SUPREME COURT OF NOVA SCOTIA

Citation: *Burgoyne v. Hutton* , 2016 NSSC 302

Date: 20161109
Docket: BWT No.'s 419430 and 419907
Registry: Bridgewater

Between:

Daniel Burgoyne of Oakland, Lunenburg County, Nova Scotia and Elizabeth Burgoyne of Oakland, Lunenburg County, Nova Scotia

Applicants

and

Elizabeth Hutton of Oakland, Lunenburg County, Nova Scotia and 3291969 Nova Scotia Limited, a body Corporate in and for the Province of Nova Scotia [successor to Hutton Sales Inc., a body Corporate in and for the Province of Ontario]

Respondents

And Between:

Elizabeth Hutton and 3291969 Nova Scotia Limited, a body Corporate, [successor to Hutton Sales Inc., a body Corporate]

Applicants

and

Daniel Burgoyne and Elizabeth Burgoyne

Respondents

Judge	The Honourable Justice Pierre L. Muise
Heard:	September 14, 15 and 16, 2015, in Bridgewater, Nova Scotia,
Final Written Submissions on costs:	May 24, 2016

Counsel: Michelle Kelly, for the Applicants/Respondents, Daniel Burgoyne and Elizabeth Burgoyne

Allen C. Fownes, for the Respondents/Applicants Elizabeth Hutton and 3291969 Nova Scotia Limited [successor to Hutton Sales Inc.]

DECISION ON COSTS

INTRODUCTION

[1] These reciprocal applications in court dealt with questions regarding the existence and scope of rights-of-way, as well as associated issues of trespass, nuisance, damages and injunctive relief. They were joined and heard together. I rendered a written decision dated March 17, 2016 bearing ordinal number 2016 NSSC 60.

[2] The parties were able to agree that the "amount involved" for the calculation of Tariff amounts would be $25,000. However, otherwise, the parties have been unable to reach any agreement in relation to costs in this matter.

[3] Therefore, I must determine what costs award will do justice between the parties.

[4] In this costs decision, I will use the same reference names for the parties and lands that I used in the decision following hearing of the applications.

POSITIONS OF THE PARTIES

[5] The position of the Burgoynes is as follows.

[6] They achieved substantial success in the applications as a whole. They were completely successful in their claim that there was no right-of-way over their driveway for the benefit of the Hutton Sales Lot. That was the central and most important issue. Significant evidence and submissions were dedicated to it. They also received general damages for trespass and an injunction restraining future impermissible passage over their driveway. On the question of the scope of the express rights-of-way for the benefit of the Homestead Lot, success was divided. They were successful in obtaining a declaration that the express rights-of-way were of a private nature, but unsuccessful in their request for a declaration that they did not include a commercial purpose.

[7] As such, they submit they are entitled to costs on a party and party basis, in an amount which represents a substantial contribution towards, but not a total indemnification, of their reasonable legal fees. They suggest either a lump sum award or the addition of a lump sum amount to costs determined in accordance with Tariff A to accomplish that. They request costs of $19,600 plus disbursements of $2,470.28.

[8] The position of the Huttons is as follows.

[9] The parties should bear their own costs because success was divided and the Huttons are prepared to forego pursuing their claim for interference with use of the express right-of-way over the Burgoyne driveway, which claim was deferred.

[10] In support, they submit the following.

[11] The Burgoynes did not concede the no-retracement principle in ***Miller v. Tipling***. The Court confirmed the express rights-of-way included access for a commercial purpose, which was disputed by the Burgoynes. The Burgoynes had claimed damages in the amount of $20,000; but, the Court only awarded $2,500. The Burgoynes could have obviated the need for a hearing by accepting the Huttons' settlement proposal to limit use of the driveway to access the Homestead Lot only, but including the no-retracement principle.

LAW AND ANALYSIS

[12] With all due respect for the contrary position of the Huttons, I agree with the position of the Burgoynes that they achieved substantial success overall, and achieved complete success on the central issue.

[13] The Burgoynes did not raise any issue regarding the Huttons' use of their driveway until they started using it to bring equipment, supplies and workers over

it to develop the Hutton Sales Lot into a haskap farm. They communicated with the Huttons regarding this issue, first directly, then through their respective lawyers. Eventually a protection of property act notice was sent. Ultimately, they filed a notice of application in court for a declaration that the right-of-way easement over their driveway was limited to use as a private roadway for the purposes of accessing the Homestead Lot, and did not permit commercial use, nor use for the purpose of accessing the Hutton Sales Lot. The Huttons defended, taking the position that persons lawfully entering the Homestead Lot could proceed to the Hutton Sales Lot without retracing their steps. They also filed their own application claiming a right-of-way over the Burgoyne driveway for the benefit of the Hutton Sales Lot by prescription, necessity or the Doctrine of Lost Modern Grant. The Burgoynes contested the existence of such a right-of-way.

[14] In my view, the central issue in the reciprocal applications was whether a right-of-way over the driveway existed for the benefit of the Hutton Sales Lot. The vast majority of the evidence and submissions were focussed on that issue. About 70% percent of my written decision is devoted to that issue, even without counting the applicable portion of the introductory background information. In my view, but for use of the driveway by the Huttons to access the Hutton Sales Lot, the dispute would not have arisen, or, even if it had, it would likely have not required a

court proceeding to resolve. Even if a court proceeding would have been required, it would have been significantly shorter.

[15] Prior to the hearing, the Huttons took the position that all they required to continue on to the Hutton Sales Lot was to have been "lawfully" upon the Homestead Lot. That ignored the requirement that the purpose for entering the Homestead Lot had to be a purpose legitimately connected to that lot, and not in reality for the purpose of simply moving on to the Hutton Sales Lot. The Burgoynes observed use of the driveway which was clearly for the purpose of reaching the Hutton Sales Lot. Some of the use involved continuous travel over to the Hutton Sales Lot. Some involved workers stopping at the residence on the Homestead Lot for things like tea and coffee before continuing on to the Hutton Sales Lot to work. I found such stopping on the Homestead Lot to be, at best, a colourable purpose. The real purpose was clearly to reach the Hutton Sales Lot.

[16] Consequently, the Burgoynes clearly had a valid complaint. The Huttons point out that not all of the use of the driveway was found to be for the purposes of accessing the Hutton Sales Lot. Some of it was found to be for purposes legitimately associated with the Homestead Lot, including bringing supplies and workers to effect renovations to the home on the Homestead Lot. However, it is noteworthy that the Burgoynes distinguished between the use they observed that

was clearly for the purposes of the Hutton Sales Lot, and that in relation to which they were uncertain. It is obvious that they could not always be certain as to the real purpose for passage. That did not make it unreasonable for them to provide evidence of the passage in relation to which they were uncertain.

[17] The reduction in damages from the amount claimed was partly based upon the reduced amount of passage actually having been found to be for the purposes of accessing the Hutton Sales Lot, and partly upon the Court distinguishing the cases provided in support of the amount of damages requested.

[18] Little hearing time was devoted to the damages question alone. The Huttons did not even address the issue of damages. Therefore, they did not incur any legal costs in relation to that issue.

[19] In addition, in the offer to settle presented by the Huttons to the Burgoynes, they did not offer any amount for damages. Quite to the contrary, they requested a $10,000 contribution to their own legal costs, survey costs and disbursements. Therefore, from a monetary point of view, the Burgoynes were $12,500 more successful in the applications than they would have been if they had accepted the offer to settle.

[20] Further, the offer to settle did not restrict the use of the express rights-of-way to use of a private nature. The outcome of the applications did. Consequently, that also represents a better result for the Burgoynes than they would have received if they had accepted the offer.

[21] I also disagree with the contention of the Huttons that the Burgoynes disputed the no-retracement principle from ***Miller v. Tipling*** entirely. In my view, they acknowledged the existence of the principle. However, they argued that some of the use made of the driveway was not in accordance with that principle. They submitted, and in relation to a significant amount of the passage, I accepted, that it was for the purpose of reaching the Hutton Sales Lot. That included some incidents in which the purported purpose was colourable, such as workers destined for the Hutton Sales Lot going to the Homestead Lot residence to have tea or coffee, or to use the washroom, when their actual reason for being there was to work in the haskap farm on the Hutton Sales Lot.

[22] Therefore, in my view, my ultimate decision was consistent with the Burgoynes' understanding of the no-retracement principle in ***Miller v. Tipling***. They were unable to prove that all of the passage they observed culminated on the Hutton Sales Lot and/or contravened the no-retracement principle. However, they were successful in proving a significant amount of impermissible use of the

driveway. For that reason, in my view, it cannot be said that they were not successful in establishing such non-permissible use.

[23] In addition, as already noted, they did prove some damages, which resulted in an award which was effectively $12,500 better than the offer to settle. Therefore, it could not be said that they were not successful in proving damages.

[24] Also, they obtained the injunctive release requested.

[25] In my view, the only determination in relation to which the Burgoynes were the unsuccessful party is the determination that the express rights-of-way existed for a commercial purpose.

[26] The commercial purpose they were concerned about is that the Huttons would, in the future, set up a store or market on the Homestead Lot to sell their haskap berries, which are produced on the Hutton Sales Lot. That had not yet taken place. It was merely something which the Huttons raised as something they potentially wished to do in the future. It became an issue in the proceeding only because the Huttons wished to have that point clarified to avoid a future return to Court. Though, in that sense, the issue was premature, it was dealt with in the interest of promoting more cost efficient access to justice. In the past, all they had done was transport berries off of the Hutton Sales Lot and out to market using the

Burgoyne driveway. As advanced by the Burgoynes, I found that to be an illegitimate purpose, irrespective of whether it was commercial.

[27] Given that the commercial use of concern was only a potential future use, in my view, it was of less significance and importance than other issues.

[28] Considering these points, in my view, the Burgoynes were substantially successful and are entitled to party and party costs. Their lack of success on the one more minor question, can properly be considered in an appropriate reduction of the costs from what they would otherwise be if there was complete success.

[29] In my view, the division of success in the case at hand does not reach the stage of that which would be required to make it appropriate to order that all parties bear their own costs. The cases provided by the Huttons in support of that result are, in my view, distinguishable.

[30] In ***Force Construction Ltd. v. Campbell***, 2008 NSSC 310, the Court found that success and failure were shared "almost equally" and that "it would be impossible to conclude that one was more successful than the other". In the case at hand, the Burgoynes are clearly and substantially more successful.

[31] In ***Nickerson v. Hatfield***, 2013 NSSC 238, the Court refused costs to the Applicant even though she was fully successful on the critical issue, because she

and her witnesses “were less than forthright with their evidence”. The same cannot be said of the Burgoynes in the case at hand. I found their evidence to be credible and reliable.

[32] In ***Croft v. Cook***, 2014 NSSC 230, the Court concluded that success was divided between the parties. In that case, the Defendants had completely blocked the roadway in question. They took the position that the Plaintiffs had no right-of-way at all over the roadway. The Plaintiffs took the position that they could use the roadway for all purposes. The Court concluded that the roadway could be used for harvesting and hauling wood, but not for passage by heavy trucks hauling shale. Therefore, in that case, success was divided.

[33] In the case at hand, there never was any dispute that the express rights-of-way existed for the benefit of the Homestead Lot. In addition, the Court in the case at hand concluded that no right-of-way at all existed for the benefit of the Hutton Sales Lot. Further, as already noted, the commercial use issue was a more minor issue based on the Hutton’s bringing up the possibility of wanting to make such use of it in the future.

[34] The Huttons also advanced that: they would undertake to forego pursuing their claim against the Burgoynes for interference with permissible use of the

express right-of-way over the driveway; and, that would provide further justification to order the parties to bear their own costs. That would have been an appropriate factor for the parties to consider in negotiating an agreement on costs. However, in my view, it is not a factor I can consider in determining costs in the applications I have heard. To do so, would involve prejudging the outcome of the Huttons' claim, prior to hearing the evidence and arguments.

[35] In my view, the division of success in the case at hand is, though not identical to that in ***Henneberry v. Compton***, 2014 NSSC 412, more comparable to it. In that case, the Court noted that the Respondents had achieved substantial success and made favourable settlement offers along the way. In addition, adverse findings of credibility were made against the Applicants. The Respondents were successful in opposing an adverse possession claim except for a narrow triangle-shaped piece only seven feet at the base where the Applicants' driveway encroached upon the Respondents' lot. The Court noted that the majority of the trial evidence was taken up by the broader area. That is similar to the case at hand, in which the question of whether a right-of-way existed for the benefit of the Hutton Sales Lot occupied the majority of the hearing time.

[36] In the ***Henneberry*** case, the Respondents had proposed different new common boundary lines. The Applicants had countered the latest offer. They

were unable to settle their narrow differences. The Judge concluded that, "measured against the outcome of the trial, the Applicants ought to have settled the case on the terms offered by the Respondents".

[37] Although, in the case at hand, the Burgoynes have not presented, to the Court, any settlement offers they have made to the Huttons, the result obtained by the Burgoynes was more advantageous than the offer they received from the Huttons.

[38] The Court in ***Henneberry*** rejected the approach of using an artificial amount involved for the non-monetary issue it had to decide. Instead, given that it had an accounting of the actual fees incurred, it used the lump sum approach of providing a substantial contribution towards the Respondents' reasonable legal expenses, that falls short of complete indemnity. It awarded $20,000 in costs, which was approximately 57% of the reasonable legal costs. It noted that that amount would have been higher but for the minimal success of the Applicants.

[39] The Court in ***Henneberry***, at paragraph 13 summarized the applicable principles extracted from **Civil Procedure Rule** 77 as follows:

> "(a) An award of costs is in the discretion of the trial judge who may make any order about costs as the court is satisfied will do justice between the parties;

> (b) Costs of a proceeding follow the result, unless a judge orders otherwise;
>
> (c) Party and party costs must be fixed in accordance with tariffs of costs and fees incorporated into Rule 77, unless a judge orders otherwise;
>
> (d) A judge who fixes costs may add an amount to, or subtract an amount from, Tariff costs;
>
> (e) A judge may award lump sum costs instead of Tariff costs;
>
> (f) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award".

[40] Since these are applications in court, the applicable Tariff would be Tariff A. The parties have agreed to an amount involved of less than $25,000. Using Scale 2, produces a base amount of $4,000. There were four days of hearing. Adding $2,000 per day, increases the amount by $8,000. That is a total of $12,000.

[41] However, the case involved the following special circumstances which are relevant to a costs determination. It combined two applications in court. A significant amount of effort had to be expended to properly prepare the evidence in the form of affidavits in advance. In addition to significant evidence from lay witnesses, there were voluminous Affidavits from title searchers, exhibiting old Deeds and Plans which had to be studied. There was a survey expert to deal with, along with multiple versions of plans and a series of aerial photographs from

previous eras. Enlarged plans were prepared as exhibits to facilitate observation of the witnesses as they pointed to and marked relevant landmarks and activities relating to the land in question. A significant amount of the evidence dated back to the 1960's. Some even went back 150 years and involved examination of old plans of grants predating the existence of the road towards Halifax in that area. It was clear that counsel for the Burgoynes spent a significant amount of time and effort in arriving at agreements prior to the hearing of the applications which saved significant hearing time. There was a legal question over whether written permission was required to defeat 25 years of use which had to be resolved. Also, the authorities left some vagueness in the area of determining the scope of the expressed right-of-way. Further, extensive post-hearing written submissions were provided. The parties had to engage in significant additional research in order to compile those.

[42] In my view, these were special circumstances requiring a sufficient level of exceptional legal services to warrant straying from the Tariff costs and awarding lump sum costs.

[43] Our Court of Appeal has stated that substantial contribution should be taken as meaning more than 50% but less than 100% of reasonable legal fees, and vary according to the circumstances of the case. Like the Court in ***Henneberry***, I am of

the view that the fact that the Burgoynes did not have complete success, and that the Huttons did have some partial success, warrants awarding a percentage close to the 50% mark. In my view, the Huttons, in the case at hand, had slightly more success than the Applicants in the ***Henneberry*** case. Therefore, an amount less than 57% is warranted.

[44] I will turn now to looking at the invoices to determine what reasonable legal fees have been established.

[45] I have reviewed the invoices for legal services provided to the Burgoynes by the law firm of Cox & Palmer in connection with this matter. They are dated April 16, 2015, August 31, 2015 and January 31, 2016. The total fees plus HST actually billed is $33,903.15. That is after the firm discounted its fees by $12,186. Adding HST to that amount would have resulted in an additional $14,013.90.

[46] Michelle Kelly, the lawyer who represented the Burgoynes in the applications, and her firm, provided effective and efficient legal representation. In my view, the legal fees charged were reasonable. Given the level of competence in which the case was handled, the full amount, without discounts would also have been reasonable.

[47] I have also reviewed the disbursements and other charges included in those invoices. As between the Burgoynes and the law firm they are perfectly reasonable. However, I must assess their reasonableness in the context of an order for disbursements.

[48] They include charges for meals and mileage totalling $253.81. That amount is noted as being taxable. With the HST added it results in a total of $291.88. They also include accommodation expenses of $382.47, plus HST, which totals $439.84. These expenses were incurred because the Burgoynes hired lawyers that were not local. It was not shown why that was reasonably required. Therefore, it is not an appropriate expense to pass on to the Huttons.

[49] Each invoice contains an entry stating “Photocopies” followed by a monetary amount. There is no indication of the number of photocopies, nor the unit price. However, having seen the materials and exhibits filed in these applications, it appears that the total amount indicated for photocopies would be at least roughly consistent with a unit price of ten cents, considering the number of copies that would have been required. Therefore, I need not reduce the photocopy disbursements indicated on the invoices.

[50] After deducting the meals, mileage, and accommodation expenses the total disbursements remaining from the Cox & Palmer invoices are $353.91.

[51] Prior to being represented by Cox & Palmer, the Burgoynes were represented by Wickstrom Law. Invoices for services provided by Derrick Wickstrom have been provided. They bear the following dates: April 2, 2013; August 31, 2013; January 23, 2014; and, April 2, 2015.

[52] Unfortunately, the reasonableness of the legal expenses in those invoices is not as clearly ascertainable as those from Cox & Palmer. I say that for three reasons.

[53] Firstly, some of the services do not appear to relate to these applications. For instance, there are references to conferences with the Burgoynes regarding the sale of land from an estate, and correspondence regarding a will in the possession of another lawyer. Those appear to relate to the estate and will of Daniel Burgoynes' late mother, not to these applications. Another item in the Wickstrom invoices which does not appear to relate to the within applications is that related to an invoice and an apparent report from Doctor David F. Woolnough. There are other points in relation to which it is unclear whether or not they are connected to

these applications. It may be that some of the services provided in the April 2, 2013 invoice did relate to this application. However, that is not clear.

[54] Secondly, in the course of dealing with some of the pre-hearing motions in this matter, it was apparent to me that the legal services provided by Mr. Wickstrom were much less effective and efficient than those provided by Cox & Palmer. In my view, he failed to fully appreciate the issues. In addition, he did not pay enough attention to the requirements of the **Civil Procedure Rules**. That caused unnecessary postponements. Even after the Court pointed out and questioned Mr. Wickstrom in relation to whether a particular **Civil Procedure Rule** had been complied with, and the matter was adjourned to another date, the documents required were still not provided.

[55] Thirdly, the Wickstrom invoices do not provide any time unit breakdown for services provided. That makes it impossible to properly assess the reasonableness of the charges.

[56] In my view, for the purposes of this costs determination, the entire April 2, 2013 should be ignored. Also, the total legal fees and HST in the remaining Wickstrom invoices should be discounted by 50% to account for the ineffectiveness and inefficiencies, as well as the impossibility of assessing

reasonableness due to the lack of time unit entries. Fifty percent of the total amount noted is $6,647.

[57] Adding that to the $33,903 in total legal fees and HST with Cox & Palmer results in a grand total of $40,550.

[58] In my view, in the circumstances of the case at hand, the appropriate level of substantial contribution to legal costs would be approximately 50% of that amount or roughly $20,000.

[59] However, the Burgoynes have limited their request for an award of costs to the amount of $19,600. Therefore, I will award them costs in the amount of $19,600.

[60] They also request disbursements of $2,470.28. I have already made my comments in relation to the disbursements contained in the Cox & Palmer invoices.

[61] The applicable Wickstrom invoices also simply include entry of a dollar amount for copies without specifying the number or the unit price. The charges for photocopies total $94. Unlike the Cox & Palmer invoices, without more evidence, I cannot conclude that the number of copies that would have been required would make it such that the unit price of those copies would be limited to ten cents per

copy. However, I will reduce the amount for copies by $50. That will make the remaining amount roughly reasonable.

[62] The Wickstrom invoices also include a $375 fee for a report from Doctor David F. Woolnough. It was not shown that that report was required for these applications. Consequently, that amount will be disallowed.

[63] In addition, in my view, it is improper to require the Huttons to reimburse the Burgoynes for the $25 file fee and the $10 phone/fax fee in the Wickstrom invoices. In my view, those are office expense amounts that, though appropriately agreed upon as between solicitor and client, ought not be passed on to the unsuccessful party. Deducting those improperly included amounts from the total disbursements and HST of $1,203.87, leaves a balance of disbursements and HST of $743.87. Adding that amount to the $353.91 in allowable disbursements and HST from the Cox & Palmer accounts, results in total allowable disbursements of $1,097.78.

CONCLUSION

[64] For these reasons, in my view, the costs award which will do justice between the parties is one requiring the Huttons to pay the Burgoynes a lump sum of $19,600 in costs, plus disbursements in the amount of $1,097.78.

[65] However, the Burgoynes made a pre-hearing motion for issuance of discovery subpoenas in relation to the lawyers who represented the persons who sold the Hutton Sales Lot and the Homestead Lot to the Huttons. The motion was dismissed and the Burgoynes were ordered to pay Costs to the Huttons in the amount of $2,500 payable in any event of the cause at the conclusion of these proceedings. Therefore, that amount owing by the Burgoynes to the Huttons is now to be deducted from the amount owing by the Huttons to the Burgoynes. That leaves a net amount of costs of $17,100 owing by Huttons to the Burgoynes.

[66] My references to the Huttons herein, as in the main decision, include Elizabeth Hutton and her company, which is solely owned by her and which she incorporated for the purpose of purchasing the Hutton Sales Lot. Given those circumstances, in my view, it is proper that they be jointly and severally liable for this net amount owing to the Burgoynes.

ORDER

[67] I order the Huttons to pay this net amount forthwith.

[68] I ask the lawyer for the Burgoynes to prepare the Order accordingly.

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PIERRE L. MUISE, J.