Conference the Applicant's counsel took a leave of absence and while it was originally expected she would be present for the Settlement Conference she extended her leave beyond the Settlement Conference date.

[10] Another lawyer took over monitoring this file and communicating with counsel for the Respondent. She advised the Respondent's counsel, by correspondence, that she was monitoring the file while previous counsel was on leave.

[11] Between October 15, 2019 and October 18, 2019 both Counsel discussed the Settlement Conference.

[12] On October 18, 2019 Mr. Briggs's acting counsel confirmed with Ms. Oickle's counsel that the Settlement Conference was going forward.

[13] It is unclear in the briefs at what time the decision was made to cancel the settlement conference.

[14] Late in the afternoon on Friday, October 18, 2019 before the Settlement Conference set for Monday, October 21, 2019 Mr. Briggs's Counsel sent a fax to the Court; which fax was not received; alerting the Court that she had obtained the consent of Ms. Oickle's Counsel to an adjournment because she had been informed that Mr. Briggs wanted to wait for his original counsel.

[15] If that was the case, the Court could have entertained a motion well in advance of that date and another matter could have been scheduled. Costs could have been mitigated.

[16] At that point Mr. Briggs should have been alerted to the fact that late cancellation could result in a costs order.

[17] There is no mention in the correspondence of a motion to request an adjournment. Rather it appears that Counsel was of the belief that consent to adjourn by the Court or reasonable notice to the Court was unnecessary.

[18] On Monday, October 21, 2019, the date set for the Settlement Conference neither party appeared, nor did Counsel. The Court directed a phone call be made to ascertain what happened.

[19] It was then that counsel for Mr. Briggs alerted the court that late Friday afternoon at or after 4:30 a fax was sent alerting the Court that both Counsel agreed the Settlement Conference would be cancelled.

[20] On Monday there was a telephone call hastily arranged to explain to the court what had occurred.

[21] Mr. Briggs's counsel sent someone else to take the call as she was otherwise occupied. I am not clear how she was otherwise occupied. I assume once again there was a presumption that one could simply cancel Court without the consent of the Court.

[22] In her costs submission, Ms. Oickle's counsel advised that Ms. Oickle felt pressured to agree to the adjournment because not to agree meant she would be responsible for her counsel's cost to appear and disbursements including travel from New Glasgow to Port Hawkesbury, should she fail to agree. Ms. Oickle did not want to authorize her counsel to travel to the Port Hawkesbury Court only to have an adjournment granted because Mr. Briggs wanted to wait for his previous lawyer to attend.

[23] No request was made, no motion filed, no approach to the Court (other than the failed attempt to fax the Court) to ask for an adjournment.

[24] I don't for a moment doubt that counsel may have attempted to fax a notice of adjournment. The Judicial Assistant for this matter confirmed after enquiry of those that were present at 4:30 Friday that no fax has been received.

[25] I have reviewed the running file.

[26] The issue of awarding costs on settlement conferences has been the subject of numerous decisions some of which I will cite in this brief decision.

[27] MacDonald J in *Lubin v Lubin* 2012 NSSC 3, at para 3 summarized the applicable principles including that costs are in the discretion of the Court.

[28] In *Armoyan v Armoyan* 2015 NSSC 46, Williams J. referred to Rule 59:39(6) where the issue was cancellation of a settlement conference. Specifically:

(6) a judge may cancel a settlement conference and may make an order for costs against a party who after agreeing to participate in a settlement conference fails to comply with all of the following:

...(c) the requirement to appear at the settlement conference at the appointed date and time.

[29] And in *Burke v Burke*, 2018 NSSC 210, Hunt J., ordered “throw away costs” of \$750 following a unilateral cancellation of a settlement conference scheduled by consent.

[30] In the *Burke* case two days in advance of the settlement conference the Court staff followed up with counsel for the Respondent requesting their brief.

[31] It was at that point counsel for the Respondent advised the Court that the Respondent advised his counsel not to proceed with the settlement conference. On instructions from his client the reasons for cancellation were not disclosed.

[32] The Applicant in that case sought costs of \$3,600, close in range to that applied for herein.

[33] As Justice Hunt said in his Costs endorsement in *Burke*:

In Nova Scotia participation in settlement conferences is voluntary. However once litigants agree to take part in the process, they are expected to follow the court’s directions in terms of filing requirements and participation. If those directions are not followed Rule 59:39(6) allows a judge to order costs against the party who fails to abide by the requirements as set by the court or who walks away without reasonable notice or excuse where the other party has incurred cost in reliance of the agreement .

[34] Justice Hunt goes on to describe the considerations in awarding costs and the assessment of damages.

[35] In *Aurini v Drake* 2016 NSSC 126 Ms. Drake withdrew after briefs were filed and just days prior to the conference. Preparation time and costs had already been incurred:

[36] *Campbell J* in para 22 commented as follows:

The court must not promote a policy that would allow each litigant to cancel settlement conferences on a whim that settlement is unlikely

### **Is this a case where costs should be ordered?**

[37] I am aware of the historical applications and court dates in this case that have not resulted in perfecting the case for hearing.

[38] While that is not relevant to this cost decision, I wish to note in fairness to Mr. Briggs the he has consented to adjournments of pre-trials and a previous Settlement Conference made by the Respondent.

[39] Some of the delay in moving this forward arose out of the lack of timely disclosure by the Respondent and some as a result of her former Counsel's inability to confirm a legal aid certificate or attend to the issues.

[40] This matter has been set for two settlement conferences and one hearing all of which have been adjourned. Both parties participated in these cancellations.

[41] In the ensuing time period, child protection became involved. Counsel sought to adjourn until Child Protection investigated the claim.

[42] I am not inclined to place blame on the Applicant for the historic failure to bring this matter to a conclusion.

[43] On June 24, 2019 this Settlement Conference was scheduled and the facts relating to this scheduling are those which I will use to form the base of my decision on costs rather than the history of appearances and adjournments.

[44] In this case there appears to be a failure to advise the other side and the Court in a reasonable time that the Settlement Conference was not going ahead contrary to what Mr. Briggs acting counsel confirmed with Ms. Oickle's counsel on October 18, 2019.

[45] Mr. Briggs had the advantage of qualified counsel monitoring his file. That Counsel would have been well able to conduct the Settlement Conference.

[46] While Mr. Briggs may have wanted to proceed with counsel of choice, he ought to have known that to insist on last minute cancellation could result in a costs order.

[47] The last-minute cancellation put everyone to costs, and the Court lost the ability to reschedule in order to preserve valuable court time for other litigants.

[48] Barring emergencies, a letter faxed at closing time on Friday to cancel a Monday morning settlement conference without consent of the presiding judge is exceptionally unwise.

[49] The Justice must have the opportunity to weigh the merits and the prejudice of the request, to determine whether it is appropriate to move forward or adjourn; all of which could have been done by phone if reasonable notice had been received.

[50] It is not up to one party to unilaterally cancel a settlement conference once it has been scheduled, a Justice assigned, briefs submitted, and valuable Court time assigned.

[51] If this is done, counsel must be aware and ought to advise clients that such unilateral actions can result in an order for costs.

[52] I am satisfied that costs are in order.

[53] In considering how much costs to order, I note that the briefs filed can be used at a subsequently held settlement conference so that time and effort is not lost.

[54] While Mr. Briggs withdrew his consent to participate in a further settlement conference after this adjournment, he still has the option and in fact has subsequently exercised that option.

[55] Had he not, the costs of preparation would be a significant cost factor for him now.

[56] The preparation already accomplished by counsel for Ms. Oickle, will be used in the subsequently scheduled Settlement Conference.

[57] However, both Counsel were required to appear by phone to speak to their failure to attend and participate in another settlement conference. They were also required to file costs submissions. Dellapinna J. recommended in *Burgar v. Assh* 2017 NSSC 134 as follows:

Although a settlement conference is a voluntary process, once the parties agree to take part in a settlement conference they are bound by the Court's directions. If either party wishes to cancel the conference, they must make that request to the court and it is for the court to decide. If the court is prepared to cancel the settlement conference it is subject to the Court's discretion on costs.

Costs should be restricted to expenses incurred by the opposing party for work that would have no lasting value if the settlement conference does not proceed. Other factors that may weigh on the Courts decision on the amount of the costs are the timing of the cancellation relative to the parties filing deadlines and the date of the settlement conference, the reason for the cancellation and the reasonableness and the necessity of the work performed or the disbursement incurred by the opposing party. (Paragraphs 33-37) In the case cited \$250 costs were awarded.

[58] The itemization of costs sought by the Applicant appears to relate to global costs so far and unbilled costs. I cannot separate out the costs as recommended in *Burgar v. Assh*, 2017 NSSC 134.

[59] Therefore, should the matter go to Court, through a hearing process, I reserve for the parties the right to seek those costs not allowed herein as costs in the cause.

[60] I order \$500.00 payable by the Respondent forthwith for the last-minute cancellation and subsequent necessity to deal with costs.

[61] I leave it to his former Counsel and Mr. Briggs as to how to pay them.

Legere Sers, J.