

SUPREME COURT OF NOVA SCOTIA

Citation: *Nichols v. Purdy*, 2021 NSSC 268

Date: 20210921

Docket: Hfx No. 491373

Registry: Halifax

Between:

Jonathan Nichols, Evelyn Bishop, Carole Black, Johanne Buchanan, Glenn Dodge, Richard Duchesne, Barbara Hines, Scott MacDonald, Careen McNeil, Kenneth Murray, Jennifer Quesnel, Michael and Matthew Retallack, Mary O’Blenis and Christopher Craib, Michael George Clarke and Pamela Susan Clarke, George Clarke and Elizabeth Clarke, Nancy Ellen Roach and Lindsay Ellen Roach and Simon Bradley Roach, Patricia Darlene Scallion and Terry Brian Scallion, Angela Louise Howell, Leo Ryan, Lynn Ryan, Fernand Tardif, Dora Brownell

Applicants

v.

Bruce Purdy, Frances Purdy, David Lennox and Janet Lennox

Respondents

**Decision on Applicants’
Costs against Respondents Lennox**

Judge: The Honourable Justice Scott C. Norton

**Heard by Written
Submissions:** September 17, 2021, in Halifax, Nova Scotia

Decision September 21, 2021

Counsel: Robert Pineo & Grace MacCormick, for the Applicants
Joseph Herschorn, for the Respondent Lennox

By the Court:

Introduction

[1] By Decision dated February 1, 2021 (*Nichols v. Purdy*, 2021 NSSC 30), the motion of the Respondents Lennox for dismissal of the Application in Court brought against them was dismissed. The Applicants were awarded costs. The decision directed:

[87] If the parties are unable to agree on costs, I will accept written submissions of the parties. The parties who have been awarded costs shall file their written submissions within one month of the date of this decision with response submissions to be filed within two weeks and reply submissions to be filed within 2 weeks of the response submissions.

[2] No Order was filed relating to the Lennox motion. A consent Order relating to the parallel Purdy motion, including a provision for costs was filed on March 31, 2021.

[3] Nothing further was heard by the Court in relation to the Lennox motion until written costs submissions were filed by counsel for the Applicants on August 26, 2021. In response, counsel for the Lennoxes wrote to the Court. The submission of the Lennoxes was, in summary:

1. Despite the clear direction of the Court, the Applicants did not file submissions on costs within one month.
2. No extension of time had been sought.
3. It is contrary to the Court's process to wait six months after the Court's deadline and file submissions for costs and the Court should not countenance such conduct.
4. The Court should not entertain the submission for costs.

[4] The Court wrote to counsel for both parties on September 2, 2021 stating:

I acknowledge Mr. Pineo's letter dated August 24, 2021 containing submissions for costs payable by the Applicants Lennox pursuant to my Decision dated February 1, 2021. I also acknowledge Mr. Herschorn's letter objecting to the claim for costs on the basis that the Decision stated that if the parties were unable to agree on costs, "the parties who have been awarded costs shall file their written submissions within one month of the date of this decision...".

Mr. Pineo made no reference to this deadline in his submissions, and provided no explanation for missing the deadline. I invite him to provide the Court with an

explanation as to why submissions were not filed within the one month deadline clearly stated in the decision and why the court should entertain any submissions at this time. Mr. Pineo shall provide these submissions on or before September 10, 2021 with any further response on those issues from Mr. Herschorn by September 17, 2021. I will then advise the parties how I will proceed.

[5] No response was received from Mr. Pineo, counsel for the Applicants. Mr. Herschorn responded that he had not received anything from Mr. Pineo and had no further submission other than to reiterate his objection.

[6] The *Civil Procedure Rules* provide:

77.02 General discretion (party and party costs)

(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

[7] When a Court provides direction to counsel and the parties with respect to the future conduct, in this case a written direction using the language “shall” with a deadline for filing submissions, the Court expects that direction to be followed. It is not suggestive or aspirational. I adopt the following quote from Chief Justice Smith in *Brown v. Nova Scotia Association of Health Organizations Long Term Disability Plan*, 2020 NSSC 301, in the context of directions provided to counsel at a Date Assignment Conference:

[28] In my view, when a judge sets a clear deadline at a Date Assignment Conference, that deadline supersedes any other relevant deadline contained in the Rules. The deadline set by the judge is not aspirational. It is not a target date or a goal for counsel to attempt to achieve. It is a deadline by which a party must act.

[8] In the present case, not only did the Applicants ignore the Court’s direction and deadline for filing submissions by six months; but, when asked to explain the delay and provide authority or submissions as to why the Court should accept submissions after such a significant delay, no response was made.

[9] It is in my view an abuse of the Court’s process to fail to follow a direction from the Court without reasonable or any excuse offered. In the circumstances of this case, a reasonable and fair response is to exercise my discretion and quantify the costs and disbursements payable to the Applicants on the motion as nil.

[10] Mr. Herschorn will prepare an Order dismissing the motion incorporating this Decision on costs and present it to me for my initial on or before September 30, 2021.

Norton, J.