

Date: 20150624
Docket: 13/71
Citation: *Fiander v. Mills*, 2015 NLCA 31

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

EDWARD FIANDER APPELLANT

AND:

DAVID MILLS FIRST RESPONDENT

AND:

LAURA MENNIE SECOND RESPONDENT

AND:

LINDA KETTLE THIRD RESPONDENT

Coram: Green C.J.N.L., Rowe and Barry JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201304G0102

Appeal Heard: June 11, 2015

Judgment Rendered: June 24, 2015

Reasons for Judgment by Green C.J.N.L.
Concurred in by Rowe and Barry JJ.A.

Counsel for Plaintiff: Self-Represented
Counsel for First Defendant: Mark Mills

Counsel for Second Defendant: James E. Merrigan Q.C.
Counsel for Third Defendant: Sarah Drodge

Green C.J.N.L.:

[1] In dry legal terms, this appeal addresses the correctness of an applications judge's decision to strike out a statement of claim on the ground that it disclosed no reasonable cause of action and that it was frivolous, vexatious and an abuse of process. The legal principles relating to these issues have been dealt with by this Court on many prior occasions. This characterization, however, masks a bigger underlying issue: how a court should respond to claims that allegedly not only are unsupported by a cause of action, but are so fundamentally at variance with and profoundly contrary to accepted law and principle that they appear to be advanced for an improper and ulterior purpose.

Background

[2] The appellant, facing charges under the *Fisheries Act*, RSC 1985, c. F-14, sued, in the Trial Division, the Crown prosecutor, the Provincial Court judge and the fisheries officer who laid the charges, claiming damages for, amongst other things, violation of his human rights and for economic losses. In making his claims, he drew a distinction between his existence as a human being and his status as a person under Article 6 of the *Universal Declaration of Human Rights*. He claimed to have waived his rights as a person, thereby justifying his assertion that the fisheries legislation under which he had been charged did not apply to him.

[3] Counsel for the Crown prosecutor and the judge both applied to strike out the claim on the bases that the claim did not disclose a reasonable cause of action and that it was frivolous, vexatious and an abuse of the court process. The judge also asserted judicial immunity.

[4] When the matter was called in Court, the appellant, though served with the applications to strike, did not appear. Nor did anyone appear for the fisheries officer. While noting that the scheduled court appearance was simply for "a date to set a date" for the actual hearing, counsel for the defendant judge nevertheless requested the applications judge to strike out the claim as against his client in view of the appellant's non-appearance and the fact that the claim had "no merit on its face." Counsel for the Crown

prosecutor had come to the hearing intending to argue the merits of his application to strike in any event and therefore made a similar submission.

The Decision of the Applications Judge

[5] After hearing submissions from counsel for the Crown prosecutor and the judge, the applications judge struck out the claims against *all* defendants. He expressed his decision in this way:

...the Plaintiff ... did not appear, and the matter ... is struck on that basis. More importantly, this is an obvious case that the statement of claim does not disclose a cause of action. It's not that it may not disclose. It cannot ... be rectified by any amendment. And, as well, in accordance with Rule 14.24(1) of the *Rules of the Supreme Court*, ... it is dismissed on the basis that it's scandalous, frivolous and vexatious, and otherwise an abuse of the process of the Court. So the action is struck against all defendants.

[6] The applications judge awarded costs against the appellant and fixed them for the Crown prosecutor and the judge, pursuant to rule 55.02(1)(a), at \$1,800 each. He gave leave to the fishery officer to apply for costs to be assessed in her favour. In setting the gross costs sums at \$1,800, the judge appeared to accept the submission of counsel for the Crown prosecutor that that amount represented the amount of taxed costs he would have been seeking had the costs issue been referred to taxation. No premium was added for extra or special costs over and above party and party costs.

The Appeal

[7] The appellant filed a notice of appeal in which he asserted: "I was unable to attend Court due to an injury, and my appointed Attorney was away on another matter." He also asserted other grounds of appeal as follows:

Institutional bias, Rule 14.24, Unconstitutional awarding of cost to Defendants without hearing the facts, violations of human rights, violated Canadian Bill of Rights – supreme law of Canada.

[8] I note in passing that the reference to the appellant's "appointed Attorney" in the notice of appeal appears to be to an individual by the name of Stuart Pearce, who is listed as the appellant's address for service on the notice of appeal. Attached to the notice of appeal is a document headed "Full Power of Attorney for Legal Work" in which the appellant purports to

appoint Mr. Pearce as his continuing attorney to perform his legal work on his behalf and to act as his litigation guardian in any legal proceeding.

[9] The registry of this Court has confirmed that Mr. Pearce is not a member of the bar of this province. Nor is there any indication that he is a member of the bar of any other jurisdiction in Canada. Accordingly, he had no authority to represent the appellant in these proceedings except perhaps as a McKenzie friend. A person who was identified by one of the counsel as Mr. Pearce appeared with the appellant in Court, but, while conferring with the appellant and passing him papers, he did not speak. The appellant read from a prepared text. His manner of delivery indicated that he was not familiar with the words he was reading. It may well be, therefore, that it had been prepared by Mr. Pearce or someone else.

[10] In the written argument filed by the appellant in support of the appeal, he does not address any of the grounds of appeal specified in his notice of appeal, except for making a couple of general references to various international treaties and the *Universal Declaration of Human Rights* which support, he says, his claimed right to harvest and dispose of natural resources as he sees fit. Instead, he asserts, again, that because he has waived his right to recognition as a person before the law, the *Fisheries Act* does not apply to him. He asserts that, by ignoring this waiver, the three respondents have committed the crime of extortion. He also asserts that the name of the information charging him with violations of the fisheries legislation is based on a birth certificate issued by the government but that such a certificate does not operate as a personal identification, only as a statement of historical facts. He asserts that those matters are “fatal” to the respondents’ position and they have received unjust enrichment, violated the Canadian Bill of Rights, his human rights in Canada and have unlawfully prosecuted him under laws that have no force against him.

[11] Whatever the relevance of the appellant’s written arguments to a possible defence on the merits against the charges brought against him under the fisheries legislation, they have no connection with the issues relating to whether the applications judge committed some error of law or principle in striking out the subsequently-commenced statement of claim against the respondents. I have attempted to summarize the essence of the appellant’s written argument, not because it is germane to the grounds of appeal but because it demonstrates: (i) that the appellant has put forward no argument additional to or in furtherance of the points listed in his notice of appeal; and (ii) the appellant’s arguments are characteristic of a species of vexatious

litigant described as the “Organized Pseudolegal Commercial Argument litigant” (“OPCA”) by Rooke A.C.J. in *Meads v. Meads*, 2012 ABQB 571, 543 A.R. 215, in particular, by references to opting out of legislation by claiming to waive rights as a person under the law, developing substantive arguments relating to assumed characteristics and legal effects of birth certificates and making references to estate law. I will come back to this latter point later.

[12] The Court is left, therefore, with the bare points listed in the notice of appeal supplemented by a few submissions made orally during the appeal hearing.

[13] For the purpose of analysis, the only appeal grounds asserted that have any relevance to the possible reversal of the decision of the applications judge can be summarized as follows:

1. Inability to attend court – I take this to mean that the appellant takes issue with the decision of the applications judge to deal with the applications to strike in the absence of the appellant.
2. “Rule 14.24”: I interpret this reference to be an assertion that the applications judge committed an error in law or principle in his decision to strike out on the bases that no reasonable cause of action was disclosed and that the claims were frivolous, vexatious and an abuse of process.
3. “Unconstitutional awarding of cost to defendants without hearing the facts”: I regard this as a challenge to the decision, in the absence of the appellant, to award costs in the respondents’ favour and to fix them as a lump sum.

The other items referenced in the notice of appeal (institutional bias and violations of human rights and the Canadian Bill of Rights) were not developed in argument and on their face are so vague that they cannot be considered sufficiently connected to the issue of possible reversal of the decision to strike out to deserve any further consideration.

[14] I will deal with the second of the three identified appeal issues first, as the decision on that is relevant to disposition of the other issues as well.

1. Decision to Strike out the Statement of Claim

[15] The applications judge struck out the appellant's claim on the basis that it did not disclose a cause of action and was not capable of amendment so as to express a recognized claim. He regarded that as the "more important" ground. He additionally found that the claim should be struck out because it was scandalous, frivolous, vexatious and an abuse of court process.

[16] He did not state the tests to be applied in making those determinations. That, of course, is not fatal if, based on the record, it is apparent that he took into account the appropriate case law, and it is further apparent that the result of the decision was justifiable on the basis of the proper tests.

(a) No Reasonable Cause of Action

[17] The test for striking out a pleading on the basis that it discloses no reasonable cause of action is a stringent one: whether it is plain and obvious that the pleader cannot succeed in his or her plea: *Roberts v. Browning Ferris Industries Ltd.* (1998), 170 Nfld. & P.E.I.R. 228 (NFCA); *Walsh v. TRA Co.*, 2007 NLCA 50, 268 Nfld. & P.E.I.R. 111; *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959. Cases enunciating the test to be applied were cited to the applications judge in the brief of law filed on the application. The applications judge said that he read the brief. It is clear that he was aware of and purported to apply the proper test.

[18] It is in any event plain and obvious to me that there was no cause of action disclosed. No facts were pleaded from which any cause of action known to the law could be discerned and for which the relief claimed could be awarded. With respect to the Crown prosecutor, the claim contains no allegation of prosecutorial indiscretion or malicious prosecution. In like manner with respect to the fishery officer, there is no allegation of malice, lack of good faith or improper execution of enforcement authority. With respect to the judge, who *prima facie* could avail of the defence of judicial immunity, there is no suggestion made in the statement of claim that the judge was in some manner purporting to act outside her judicial capacity or role, thereby triggering non-application of the immunity (*Morier v. Rivard*, [1985] 2 S.C.R. 716 at paragraphs 85-110).

[19] The only possible argument that the prosecutor, fishery officer and judge stepped outside of their official roles or judicial capacity, as the case may be, relates to the argument that the fisheries legislation does not apply to the appellant. But that submission has no traction whatsoever. The assertions that an individual is entitled unilaterally to “waive” his rights as a person and thereby shield him or herself from the application of legislation intended to be applied to all Canadians is absurd and has been uniformly rejected by Canadian courts. See *Meads* and cases therein cited. The general application of the law to all is the essence of the rule of law, one of the fundamental principles of our constitutional polity. All citizens of and most residents within Canada are subject to the law and cannot opt out of it.

[20] The appellant also asserted in his statement of claim that he is the “grantor and sole beneficiary” of the “Estate” of the human being known as “Edward John Fiander” and that the government continues wrongfully to “administer” his estate in breach of trust by forcing him to pay licence fees and seizing his fish, amongst other things. This notion of treating a named individual as an “estate” that is somehow separate from the person who is subject to the law and that is free from governmental regulation is also a concept unrecognized by the law of Canada. It is just nonsense and has no basis for inclusion in a statement of claim.

[21] The appellant’s assertion in the statement of claim that the issuance of a birth certificate, which merely records an historical fact and does not create identity, somehow nevertheless results in “the process of the creation of an Estate with the parents or guardians granting to the government, as Trustee, their offspring’s (child) share of the earth over which it was given dominion by its creator, the earth and all things of it (Genesis 1:26-28)” is, quite apart from the incomprehensible nature of the assertion, unconnected to any basis for asserting a claim for damages against the respondents.

[22] The appellant also advanced an argument during oral submissions that was not contained in his written material. He submitted that the *Fisheries Act* was not, as a matter of form, properly enacted by Parliament and that consequently each of the respondents was acting illegally when purporting to charge and prosecute him or adjudicate on his prosecution. He points out that legislation requires passage by both houses of Parliament and also Royal Assent for it to be regarded as valid. In this case, the consolidation of the *Fisheries Act* in the 1985 consolidation does not contain a formal enacting clause that recites that her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacted the *Act*.

[23] This submission was not included in the appellant's statement of claim as a basis for his claim for damages against the three respondents. It therefore cannot now be regarded as a justification for not striking out the claim unless it would be appropriate to allow an amendment instead of striking out. There is no basis for taking that route here.

[24] Even if the *Fisheries Act* was formally defective and invalid, it does not follow that the fishery officer, prosecutor and judge purporting to act in good faith pursuant to its provisions would necessarily expose themselves to claims for damages with respect to how they interacted with the appellant: *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at paragraph 42; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405. The appellant has not pleaded – and does not seek to plead – any facts that would set up a cause of action against the respondents in such circumstances. Nevertheless, even if that hurdle could be gotten over, the submission is fatally flawed for other reasons.

[25] It is true that a bill that does not receive royal assent is not law: *Gallant v. The King* (1949), 93 C.C.C. 237 (P.E.I.S.C.). A court has jurisdiction to look at the Parliamentary roll to determine whether a bill in fact passed both Houses and received Royal assent: *Edinburgh and Dalkeith Railway Co. v. Wauchope*, [1842] UKHL J12; 8 Cl. & F. 710, 8 E.R. 279. There is, however, no obligation on the Court to delve into the history of formal enactment of every piece of legislation as a condition of treating it as valid and applying it. A copy of an Act included in the body of legislative sources to which reference is regularly made may be presumed to be valid with respect to its form unless the party impugning its validity presents something of substance suggesting some material defect: *Canada Evidence Act*, RSC 1985, c. C-5, s. 19; *R. v. Welsh and Iannuzzi (No. 6)* (1977), 74 D.L.R. (3d) 748 (Ont. C.A.).

[26] In this case, the appellant has not put forward anything substantively suggesting defective enactment. All he has done is to point to the absence of a formal enacting clause in the 1985 consolidation of Canadian statutes. He relies on form rather than substance. Section 4 of the *Interpretation Act*, RSC 1985, c. I-25 provides as follows:

(1) The enacting clause of an Act *may* be in the following form:

“Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:”.

(2) The enacting clause of an Act shall follow the preamble, if any, and the various provisions within the purview or body of the Act shall follow in a concise and enunciative form.

(Emphasis added.)

[27] The presence of an enacting clause is not a mandatory formal requirement. The absence of such a clause is therefore not fatal to the validity of the legislation. That provides an answer to the appellant's assertions in this case inasmuch as he is merely asserting that as a matter of form the *Act* is not valid.

[28] In any event, the progenitor of the current *Fisheries Act* is the statute 31 Vict., c. 40. It has been amended many times since, but the current legislation originated from the same original bill. That statute records that it received royal assent on May 22, 1868 and contains the usual enacting clause in the following terms:

Her Majesty, by and with the advice and consent of the Senate and the House of Commons of Canada, enacts as follows ...

[29] The fact that the 1985 consolidation did not repeat the enacting clauses in the consolidated version of the *Act* (or of many other Acts for that matter) cannot be said to have resulted in the repeal of the *Act* either in its original or amended forms. Section 4 of the *Revised Statutes of Canada, 1985 Act*, RSC 1985, c. 40 (3rd Supp.) provides that the Revised Statutes are not to be held to operate as new law but shall be construed and have effect as a consolidation of the law as contained in the Acts which they are consolidating.

[30] This argument on the part of the appellant has no merit.

[31] There is therefore simply no basis for concluding from a reading of the statement of claim that any cause of action known to the law, or likely to be developed or deduced from current law, is disclosed. There is not even, to use the words of this Court in *Montreal Trust Co. of Canada v. Hickman* 2001 NLCA 42, 204 Nfld. & P.E.I.R. 58 at paragraph 53, "a skeleton, or even a ghost of a claim." Furthermore, the claim is constructed in such a way that it can safely be said that there is no basis for curing any possible deficiency by allowing amendment. It is, in the words of Mercer J.A. in *GRI Simulations Inc. v. Pro-Dive Oceaneering Co.*, 2004 NLCA 74, 243 Nfld. & P.E.I.R. 50 at paragraph 13, "irremediably defective." The claims are fatally

flawed out of the starting gate. The applications judge addressed this issue and likewise concluded that the claim could not be saved by amendment.

[32] I conclude, therefore, that the applications judge made no error in law or principle in reaching the conclusion that the claim should be struck out on the basis that it disclosed no reasonable cause of action. Accordingly, his discretionary decision should be accorded deference within the principles of *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (NFCA).

(b) Scandalous, Frivolous and Vexatious Claims and Abuse of Process

[33] The applications judge, relying on rule 14.24(1), also struck out the claim on the basis that it was scandalous, frivolous, vexatious and an abuse of the process of the court. This engages paragraphs (b) and (d) of rule 14.24(1), which allows the Court to strike out:

... any pleading ... or anything therein, ... on the grounds that

...

(b) it is ... scandalous frivolous or vexatious;

...

(d) it is otherwise an abuse of the process of the Court.

[34] The judge did not state or differentiate between the tests applicable to each of these justifications for striking out. To some degree they overlap. For example, a claim that does not disclose a cause of action, clearly has no merit and raises no claim that can be connected with or result in the relief claimed, can also be regarded as a frivolous claim: *Brace v. Watch Tower Bible and Tract Society of Pennsylvania*, 2009 NLTD 171, 291 Nfld. & P.E.I.R. 270 at paragraph 50; *Walsh v. Johnson*, 2010 NLCA 6, 293 Nfld. & P.E.I.R. 101 at paragraphs 19 and 21. To allow a claim obviously lacking in merit to proceed, thereby requiring the other parties to engage counsel, incur costs and respond to something that cannot succeed, would *prima facie* make it a vexatious proceeding because it could lead to an abuse of the court's process: *Currie v. Halton Regional Police Services Board* (2003), 233 D.L.R. (4th) 657 (Ont. C.A.) at paragraphs 14 and 17; *Walsh*, paragraph 21.

[35] The filing of an obviously baseless claim for an ulterior purpose, i.e. for a purpose other than for the legitimate vindication of legal rights, such as to delay or disrupt proper legal proceedings or to inflict unnecessary cost on other parties, can constitute abuse of process. As this Court said in *Anstey v. St. John's (City)*, 2014 NLCA 35 at paragraph 65, it generally involves “the requirement that the legal process be involved for a collateral and improper purpose and involve an overt act or threat in furtherance of an illegitimate purpose.”

[36] The ability of a Court to strike out a claim on the basis of abuse of process is an important tool in the Court’s arsenal to control its own process. It enables the Court to balance the competing interests of providing access to the courts for a legitimate purpose with preventing the courts from being used for an oppressive and illegitimate end. While the power to strike for abuse of process is found in the rules of procedure, this important power also exists at common law as part of the court’s inherent jurisdiction: *Brace* at paragraph 22; *Penney v. Canadian Imperial Bank of Commerce* (1996), 145 Nfld. & P.E.I.R. 355 (NFSC, TD) per L.D. Barry J. at paragraph 14.

[37] The claims being asserted, being completely baseless and having no recognized foundation within the jurisprudence in our judicial system and no rational connection to the remedies being claimed, are clearly frivolous. By asserting them, not only in the trial court but continuing to press them on appeal in the face of their rejection in the court below also makes them vexatious, at least at the level of this Court. Furthermore, where a claim not only does not disclose a cause of action but is additionally based on assertions that are profoundly *contrary* to accepted law, it is open to the Court to infer that the claim is being advanced for an ulterior and improper purpose and is thereby an abuse of process. It is not hard to draw that inference here. The commencement of the action in this case appears to be an indirect way of trying to avoid having to deal with the prosecution of the fisheries charges that the appellant was facing, and that consequently the appellant was attempting to use the court system for a collateral and improper purpose. Furthermore, it amounts to a veiled threat to public officials who are purporting to act under applicable law that if they proceed against him they will face inconvenience, nuisance and unnecessary cost. It is an abuse of process which perfectly entitled the applications judge to strike out the claim.

[38] In addition, as noted previously, the pleading in this case, with its assertions of a right unilaterally to opt out of the application of Canadian law

and the elevation of the status of the appellant's birth certificate as creating some sort of "estate" of which the appellant was the beneficiary, are characteristics of an OPCA litigant, as described in *Meads*. As Rooke A.C.J. noted in that case, because every person, individual or human being (there is no difference in law with respect to these terms in this context) is subject to Canadian (including provincial) law and Canadian courts:

[569] ... it is possible that *simply advancing* many OPCA concepts and arguments may *prove* an intention to disobey and ignore the courts and the law. Reduced to their simplest form, many, if not most, OPCA arguments and concepts resolve to a simple claim: "I am not subject to control or sanction by any court or government."

[570] ... an OPCA concept that denies the jurisdiction of the court is vexatious in character and a basis to immediately strike out arguments, applications, and litigation.

[39] This is not to say that a litigant is not ever entitled to challenge the jurisdiction of the court on pain of being labelled a vexatious litigant. But where such a jurisdictional challenge is founded on a baseless assertion that has no rational support in Canadian law or principle and is in derogation of or profoundly contrary to it and has no prospect of being advanced as a legitimate legal argument, it would be open to the court to conclude that the litigant is abusing the court's process for an ulterior purpose.

[40] In this case, this Court has now declared that arguments relating to opting out of legislation, the fractionating of human personality to support claims of not being subject to law and the fanciful use of arguments based on birth certificates to create notions of estates to advance submissions that would otherwise have no rational support in the jurisprudence, have no basis in the law in this jurisdiction. It would therefore be open to a trial court in the future, when made aware of such submissions in other proceedings, to treat those submissions as presumptively vexatious and abusive and to act preemptively to prevent such claims from improperly clogging up the legal system to the cost and prejudice of those who would otherwise have to face and deal with them. The court would not have to wait for a formal application to strike from an affected party but could also act on its own motion to deal with the issue, applying such procedural safeguards (such as a show-cause hearing initiated by the senior court official in the relevant judicial centre) as may be appropriate in the circumstances. It must be remembered that even rule 14.24(1), by its language, does not require a

formal application by a party to initiate a consideration as to whether a pleading is an abuse of the process of the Court.

[41] Although the applications judge in the instant case did not state any reasons for concluding that the statement of claim was frivolous, vexatious and an abuse of process, it is obvious from a perusal of the pleading and the record that he had ample grounds for so concluding. There is no error of law or principle evident with respect to his conclusion in this regard.

Furthermore, even though he did not have in front of him an application to strike from the fishery officer, he was in the circumstances within his authority to apply the conclusions he reached in respect of the other two applications with respect to abuse of process to the fishery officer as well. Each of the claims all had the same defects. In the interests of maintaining “the integrity of the adjudicative functions of the courts”, which the doctrine of abuse of process is designed to protect (*Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John’s*, 2013 NLCA 62, 343 Nfld. & P.E.I.R. 68 at paragraph 143) and sparing other parties from unnecessary and improper litigation, the judge in this case was justified in striking out the claim against all parties.

[42] Having concluded that, on the applicable principles, the applications judge was justified, from a substantive point of view, in striking out the claim, there remains the question as to whether he reached his conclusions in a procedurally acceptable way, given the appellant’s absence during the hearing.

2. Proceeding to Deal with the Substance of the Applications to Strike in the Absence of the Appellant

[43] The applications judge also struck out the claim on the basis that the appellant did not appear when the application was called in court. Rule 29.11(1) provides that when a party fails to attend on a hearing of an application after being served with the application, the court may proceed in the party’s absence. The decision is a discretionary one, to be made by the presiding judge by balancing the interest in expeditiously disposing of court business against fairness to the absent party.

[44] It is to be noted, however, that rule 29.11 does not allow a judge automatically to grant the application of an opposing party based solely on the fact of non-appearance of a party-defendant/respondent. The rule provides merely that the court can “proceed” in the party’s absence. The

Court must therefore consider the merits of the matter, albeit without the input of the non-appearing party and perhaps less thoroughly than would otherwise be the case. In the current case, the applications judge did state that he was striking the appellant's claim on the "basis" of his non-appearance. If that has been the totality of his decision, there could be a basis for concluding that the judge did not exercise his discretion judicially. However, it is clear that he nevertheless went on to adjudicate on the applications to strike by concluding that the claim disclosed no reasonable cause of action and that it was frivolous, vexatious and an abuse of process. The fact that he purported also to strike the statement of claim based on the appellant's non-appearance in itself is therefore, in these circumstances, not a basis for altering the result.

[45] In this case, it appears that the applications judge and counsel for the respondent judge regarded the hearing as simply a date to set a date for full argument. Counsel for the Crown prosecutor, however, came prepared to argue the merits. We do not know what the appellant or the fishery officer thought about the matter. Depending on the expectations of the parties as to what was to occur on the scheduled date, it is possible that the appellant could have been taken unawares when the court proceeded to hear the applications on their merits. This is a factor that would be relevant to be weighed by the applications judge in determining whether it would be appropriate nevertheless not to hear the merits even though he had the jurisdiction to act early and decisively to deal with an apparent abuse of process.

[46] I am satisfied, however, that on the face of the applications to strike that were served on the appellant, there is a clear indication that the issues were to be dealt with on their merits when called in court. While there may be a general court practice not to deal with merits on an initial appearance, unless the appellant had been made aware of that practice or it had been specifically represented to him by a party or the court that the case was not to be dealt with on the merits on that day, there would be no basis for the judge to consider postponing the application on the basis of some assumed unfairness based on possible misunderstanding as to the scope of the hearing. There is no indication that the appellant believed that the hearing was anything other than intended to deal substantively with the applications on the scheduled appearance date.

[47] The appellant also represented in his notice of appeal that he was unable to attend court due to an injury. At the appeal hearing, however, he

said his non-appearance was caused by the fact that he was also scheduled to appear in another court in Port-aux-Basques at the same time. Putting aside the question as to whether the assertion of two different and inconsistent explanations might reflect adversely on his credibility, it is possible that either of the explanations might have been a sufficient reason for an adjournment; however, there is an obligation on the affected party to bring such matters to the attention of the court, if possible, before the hearing, rather than to nonchalantly disregard the matter and to assume non-appearance will automatically result in a postponement: *R. v. Gosse*, 2012 NLCA 78, 332 Nfld. & P.E.I.R. 355 at paragraph 13. Furthermore, even if circumstances prevent the non-appearing party from contacting the court ahead of time, rule 29.11(2) provides a mechanism for a party who fails to appear “through accident, mistake, insufficient notice or other just cause” to apply, within ten days of becoming aware of the order made in his or her absence, to set aside or vary the order. The appellant did not avail of this procedure but filed the current appeal instead.

[48] It might have been preferable to have set the matter over for a short period to make inquiries as to the whereabouts of the appellant and to determine if there was a good reason for his non-appearance. However, given the obviously frivolous, vexatious and abusive nature of the claim, I am not prepared to conclude that the applications judge improperly exercised his discretion to proceed expeditiously in the appellant’s absence.

[49] Nevertheless, even if the judge could be said to have erred in the exercise of his discretion by proceeding without further delay, I am not satisfied that this procedural defect can now be relied upon to justify overturning the judge’s order and remitting it to the Trial Division for yet another hearing. Given the simple alternative mechanism available under rule 29.11(2) and the patent abuse of process and lack of merit in the claim, this Court should not be seen to promote the continuation of the abuse by affording the appellant yet another forum. The better approach, in exercise of this Court’s authority to prevent abuse of process, is to dispose of the matter on its merits.

3. Costs

[50] The applications judge awarded the two appearing respondents costs on a lump sum basis fixed at \$1,800 and gave the fishery officer the right to apply for an assessment of costs.

[51] The applicants had sought solicitor-and-client costs, relying on suggestions in *Meads* that, typically, OPCA litigation results in elevated costs awards, either double costs, special costs or full indemnification (paragraphs 594-600). The role of costs in acting as a deterrent to further litigation of the OPCA type has often been stressed in the cases.

[52] In fixing the lump sum at \$1,800, the judge did not indicate whether he was addressing the request for solicitor-and-client costs. Indeed, that is not the appropriate approach to settlement of costs on a lump sum basis. The object of fixing costs is to avoid delay and the added costs of a separate assessment; it should not be limited to lengthy or complex cases but should be governed by practical considerations: *Anstey* at paragraph 59; *Abitibi-Price Inc. v. Voith Hydro Inc. et al.* (1993), 115 Nfld. & P.E.I.R. 183 (NFSC,TD) at paragraph 7. As noted in *Anstey*, fixing lump sum costs does not involve the traditional taxation of costs under another guise. The Court is not bound by the scale of fees applicable on taxation and may take account of the fact that a party is deserving of disapproval in the way in which he or she has conducted the litigation: “The Court may take a broad approach to calculating what would be an appropriate amount and may, in appropriate circumstances, award an amount that would be in excess of what might reasonably be expected on a taxation” (paragraph 60).

[53] In the instant case, I see no error in principle in the judge’s decision to fix costs by a lump sum or in the number at which he arrived.

[54] But what about the fact that the fixing of the costs was also decided in the appellant’s absence? Should the judge, procedurally, have set the costs issue over to hear representations from the appellant, regardless of what his initial impressions on the costs issue were? The appellant’s submissions on this point may not have been intertwined with the irrational arguments that he was making on the substance of the claim. It does not necessarily follow, therefore, that because the Court disposes of the substance of an application in the absence of a party, it would necessarily also be justified in dealing with the costs consequences of the decision in the absence of the party.

[55] The better position, therefore, would have been for the judge to have set the costs issue over to hear all parties together as to whether they should be fixed by lump sum and, if so, in what amount.

[56] Notwithstanding this conclusion, however, having now heard from all parties on the issue of costs and having concluded that the costs disposition

by the applications judge is not inappropriate, I would affirm the lump sum award of \$1,800 to the first and second respondents in order to bring this proceeding to a conclusion and to send a message that this type of litigation will be dealt with swiftly and decisively. Counsel for the fishery officer, the third respondent, advised this Court that she was not seeking any costs at the Trial Division level.

Conclusion and Disposition

[57] I would dismiss the appeal from the decision to strike out the statement of claim and affirm the award of lump sum costs of \$1,800 in the Court below and in favour of the first and second respondents.

[58] As to costs on the appeal, applying the same reasoning applicable to costs in the Trial Division, I would fix costs on a lump sum basis at \$1,500 in favour of each of the respondents. All costs should be payable within ninety days.

J. D. Green C.J.N.L.

I Concur: _____

M. Rowe J.A.

I Concur: _____

L.D. Barry J.A.