

SUPREME COURT OF NOVA SCOTIA

Citation: *Boutilier v. Hilly Acres Farm Limited*, 2025 NSSC 105

Date: 20250325

Docket: Hfx No. 519951

Registry: Halifax

Between:

Jennifer Boutilier

Plaintiff

v.

Hilly Acres Farm Limited, a N.S. Limited company and Sobeys Inc., a N.S.
Limited Company

Defendants

and

Docket: Hfx No. 519952

Registry: Halifax

Matthew Degaust-White

Plaintiff

v.

Hilly Acres Farm Limited, a N.S. Limited company and Sobeys Inc., a N.S.
Limited Company

Defendants

and

Docket: Hfx No. 519953

Registry: Halifax

John White

Plaintiff

v.

Hilly Acres Farm Limited, a N.S. Limited company and Sobeys Inc., a N.S.
Limited Company

Defendants

and

Docket: Hfx No. 519954
Registry: Halifax

Amelia Cochrane

Plaintiff

v.

Hilly Acres Farm Limited, a N.S. Limited company and Sobeys Inc., a N.S.
Limited Company

Defendants

and

Docket: Hfx No. 519955
Registry: Halifax

Reece White

Plaintiff

v.

Hilly Acres Farm Limited, a N.S. Limited company and Sobeys Inc., a N.S.
Limited Company

Defendants

and

Docket: Hfx No. 519956
Registry: Halifax

Jesse White

Plaintiff

v.

Hilly Acres Farm Limited, a N.S. Limited company and Sobeys Inc., a N.S.
Limited Company

Defendants

Decision

Judge: The Honourable Justice C. Richard Coughlan

Last Written Submission: December 13, 2024

Oral Decision: February 11, 2025

Counsel: Robert Carter, K.C., for the Plaintiffs (in this motion only)

J. Andrew Fraser, K.C. and Shanieka Wood, for the Defendant Hilly Acres Farm Limited

Tyana Caplan and Kali Robertson, for the Defendant Sobeyes Inc.

By the Court:

[1] These motions demonstrate the importance of the requirement for full and fair disclosure on a party making an *ex parte* motion. The motions were caused by the fact the Plaintiffs' *ex parte* motions to renew their Notices of Action contained false and misleading information.

[2] In a judgment delivered on October 22, 2024 I found the *ex parte* motions to renew the Notices of Action which resulted in the renewal orders issued on January 15, 2024 contained false and misleading information and set aside the renewal orders. In a judgment delivered December 2, 2024 after rehearing the motions I granted motions to renew the Notices of Action in each of the proceedings. This judgment deals with the issue of costs of the motions.

[3] The facts are as follows:

[4] These proceedings as well as an action by Stefanie Degaust-White against Hilly Acres Farm Limited (Hilly Acres) and Sobeys Inc. (Sobeys) arise from a claim for damages from injuries from consuming eggs allegedly provided by Hilly Acres and sold by Sobeys.

[5] By letters of demand dated March 19, 2021, Liam O'Reilly a lawyer at Wagners a law firm, wrote to Hilly Acres and Sobeys stating the firm represented Stefanie Degaust-White; John White; Matthew Degaust-White; Reece White, by his litigation guardian Stefanie Degaust-White; and Jesse White, by his litigation guardian Stefanie Degaust-White.

[6] Subsequently Hilly Acres and Sobeys were notified of two further claimants Amelia Cochrane and Jennifer Boutilier in relation to the same incident.

[7] On September 14, 2021 counsel for Hilly Acres' insurers denied liability as did Sobeys Inc. in May or June 2021.

[8] On May 17, 2022 Stefanie Degaust-White commenced action against Hilly Acres and Sobeys. Hilly Acres' solicitor accepted service of the Notice of Action and the Notice of Action was served on Sobeys. Both Defendants filed Defences on October 14, 2022.

[9] The six actions which are the subject of these motions were unbeknownst to Hilly Acres and Sobeys commenced on December 14, 2022.

[10] Between October 2022 and November 2023 there were extensive communications between Stefanie Degaust-White's counsel and counsel for Hilly Acres and Sobeys about Ms. Degaust-White's claim including disclosure and attempting to schedule discovery. Eventually Stefanie Degaust-White's claim was settled.

[11] On January 8, 2024 Mr. O'Reilly filed *ex parte* motions to renew the Notices of Action in the actions which are the subject of these motions. The reason the motion was being made *ex parte* was set out in the Notices of Motion as follows:

This motion is made without Notice to any other person because we are unable to serve the Defendants.

[12] In the brief he filed Mr. O'Reilly stated:

We ask this Honourable Court to grant an Order allowing for a renewal of this period of time to serve the Notice of Action. This will permit us time to serve the Defendants and continue the ongoing settlement discussions.

[13] Nothing was before the Chambers Judge dealing with the motions for renewal of the Notices of Action concerning the service of Stefanie Degaust-White's Notice of Action on Sobeys or the acceptance of service by Hill Acres' counsel or the extensive communications Mr. O'Reilly had with the Defendants' counsel. The Notices of Action were renewed.

[14] The Defendants moved for a rehearing of the *ex parte* motions issued on January 15, 2024 renewing the Notices of Action for an additional year and for orders setting aside the renewal orders, declarations the Notices of Action expired, dismissing the actions against them and awarding the Defendants costs of the motions.

[15] Both Hilly Acres and Sobeys submit each should be awarded lump sum costs of \$15,000. Hilly Acres counsel submits such an award does not approach a solicitor-client scale of award and is well below Hilly Acres' actual fees incurred in respect of all the motions before the Court. Sobeys' counsel submits the award would go toward Sobeys' fees and expenses associated with the motions and in compensation for the prejudice to Sobeys occasioned by the Plaintiffs' conduct of these matters. I do not have particulars of the fees and disbursements incurred by Hilly Acres and Sobeys.

[16] The Plaintiffs in their submissions on costs state:

The Defendants were successful at the first part of the hearing under Rule 22.08, and the Plaintiffs were successful at the second part of the hearing under Rule 4.04(2). Each hearing was one half day. In the normal course, the Plaintiffs might have been willing to suggest each party bear their own costs. However, when one considers some of the unsubstantiated allegations made by the Defendants, which allegations complicated the motions, the Plaintiffs ask that the [C]ourt consider the Defendant's unsubstantiated allegations against counsel for the Plaintiffs and award the Plaintiffs some costs.

The amount of costs are generally determined by the *Tariffs of Costs and Fees* under Rule 77. Costs on a motion are governed by Tariff C, unless the judge orders otherwise: *Rule 77.05(1)*. A judge is afforded wide discretion to "make any order about costs as the judge is satisfied will do justice between the parties" (*Rule 77.02(1)*).

In the present case, though the Plaintiff's acknowledged that the original renewal motions contained errors, it is submitted that those errors did not in any way affect the conclusions that the renewals be granted pursuant to Rule 4.04(2). But we respectfully submit, that the Defendant's allegations, more specifically certain unsubstantiated and offensive allegations made against Plaintiffs' counsel personally, caused significant and unnecessary additional work for all parties and time of the Court and it is these allegations that merit an award of costs in favour of the Plaintiffs.

[17] The Plaintiffs go on to submit they should receive costs of \$1,000.00 from each Defendant due to the increased complexity of the matter, the importance of the matter to the Plaintiffs, the amount of effort required by the Plaintiffs to address the untenable allegations put forth and unreasonable position taken by the Defendants. In the alternative, if the Court declines to award the Plaintiffs costs each party should bear their own costs.

[18] The following principles are set out in the *Civil Procedure Rules*. In determining appropriate costs the Court is to "do justice between the parties" (*Rule 77.02(1)*). Costs follow the result, unless a judge orders or a rule provides otherwise (*Rule 77.03(3)*). Unless a judge orders otherwise party and party costs are fixed according to the tariffs reproduced at the end of Rule 77 (*Rule 77.06(1)*). Tariff C applies to motions. *Rule 77.07(2)* sets out examples of factors which may be relevant in determining whether the Tariff costs should be increased or decreased. A judge may order lump sum costs instead of tariff costs (*Rule 77.08*).

[19] This matter involved motions in six separate proceedings.

[20] *Civil Procedure Rule 22.02* provides a party must make a motion on notice unless the party satisfies the judge hearing the motion it is properly made *ex parte*.

Rule 4.04(3) allows a motion to renew a notice of action to be made *ex parte*, unless a judge orders otherwise. If made *ex parte* Rule 22.05 sets the standard a party must meet:

22.05 Full and fair disclosure on an *ex parte* motion

- (1) The party who makes an *ex parte* motion must include, in an affidavit filed for the motion, any evidence known to the party, personally or by information, that weighs against granting the order.
- (2) A party who makes a motion for an *ex parte* order must advise the judge hearing the motion of any fact that may weigh against granting the order.
- (3) A judge who is satisfied that an *ex parte* order was obtained without full and fair disclosure may set aside the order.

See *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2022 NSCA 64 at paras. 97-101, 103 and 105.

[21] In the case of the motions which resulted in the renewal orders issued January 15, 2024 the Plaintiffs did not meet the standard set out in Rule 22.05. There were not just errors in the motion documents as the Plaintiffs submit. The Notices of Motion and the briefs filed in support of the motions contained false and misleading information. In *ex parte* motions, as parties affected by the motion are not present full and frank disclosure must be made. The motions we are dealing with today were caused by the fact the Plaintiffs' *ex parte* motions to renew their Notices of Action contained false and misleading information.

[22] The Plaintiffs submit the Defendants made certain unsubstantiated and offensive allegations against the Plaintiffs personally. In fact the Defendants' counsel said the Plaintiffs' counsel did not intentionally mislead the Court.

[23] In my judgment delivered on December 2, 2024 I found the Defendants did not suffer prejudice that cannot be compensated for in costs. Considering these motions were caused by the fact the *ex parte* motions contained false and misleading information the Defendants are entitled to a substantial contribution to their costs related to these motions.

[24] Considering all the facts of these motions including that they involved motions in six separate proceedings, and to do justice between the parties the Plaintiffs are to pay each Defendant costs as follows:

- In the matter Jennifer Boutilier v. Hilly Acres Farm Limited and Sobeys Inc., Hfx No. 519951 Jennifer Boutilier is to pay costs to Hilly Acres Farm Limited in the amount of \$2,000 and in the amount of \$2,000 to Sobeys Inc. payable forthwith;
- In the matter Matthew Degaust-White v. Hilly Acres Farm Limited and Sobeys Inc., Hfx No. 519952 Matthew Degaust-White is to pay costs to Hilly Acres Farm Limited in the amount of \$2,000 and to Sobeys Inc. in the amount of \$2,000 payable forthwith;
- In the matter John White v. Hilly Acres Farm Limited and Sobeys Inc., Hfx No. 519953 John White is to pay costs to Hilly Acres Farm Limited in the amount of \$2,000 and in the amount of \$2,000 to Sobeys Inc. payable forthwith;
- In the matter Amelia Cochrane v. Hilly Acres Farm Limited and Sobeys Inc., Hfx No. 519954 Amelia Cochrane is to pay costs to Hilly Acres Farm Limited in the amount of \$2,000 and to Sobeys Inc. in the amount of \$2,000 payable forthwith;
- In the matter Reece White v. Hilly Acres Farm Limited and Sobeys Inc., Hfx No. 519955 Reece White is to pay costs to Hilly Acres Farm Limited in the amount of \$2,000 and to Sobeys Inc. in the amount of \$2,000 payable forthwith; and
- In the matter Jesse White v. Hilly Acres Farm Limited and Sobeys Inc., Hfx No. 519956 Jesse White is to pay costs to Hilly Acres Farm Limited in the amount of \$2,000 and to Sobeys Inc. in the amount of \$2,000 payable forthwith.

Coughlan, J.