

1995

S.H. No. 135255

**IN THE SUPREME COURT OF NOVA SCOTIA**  
Cite as: Hudgins v. Danka Business Systems Ltd., 1998 NSSC 92

BETWEEN:

**PATRICK HUDGINS**

PLAINTIFF

- and -

**DANKA BUSINESS SYSTEMS LTD.**

DEFENDANT

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**DECISION ON COSTS**

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**HEARD BEFORE:** The Honourable Justice Walter R.E. Goodfellow

**PLACE HEARD:** Halifax, Nova Scotia

**DATE HEARD:** Written representations June 1998

**DECISION:** July 10, 1998

**COUNSEL:** Bernadette C. Maxwell, Nancy L. Elliott  
Solicitors for Patrick Hudgins  
Hugh H. Wright, Paul D. McLean and Articled Clerk Deanna Borden  
Solicitors for Danka Business Systems Ltd.

***Goodfellow, J.:***

**1. BACKGROUND**

The Court rendered a decision in this matter on May 1, 1998, concluding that Hudgins was entitled to a fixed salary for three months, of \$2,500.00 and a commission at the rate of 35% on a Marshview sale and Sasha Publishing sale. In calculating the amount outstanding, the Court did not use the gross figures and invited counsel in its decision, to reflect upon the mathematics.

Hudgins counsel now calculate the amount at \$5,954.62 gross and counsel for Danka calculate at \$4,708.86. Hudgins counsel calculates 35% of \$12,238.70 at \$4,298.55 and included in this amount, a \$15.00 addition. The basic difference between the calculations is in relation to the bi-weekly payment of \$923.08 made on December 1, 1995. Salary amounts were paid in arrears and I am satisfied that this amount should be deducted from the calculation advanced by Hudgins and the recovery is therefore adjusted to \$5,031.54.

The parties held a Settlement Conference and Hudgins' solicitors recited an expression of opinion by this settlement, justice. I simply comment that it was a very conditional expression of opinion based on if Hudgins was able to establish certain facts. In any event, it is totally inappropriate for counsel to refer to matters raised during the Settlement Conference process. It is the clear understanding of counsel and parties that, a Settlement Conference is entirely without prejudice.

## 2. OFFERS TO SETTLE

- (1) In November 1996, Hudgins' solicitors wrote seeking payment of outstanding salary and commissions calculated at \$38,974.14.
- (2) On October 30, 1997, Hudgins made a 41A Offer to Settle in the amount of \$200,000.00 plus costs, less any statutory deductions.
- (3) On April 2, 1998, Danka advanced a 41A Offer to Settle for \$15,000.00 all inclusive.
- (4) On April 6, 1998, Danka filed a Final 41A Offer to Settle for \$35,000.00 plus pre-judgment interest at the rate of 6% (\$2,800.00) and costs under Tariff C (\$2,150.00).  
This offer was not withdrawn and remained outstanding.
- (5) Hudgins made his final offer under 41A to Settle, April 7, 1998 for \$180,000.00 plus costs and pre-judgment interest at 6%.

## 3. CIVIL PROCEDURE RULES

**63.02** (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate of portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

- (a) award a gross sum in lieu of, or in addition to any taxed costs;
- (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
- (c) direct whether or not any costs are to be set off.

**63.04**(2) In fixing costs, the court may also consider

- (a) the amount claimed;

. . .

- (j) any other matter relevant to the question of costs.

**41A.09(2)** Unless ordered otherwise, where an offer to settle was made by a defendant at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where the plaintiff fails to obtain a judgment more favourable than the terms of the offer to settle, the plaintiff shall be entitled only to party and party costs plus taxed disbursements to the date of service of the offer to settle and the defendant shall be entitled to party and party costs plus taxed disbursements from the date of such service.

**41A.11** Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.

#### **4. AMOUNT INVOLVED**

##### **Cost and Fees Act**

##### **Tariffs of Cost and Fees Determined by the Costs and Fees Committee To Be Used in Determining Party and Party Costs**

To be used in determining party and party costs in a proceeding commenced on or after January 1, 1989.

In these Tariffs, the "amount involved" shall be

- (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
  - (I) the amount allowed
  - (ii) the complexity of the proceeding, and
  - (iii) the importance of the issues;

## 5. DETERMINATION

### a) Hudgins' Entitlement

While I am tempted to follow the rule of thumb in non-monetary cases, **TD Bank v. Lienaux (1993), S.H. 93-5807, February 18th, 1997 (unreported)** and such cases as **Collins v. Speicht, (1993) 123 N.S.R. (2d) 71** and **Wyatt v. Franklin (1993), 123 N.S.R. (2d) 347**, the guidance provided clearly indicates where the main issue is a monetary claim, the amount involved should have regard to the amount allowed. I conclude that the amount allowed is, in this case, the proper amount for the exercise of judicial discretion.

Had there been no offer of settlement by the defendant, the plaintiff would have been entitled to costs in accordance with Tariff A, Scale 3 in the amount of \$1,250.00 plus his full reasonable disbursements.

The recovery by the plaintiff is limited to party and party costs to the date of service of the offer of April 2, 1998. This was a fiercely contested matter that took five days, and the plaintiff advanced a claim, which I described in my decision, as a "wish list". The plaintiff is entitled only to a portion of Tariff A, Scale 3 costs and the evidence advanced by the defendant is that it had time records indicating approximately 65.2% of the value of the time spent on this matter, was incurred after the April 2, 1998 offer, predominantly in preparing for trial, witness preparation and actual attendance in court.

The plaintiff's solicitors, in their representations on costs, refer to the 65.2% time allotment without criticism and without advancing any time allotment to the contrary.

It seems to me that the defendants allocation of time post their offer of settlement, is reasonable guidance to the court, and I conclude that two thirds of the plaintiff's time and services would have been similarly allocated, limiting the plaintiff's recovery to one third of Tariff A, Scale 3, so that the plaintiff is entitled to cost, which I tax and allow the amount of \$333.33 plus reasonable disbursements to the date of receipt of the offer of settlement.

The plaintiff claims the following disbursements:

Filing Fees	\$78.21
Document Service	45.00
Transcripts	334.75
In-House Photocopying	<u>150.00</u>
Total Disbursements	\$607.96

The plaintiff objects to the disbursements sought by the defendant, which I will address further. They specifically call into question, the defendants claim for photocopying post April 2, 1998 in the amount of \$404.25.

I have had occasion to express my views with respect to the photocopying expenses being charged totally as a reasonable disbursement **Knox v. Inter-Provincial Engineering Ltd. et al** (1993), 120 N.S.R. (2d) 288 at p.303. In the absence of more specifics, I allow 60% of the photocopying amounts advanced.

The plaintiff is therefore entitled to tax costs of \$333.33 and disbursements taxed at \$547.96.

**b) Danka's Entitlement**

Danka requests double costs from the date of delivery of their April 2, 1998, 41A offer. It is noted that C.P.R. 41A.09(1) permits, unless otherwise ordered, the plaintiff to an entitlement of double party and party costs, post an offer for settlement by the plaintiff, which is less than the recovery. No similar provision is contained in C.P.R. 41.09(2), however it does commence "unless ordered otherwise". Danka asks for double costs, based upon the discretion existing in the court and points also to C.P.R. 41A.11. I agree that in an appropriate circumstance, the proper judicial exercise of discretion might well allow double costs or additional consideration to costs for the defendant, where at C.P.R. 41A.092 situation exists **MacWilliams Engineering Ltd. v. D.M.L.P. Holdings** (1995), 139 N.S.R. (2d) 84, **Wheel Ranch Ltd. v. Sun Alliance Insurance Co. et al** (1995), 142 N.S.R. (2d) 154.

After careful consideration, I conclude that Danka should have its party and party costs and reasonable disbursements post receipt by Hudgins, of Danka's offer of April 2, 1998 and that it

should be related to the amount involved "which I have determined is the amount recovered". In my view there was not a snowball chance of facing exposure of the magnitude for which Hudgins wished to settle. I appreciate Danka would recognize Hudgins' lack of credibility but have some difficulty in assessing its full impact without trial. Danka's exposure at no time was remotely related to the amount for which Hudgins was prepared to settle. Danka are therefore entitled to two thirds of Tariff A, Scale 3, the sum of \$666.66 and with respect to their disbursements, Danka claims a total of \$3,670.95 and the following of those disbursements are contested by Hudgins:

Meal Expenses (Hugh Wright/P. Lafferty?)	\$52.83
Mr. Wright's Travel Expenses	641.42
Mr. Wright's Rental of Meeting Room	85.00
Kathleen Maynard's Meals	33.30
Peter Lafferty's Meals	140.00
Cost of Legal Assistant's Travel to Wentworth	93.69
Photocopies after April 2/98	404.25
Document Service on Allison Furlong	<u>169.57</u>
Total	\$1,620.06

Mr. Furlong, if memory serves me correct, resides in Sackville, New Brunswick and presumably, this is a combination of a document subpoena service fee and his mileage one way. In the absence of an explanation as to why it would be reasonable for such to reach this level claimed, I allow only \$100.00 and the photocopying is to be reduced by forty percent, for an allowance of \$242.55. Additionally, I am satisfied that I have not been provided with a sufficient basis for the



disbursements objected to and they are disallowed in the amount of \$946.24. This reduces the disbursements claimed by \$1,178.06 for disbursements allowed of \$2,492.89. This figure should probably be adjusted by a further reduction in relation to HST and I leave the final calculation to counsel. However, based upon costs and disbursements totaling \$981.29 deducted from the costs of \$666.66 and disbursements of \$2,492.89, which total \$3,159.55, the defendant is entitled to a set off against the amount recovered by the plaintiffs for the difference which is \$2,178.26.

**J.**