SUPREME COURT OF NOVA SCOTIA

Citation: *Matthews v. Ocean Nutrition Canada Limited*, 2022 NSSC 80

Date: 20220318
Docket: Hfx, No. 353606
Registry: Halifax

Between:

David Matthews

Applicant

v.

Ocean Nutrition Canada Limited

Respondent

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	October 30, 2020, February 22, April 29, May 27, July 14, 15, 2021, in Halifax, Nova Scotia
Counsel:	Blair Mitchell, for the Applicant Nancy Barteaux, for the Respondent

By the Court:

Introduction

[1] This is a decision on costs in a proceeding with a long and complicated history. On August 9, 2011, David Matthews filed a notice of application against his former employer, Ocean Nutrition Canada Limited (ONC), outlining claims for constructive dismissal and oppression, together with general and special damages, punitive and exemplary damages, and solicitor and client costs. Over the ten years since the application was filed, a tremendous amount of time and effort has been expended to bring this matter to a final resolution. At times, the proceedings were not simply contentious, they were rather fractious. Unfortunately, this spilled over and affected the manner in which the parties' counsel dealt with one another. I am sure the parties and their counsel look forward to moving on.

[2] It is necessary to review the matter's history in some detail to explain how we all find ourselves here, dealing with costs on an application that was heard six years ago by another judge of this court.

History

[3] On July 29, 2011, Blair Mitchell, counsel for Mr. Matthews, sent a demand letter to Martin Jamieson, CEO and President of ONC; Daniel Emond, the company's COO; and David Brown, President and CEO of Richardson Capital Limited (through its ownership of various entities, Richardson Capital held 45% of the shares in ONC). Mr. Mitchell was not aware at the time he prepared the letter that ONC had already retained Nancy Barteaux, Q.C., to represent it in any dealings with respect to Mr. Matthews. Mr. Mitchell advised that he had instructions from his client to bring a proceeding in the Supreme Court of Nova Scotia "in short order." He further stated:

> In sum, and on a Without Prejudice basis, our client anticipates loss and entitlement [*sic*] compensation as follows:
>
> 1. Compensation - $700,000.00;
> 2. Loss of employment and notice over eighteen months - $270,000.00;

3. General Damages;
4. Contribution to legal fees and expenses.

[4] The notice of application filed on August 9, 2011 named ONC, Martin Jamieson, Daniel Emond, and Richardson Capital Limited as respondents.

[5] At a motion for directions on August 31, 2011, Justice Pickup directed that the notice of application be amended to properly name the Richardson entities that held shares in ONC. ONC took the position that none of Richardson Capital Limited, Martin Jamieson, or Daniel Emond should be named as respondents. It advised the court that it intended to bring three motions – one removing the respondents other than ONC, one seeking summary judgment on evidence in regard to the claim of oppression, and a third to convert the matter from an application in court to an action.

[6] ONC filed its notice of contest on September 22, 2011, and its three motions on November 17. The motions were set down for March 1, 2012. On February 21, Mr. Matthews made a formal offer to settle all his claims against ONC, other than costs and prejudgment interest, in the amount of $625,000. The offer was not accepted. The motions were heard on March 1 as scheduled.

[7] On April 12, 2012, Justice Wood (as he then was) issued his decision on the motions. ONC was successful in having all parties other than ONC removed as respondents. However, Justice Wood did not allow the summary judgment motion nor did he allow the matter to be converted to an action. On April 26, ONC filed a notice of appeal.

[8] ONC's appeal was heard on November 20, 2012. It was dismissed on December 21. On January 31, 2013, ONC made a formal offer to settle – the applicant could dismiss his application in court without costs to either party. On February 1, Mr. Mitchell wrote to Ms. Barteaux refusing the offer. He did not make a counteroffer.

[9] The application in court was not heard until November 2015. The parties blame each other for the intervening delay, which included several disputes and motions about document production, discovery examinations, and other matters. This period will be examined in greater detail later.

[10] The application was heard before Justice Leblanc on November 2, 3, 4, 5, 9, 10, 12, 13, 2015, and January 28, 2016. The parties filed post-hearing written submissions in April and May 2016. On October 12, Leblanc J. wrote to the parties

asking, among other things, for any submissions on two decisions released by the Ontario Court of Appeal that were relevant to Mr. Matthews's claim under the long term incentive plan (LTIP). The parties filed their submissions in November and early December.

[11] On January 4, 2017, the Alberta Court of Appeal also released a decision that was relevant to the LTIP issue. Since both parties had relied on the lower court decision, Leblanc J. permitted them to file any additional submissions by January 20, which they did.

[12] On January 30, 2017, Justice Leblanc released his decision, finding that David Matthews had been constructively dismissed by ONC, and that he was entitled to 15 months' reasonable notice along with compensation for the loss of the payout he would have received under the LTIP ($1,086,893.36, less applicable tax deductions) and the short term bonus plan (STIP) during the notice period. Justice Leblanc noted, however, that Mr. Matthews had begun other, more lucrative employment with TASA on August 1, 2011, and that any salary or bonuses Matthews received in excess of what he would have earned at ONC during the notice period would have to be deducted from his damage award. Since Leblanc J. had no evidence as to the STIP amount or any bonuses or salary increases Matthews earned after starting with TASA, he left it to counsel to do the calculations. He added, however, that he would hear from them if they were unable to reach agreement. Justice Leblanc directed that if the parties were unable to agree on costs, he would accept written submissions within 45 days of the release of his decision.

[13] On February 21, 2017, ONC filed a notice of appeal alleging, among other things, that Justice Leblanc erred in his conclusions that Mr. Matthews had been constructively dismissed and that he was entitled to compensation for the loss of a payout under the LTIP.

[14] The parties ultimately failed to reach agreement on costs or on the quantum of damages owing. On April 20, 2017, they appeared before Justice Leblanc to make submissions regarding the STIP amount and prejudgment interest. At the hearing, the court invited counsel to make further written submissions, which they did. On May 12, Justice Leblanc issued his supplemental decision dealing with the STIP and prejudgment interest. The decision also held that ONC was to remit 50% of the judgment amount to the Canada Revenue Agency.

[15] Prior to the parties completing their submissions on costs, it was announced that Justice Leblanc would be appointed Lieutenant Governor of Nova Scotia.

Justice Leblanc held a meeting with the parties on June 26, 2017, to advise that I would be assuming carriage of the matter to deal with costs.

[16] A costs hearing had not occurred before ONC's appeal was heard. The Court of Appeal released its decision on May 24, 2018. The majority affirmed Justice Leblanc's findings that Mr. Matthews had been constructively dismissed and that he was entitled to a reasonable notice period of 15 months. The majority disagreed, however, with his conclusion that Mr. Matthews was entitled to damages on account of the lost LTIP payment. In their view, the plain and unambiguous language of the LTIP deprived Mr. Matthews of the opportunity to recover under it once he left ONC. The Court of Appeal ordered Mr. Matthews to repay to ONC any amounts received from it, including any amount received under the LTIP. The Court of Appeal declined to award costs of the appeal to either party.

[17] On August 22, 2018, Mr. Matthews filed an application for leave to appeal to the Supreme Court of Canada. Leave was granted on January 31, 2019. On February 14, I had a telephone conference call with the parties. After hearing from counsel, I decided that the costs hearing should be adjourned pending the Supreme Court of Canada's decision.

[18] The appeal was heard on October 8, 2019. The Supreme Court of Canada's unanimous decision, issued on October 9, 2020, allowed the appeal, set aside the judgment of the Court of Appeal, and restored the trial judgment, "with costs throughout." The Supreme Court of Canada held that Mr. Matthews was entitled to damages equal to what he would have received pursuant to the LTIP, subject to mitigation.

[19] On October 30, 2020, I had a telephone conference call with the parties to schedule a hearing to determine the costs that would be payable to Mr. Matthews, along with the duration for which prejudgment interest at 2.9% should apply to the damages awarded. I asked the parties to address these issues, along with the meaning of "with costs throughout", in supplemental submissions. Mr. Matthews filed a supplemental brief and affidavit on December 17. Ms. Barteaux filed a reply on April 14, 2021. On April 27, Mr. Mitchell filed a second supplemental brief, which the court had neither requested nor previously agreed to accept. Ms. Barteaux filed a reply to that submission on June 25. The hearing took place over two days beginning on Wednesday, July 14, 2021 and concluded the following day.

Issues

[20] The issues to be determined are:

1. What is the meaning of "with costs throughout"?
2. What should the applicant be awarded for costs?
    a. Should the court depart from the tariffs and award a lump sum?
    b. Should costs be reduced due to the conduct of applicant's counsel?
    c. Should costs be awarded against applicant's counsel personally?
3. What should the applicant recover for reasonable disbursements?
4. Has the rate of prejudgment interest already been decided?
5. For what period should prejudgment interest be awarded?
6. Should interest be awarded for the year during which Mr. Matthews had the award in his hands?

Positions of the parties

[21] Mr. Matthews seeks a lump sum award of costs in the range of $250,000 to $290,000 and disbursements in the amount of $16,189.53. He also seeks prejudgment interest from June 26, 2011 – the date he accepted his constructive dismissal and resigned from ONC. Mr. Matthews also seeks post judgment interest.

[22] ONC submits that Mr. Matthews should receive costs at Scale 1 (-25%) of Tariff A, plus six days of hearing, for a total of $64,887. It says disbursements should not be awarded because Mr. Matthews's counsel has not filed any invoices with the court. ONC also seeks costs in the amount of $2,500, payable by Mr. Mitchell, in relation to his conduct at the main application hearing before Justice Leblanc, and a further $2,500, payable by Mr. Mitchell, "in relation to his incomplete and at times erroneous submission with respect to costs." ONC says prejudgment interest should start when Mr. Matthews would have become eligible for a payout under the LTIP and end on December 31, 2015, instead of the date of Justice Leblanc's order, to account for delays caused by the applicant and those related to Justice Leblanc's illness. Finally, ONC says interest should not accrue for the one year period when

Mr. Matthews had the judgment in his hands, before the Court of Appeal ordered that it be repaid to ONC.

With costs throughout

[23] The Supreme Court of Canada's decision allowing the appeal (2020 SCC 26) concluded as follows:

> [89] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Supreme Court of Nova Scotia, with costs throughout.
>
> [Emphasis added]

[24] The Supreme Court of Canada has the power to make an order with respect to costs in lower courts pursuant to s. 47 of the *Supreme Court Act*, R.S.C., 1985, c. S-26:

> **Payment of costs**
>
> 47 The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.

[25] During one of the telephone conferences between counsel and the court, Mr. Mitchell advised that, based on his communication with court administration, the Court of Appeal would not revisit the issue of costs in that court on the basis that it is *functus officio*. Mr. Mitchell suggested that this court could assess costs on the appeal on some sort of "informal" basis, in the interest of judicial economy. Ms. Barteaux took the position that this court has no jurisdiction to assess costs in a higher court. I asked the parties to provide further submissions on the issue prior to the hearing. In those submissions, Mr. Mitchell referred to Civil Procedure Rule 90.53, which provides:

> **90.53 Entry by prothonotary of certified order**
>
> (1) When an order of the Court of Appeal has been certified by the registrar to the prothonotary or clerk with whom the order appealed from was entered, the

> prothonotary or clerk must cause it to be filed, and all subsequent proceedings may be taken as if the certified order had been granted by the court appealed from.
>
> (2) When an order of the Supreme Court of Canada has been certified by the registrar of that Court to the prothonotary or clerk with whom the order initially appealed from was entered, the prothonotary or clerk must cause it to be filed, and all subsequent proceedings may be taken as if the certified order had been granted by the court initially appealed from.
>
> [Emphasis added]

[26] Mr. Mitchell submits that under Rule 90.53(2), the Supreme Court of Canada's order that the applicant be awarded costs throughout is treated as if it had been granted by this court. It follows, he says, that the issue of costs in the Court of Appeal becomes a matter for determination in the Supreme Court of Nova Scotia.

[27] At the hearing, Mr. Mitchell advised that he had filed a separate motion to have this court assess costs at the Court of Appeal. He suggested that I set aside the matter of appeal costs until the other motion can be heard. I advised Mr. Mitchell that I had asked the parties for submissions on the issue because I intended to deal with it in this decision, and I will.

[28] Ms. Barteaux for ONC submits that a judge of the Supreme Court of Nova Scotia has no jurisdiction to award costs for the Nova Scotia Court of Appeal. ONC cites the *Judicature Act*, R.S.N.S. 1989 c. 240, which provides that the Supreme Court of Nova Scotia will have those powers not assigned to the Nova Scotia Court of Appeal. Section 7 of the Act provides that the Court of Appeal:

> shall exercise all the jurisdiction, powers and authority belonging to or exercised by the Supreme Court *in banco* before the first day of August, 1966, and the judges of the Court of Appeal shall exercise all the jurisdiction, powers and authority belonging to or exercised by a judge of the Supreme Court before that date in relation to the Supreme Court *in banco.*

[29] Section 8 provides that the Nova Scotia Supreme Court has:

> all the jurisdiction, powers and authority belonging to or exercised by the Supreme Court of Nova Scotia before the first day of August, 1966, and not assigned to the Court of Appeal by this or any other Act and the judges of the Supreme Court shall exercise all the jurisdiction, powers and authority belonging to or exercised by a judge of the Supreme Court of Nova Scotia before that date and not assigned to the judges of the Court of Appeal by this or any other Act.
>
> [Emphasis added]

[30] Section 13 states that the exercise of the assigned jurisdiction shall be in accordance with the *Judicature Act* and the Nova Scotia *Civil Procedure Rules*:

> The jurisdiction of the Court shall be exercised in the manner provided in this Act and the Rules and, where no special provisions are contained in this Act or the Rules, it shall be exercised in accordance with the practice and procedure followed by the Supreme Court of Nova Scotia before the first day of March, 1972.

[31] Civil Procedure Rule 90.48(1) sets out the powers of the Court of Appeal:

> 90.48(1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all of the following:
>
> (a) amend, set aside, or discharge a judgment appealed from;
>
> (b) draw inferences of fact and give any judgment, allow any amendment, or make any order that might have been made by the court appealed from or that the appeal may require;
>
> (c) make such order as to costs of the trial, hearing, or appeal as the Court of Appeal considers is in the interest of justice;
>
> (d) direct a new trial by jury or otherwise, on terms the Court of Appeal considers is in the interest of justice, and for that purpose order that the judgment appealed from be set aside;
>
> (e) make any order or give any judgment that the Court of Appeal considers necessary.
>
> [Emphasis added]

[32] ONC further submits that in *Turner-Lienaux v. Campbell*, 2004 NSCA 41, the Nova Scotia Court of Appeal confirmed its exclusive jurisdiction over costs in that court when it stated at para. 44:

> Nor would it be appropriate for a trial judge to vary a costs order made by the Appeal Court…

[33] ONC also refers to *Bannon v. Thunder Bay*, 2003 CarswellOnt 1158 (Ont. C.A.), a slip and fall case in which the Supreme Court of Canada restored a trial decision that had been reversed on appeal, and awarded the plaintiff her costs throughout. When the matter returned before the trial judge (2002 CarswellOnt 2801), the court noted:

> 3 Initially all counsel were of the view that as trial judge, I would be in the best position to assess all of the costs, including the proceedings before the Court of

> Appeal and the Supreme Court of Canada. When I expressed my concerns about jurisdiction, it was conceded following further research by counsel, that this court did not have the jurisdiction to assess any costs related to proceedings before the Court of Appeal or the Supreme Court of Canada. However it was the position of counsel for the plaintiff that I would still have the jurisdiction to assess a risk plus premium in favour of the appellate counsel for the result that they obtained before the Supreme Court of Canada given the past circumstances of the case.
>
> [Emphasis added]

[34] Relying on Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, which sets out the factors to be considered by the court when exercising its discretion to award costs, the trial judge went on to award the plaintiff costs on a "risk plus premium" basis. In reversing that decision, the Ontario Court of Appeal held that the trial judge had no jurisdiction to treat appellate proceedings as "incidental to the trial":

> 1 Section 47 of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26, as amended, gives the Supreme Court of Canada express authority to "order the payment of the costs of the court appealed from . . . and of the appeal". The Supreme Court of Canada made such an order in its judgment of February 21, 2002 [2002 CarswellOnt 549 (S.C.C.)], in the following words:
>
> > Consequently, we would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and restore the judgment of Kozak J. at trial.
>
> 2 Kozak J. did not have the authority to order that the costs of the appellate proceedings be assessed on a "risk plus premium" basis. We reject the submission that the breadth of jurisdiction of the trial judge pursuant to rule 57.01 is such that it can extend to treat appellate proceedings as incidental to the trial. Moreover, having given the power to award costs of appellate proceedings to the Supreme Court of Canada, there is no gap that would justify giving the trial judge some type of residual discretion to order such a premium.
>
> 3 The basis upon which costs were to be awarded in the appellate proceedings was a matter to be argued before the Supreme Court of Canada. Even if Kozak J. had had the authority to make the order that he did -- which he did not -- the matter of costs having already been decided by the Supreme Court of Canada, he could not adjudicate upon it again.
>
> 4 The respondent is not precluded from advancing an argument in favour of such a premium in the appropriate forum(s). The costs of the proceedings in this court have yet to be assessed. Should counsel for the respondent choose to pursue a claim for such a premium in the proceedings taken before this court, it would be appropriate that the matter be dealt with by a panel of this court rather than by an assessment officer.

[Emphasis added]

[35] ONC notes that Rule 90.53, cited by the applicant, has not been interpreted in the context of an order of the Supreme Court of Canada. It has, however, been interpreted in the context of an order of the Nova Scotia Court of Appeal filed with the Supreme Court of Nova Scotia. In *Armoyan v. Armoyan*, 2014 NSCA 17, the Court of Appeal made a costs order against Mr. Armoyan. Mrs. Armoyan took out an execution order for the awarded costs and obtained a discovery subpoena in aid of execution, but she was unable to serve Mr. Armoyan. As a result, she returned to the appeal court to seek an order for substituted service. Citing Rule 90.53, the Court of Appeal held that it did not have jurisdiction to enforce its earlier order:

> [8] As a result, following the issuance of an order by this Court, all "subsequent proceedings" may be taken as if the certified order had been granted by the Supreme Court. To put it another way, a costs order of the Court of Appeal will be treated as a costs order of the Supreme Court if there are subsequent proceedings in relation to that order (other than, for example, if a party seeks to amend the order in accordance with Rule 90.50(2) or seeks to appeal the order). Logically it follows that if the subsequent proceeding is execution on that costs order, then this should occur in the Supreme Court in the first instance. This interpretation would be consistent with the language of Rule 79, which expressly provides for Supreme Court judges and prothonotaries to take action with respect to executions rather than the Court of Appeal judges and the Registrar.
>
> [9] For this reason it is my view that the proper recourse for Ms. Armoyan is to seek an order for substituted service before the Supreme Court.

[36] ONC submits that in *Armoyan*, the subsequent proceeding was in aid of the execution of a costs order that had already been made. In the present case, the Supreme Court of Canada has ordered that costs be payable by ONC, but an assessment of those costs has not yet been made by the Court of Appeal. In essence, the Supreme Court of Canada has ordered costs be payable in both lower courts, but has remanded the decision on the assessment of costs to those courts.

[37] In addition to the authorities provided by the parties, the court has considered *Haynes Group of Lawyers v. Regan*, 2001 NSCA 34, which deals with the predecessor to Rule 90.53, and *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 FCA 278, which addresses the meaning of "with costs throughout".

[38] The facts in *Regan* were as follows. In January 1995, the applicant Ms. Regan and the respondent law firm entered into a contingency agreement respecting services to be performed with respect to Ms. Regan's personal injury action. The

contingency agreement provided that if Ms. Regan discharged the firm prior to final recovery of compensation, she would immediately pay the lawyers all fees and disbursements calculated up to that time.

[39] In October 1997, Ms. Regan advised the firm that she had retained another lawyer and would no longer require its services. The firm submitted its bill for services. The bill was taxed before Davison J., who fixed the amount at $7,924.31. He ordered a modification to the contingency fee agreement to provide that no monies would be payable by Ms. Regan to the firm until the disposition of her personal injury action. He also ordered that there could be no enforcement of the bill prior to "successful disposition of this proceeding, and then only with the leave of this Honourable Court". The law firm appealed the order, asking that the limitation on its enforcement be deleted. In May 1998, the appeal was dismissed without costs, but the order of Davison J. was varied so as to permit the firm to obtain a charging order for its fees pursuant to the former Rule 63.26.

[40] In May 1998, at the law firm's request, the prothonotary issued a certificate of judgment showing a debt owing from Ms. Regan to the firm in the amount of $7,924.31. There was no dispute that Ms. Regan's personal injury action had not yet concluded. The law firm recorded the certificate in the registry of deeds. When Ms. Regan attempted to sell her house, an objection to title was made on the basis of the outstanding judgment. She then filed an application in the Court of Appeal to vacate the certificate of judgment.

[41] Cromwell J.A. (as he then was) began his analysis by setting out Rule 62.29(1):

> [9] The foundation of Ms. Regan's application is the Order of Davison, J. dated March 17th, 1998, and a Certificate of Judgment issued by the Prothonotary on the 12th day of May, 1998. The Civil Procedure Rules specifically address the effect of a subsequent appeal on the order appealed from. Rule 62.29(1) provides that where an order of the Court of Appeal which has been certified by the Registrar to the Prothonotary or clerk with whom the order appealed from was entered, the latter shall thereupon cause it to be entered in the proper book and "all subsequent proceedings may be taken thereon as if the order had been granted by the court appealed from". I set out Rule 62.29(1) for convenience:
>
> > 62.29 (1) Where an order of the Court has been certified by the Registrar to the prothonotary or clerk with whom the order appealed from was entered, the latter shall thereupon cause it to be entered in the proper book and all subsequent proceedings may be taken thereon as if the order has been granted by the court appealed from.

(emphasis added by Cromwell J.A.)

[42] Justice Cromwell went on to find that, in light of Rule 62.29(1), the Court of Appeal had no jurisdiction to order the relief sought by Ms. Regan:

> [10] In my opinion, the Certificate of Judgment issued by the Prothonotary certifies the judgment of Davison, J. of the Supreme Court as varied on appeal. The effect of the Order of the Court of Appeal, once transmitted to the Prothonotary of the Supreme Court, is to permit all proceedings to be taken with respect to that Order as if it had been made by the Supreme Court. This *Rule* … is, in my opinion, intended to leave matters relating to the enforcement of the Order, as varied if at all on appeal, to the Court that originally made it. While a chambers judge of this Court has the authority to amend the formal order for judgment to correct any errors or omission, or otherwise to better express the order's intent: see Rule 62.26(2), in light of the explicit provision of Rule 62.29(1), I do not think that a judge of this Court should issue directions to the Prothonotary, let alone the Registrar of Deeds, with respect to a Certificate of Judgment based on a judgment issued out of the Supreme Court and substantially affirmed on appeal.…
>
> [Emphasis added]

[43] In *Law Society of Upper Canada,* the defendant Law Society brought a motion for increased costs against the plaintiff publishers. The publishers had brought an action for copyright infringement against the Law Society for providing copies of the publishers' reported judicial decisions and other legal works to its members and for permitting patrons of its library to make photocopies of those materials. The action reached the Supreme Court of Canada, which ruled in favour of the Law Society and awarded it costs throughout. The publishers submitted that an award of increased costs was not within the Federal Court of Appeal's jurisdiction and that the Law Society would have to seek such an order from the Supreme Court of Canada. The publishers further submitted that the award of costs throughout precluded an award of increased costs.

[44] In rejecting both the publishers' arguments, Rothstein J.A., for the court, said the following about an award of "costs throughout" in the Supreme Court of Canada:

> [15] As to the publishers' first argument, nothing in the judgment of the Supreme Court expressly or implicitly reserves to the Supreme Court the exclusive authority to award increased costs. Rather, an award of "costs throughout" by the Supreme Court remits to the respective lower courts the determination of costs in respect of the proceedings in each Court, according to the rules of each lower court.
>
> [16] Turning to the publishers' second argument, when the matter of costs is remitted to this Court after a judgment of the Supreme Court awarding costs, the

> only fetter on the discretion conferred upon this Court in respect of costs is that this Court may not exercise its discretion in a manner inconsistent with the award of costs by the Supreme Court of Canada. This approach was succinctly explained by Strayer J.A. in *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 85 C.P.R. (3d) 219 at paragraph 5 (F.C.A.):
>
> > Clearly there are some discretionary powers under Rule 400 which cannot be exercised in the face of an award of costs ordained by the Supreme Court. For example, this Court could not, in the face of such a direction, refuse costs or award them instead to the unsuccessful party. But, in my view, any discretionary power granted by the Federal Court Rules whose exercise is not inconsistent with the award of costs by the Supreme Court can be exercised in giving effect to an award of costs in this Court by the Supreme Court on appeal.
>
> [17] In my view, when the Supreme Court makes an award of "costs throughout," the direction to this Court is neutral, in the sense that, as long as costs are awarded, the Supreme Court is leaving it to this Court to decide on the appropriate amount of costs. Under such a direction, when the matter of costs is remitted to this Court, costs are to be assessed in accordance with the Rules of this Court which allow for the awarding of increased costs (see rules 400(1) and (4)).
>
> [Emphasis added]

[45] Having considered all of the authorities, I find this court has no jurisdiction to assess appeal costs. That jurisdiction is assigned exclusively to the Nova Scotia Court of Appeal pursuant to the *Judicature Act* and Civil Procedure Rule 90.48(1)(c). I agree with the view expressed in *Law Society of Upper Canada* that when the Supreme Court of Canada makes an award of "costs throughout", that order remits to the respective lower courts the determination of costs in respect of the proceedings in each court, according to the rules of each lower court. Rule 90.53(2) does not change that.

[46] Under Rule 90.53(1), an order of the Court of Appeal will be treated as an order of the Supreme Court if there are "subsequent proceedings in relation to that order". As noted in *Regan* and *Armoyan*, that would include proceedings to enforce the order, but not to amend or appeal its contents. In other words, the order of the Court of Appeal is not treated as an order of the Supreme Court for *all* purposes. If it were, the Supreme Court would have jurisdiction to amend what is, in effect, its *own* order. In sum, Rule 90.53(1) does not confer on the Supreme Court the jurisdiction to deal with the content of the order because that jurisdiction is assigned exclusively to the Court of Appeal. It follows that the filing of an order of the Supreme Court of Canada which includes an award of "costs throughout" with the

Supreme Court of Nova Scotia pursuant to Rule 90.53(2) does not expand the latter's jurisdiction to include the power to assess costs in the Court of Appeal.

[47] Accordingly, the remainder of my decision will deal only with the assessment of costs in relation to the proceedings in this court.

Costs

[48] Mr. Matthews submits that a costs award fixed in accordance with the tariffs would not amount to a substantial contribution to his reasonable legal fees and expenses. He seeks a lump sum award of party and party costs in the range of $250,000 to $290,000. If the court declines to award a lump sum, Mr. Matthews asks in the alternative for increased tariff costs.

[49] ONC says lump sums should only be awarded where there is reason to do so, and there is no such reason in this case. ONC asks the court to exercise its discretion to apply Scale 1 (-25%) of Tariff A due to the manner in which Mr. Mitchell advanced his client's case, which caused unnecessary expense and delays.

[50] The law on costs is uncontroversial. The court has considerable discretion when fixing costs. Civil Procedure Rule 77 provides in part:

> **77.01 Scope of Rule 77**
>
> (1) The court deals with each of the following kinds of costs:
>
> (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
>
> (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
>
> (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.
>
> **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.

> **77.03 Liability for costs**
>
> (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.
>
> (2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.
>
> (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> [Emphasis added]

[51] Rule 77.06 provides that, unless ordered otherwise, party and party costs are quantified according to the tariffs. Under Rule 77.07(1), the court has discretion to raise or lower the tariff costs, applying factors such as those identified in Rule 77.07(2):

> **77.07 Increasing or decreasing tariff amount**
>
> (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> (a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
>
> (c) an offer of contribution;
>
> (d) a payment into court;
>
> (e) conduct of a party affecting the speed or expense of the proceeding;
>
> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
>
> (h) a failure to admit something that should have been admitted.

[52] Rule 77.08 permits the court to award lump sum costs but does not specify the circumstances when such an award is appropriate. That guidance is found instead in the case law. In *Armoyan v. Armoyan*, 2013 NSCA 136, the Court of Appeal, *per* Fichaud J.A., explained that a lump sum award will be appropriate in cases that bear no resemblance to the tariffs' assumptions:

[15] The tariffs are the norm, and there must be a reason to consider a lump sum.

[16] The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses. In *Williamson*, while discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
>
> > "… the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity."

Justice Freeman continued:

> In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[17] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.

[18] But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no "amount involved", other important issues being at stake. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity – e.g. to define an artificial "amount involved" as Justice Freeman noted in *Williamson* – that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful.

> Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law.
>
> [Emphasis added]

[53] Fichaud J.A. went on to note:

> [29] The propriety of a lump sum award may be tested by comparing the proposed tariff award to the actual legal fees and expenses. Mr. Armoyan's calculation under the tariffs is $117,714.64. Even after the adjustments that I will discuss later, Ms. Armoyan's legal fees and disbursements exceed $450,000 for the Nova Scotia *forum conveniens* proceeding and both appeals. A recovery of about 27% does not approach the "substantial contribution" that Justice Freeman contemplated in *Williamson*.
>
> [Emphasis added]

[54] The *Armoyan* decision was applied in *Andrews v. Keybase Financial Group Inc.*, 2014 NSSC 287, where Wright J. held that an award of $310,000 was a substantial contribution to actual legal fees of $469,349:

> [30] In similar fashion to *Williamson*, Justice Fichaud [in *Armoyan*] tested the propriety of a lump sum award by comparing the proposed tariff award to the actual legal fees and expenses to be charged to the client. He concluded that a recovery of about 27% did not approach the "substantial contribution" that Justice Freeman had contemplated in *Williamson*. Hence, a lump sum was appropriate which the Court then fixed at a total amount of $306,000 (including disbursements) measured against solicitor-client legal fees and disbursements in the aggregate of approximately $477,000.
>
> [31] Bearing these principles in mind, as well as the representation by plaintiffs' counsel that the solicitor-client fees would be similar whether computed under the contingency fee agreements or by time records, I conclude that this is clearly a case where a lump sum award of costs should be made so as to effect a substantial contribution to the plaintiffs' legal expenses. Considering as well the three factors identified earlier in this decision in common with the *Williamson* case, I am of the opinion that an appropriate award of lump sum costs to be made here is $310,000 representing a rounded recovery of 66% of the solicitor-client fees of $469,349 (recognizing that the latter figure does not include the contingency fee recovery on the costs award itself).

[55] In this case, Mr. Mitchell has filed time records with fees totaling $427,000. He says Mr. Matthews has paid $237,502 to date. An award under Scale 2 of Tariff A using an "amount involved" of $1,086,893.36 would be $70,648, to which must be added $2,000 per hearing day. The parties disagree on the number of hearing

days, with Mr. Matthews submitting that there were at least eight ($16,000), and ONC saying there were six ($12,000). In either case, Mr. Mitchell says, an award under the tariffs would not represent a substantial contribution to his client's actual legal fees.

[56] To bolster his position that fees of $427,000 are reasonable in the circumstances, Mr. Mitchell refers to a letter he received from Ms. Barteaux, dated August 17, 2015, which contained the following paragraphs:

> Despite ONC's strong belief that it will be successful, it is prepared to offer Mr. Matthews an opportunity to limit his losses which, when he fails to prove the claims he has made in his Amended Notice of Application in Court, will likely result in him being ordered to pay a very significant cost award since ONC will be entitled to receive a substantial contribution to its legal fees. The terms of the offer are set out below.
>
> To ensure that you and Mr. Matthews appreciate the magnitude of the cost award at stake, we are informing you that by the conclusion of the hearing ONC's legal fees will likely exceed $400,000, plus disbursements of approximately $15,000. This is clearly not a matter that will fall under the Tariffs (which under the basic scale would yield a cost award of approximately $82,650). Rather, should this proceed to a hearing in November, ONC anticipates that it will be seeking a lump sum cost award that represents approximately two-thirds of the legal fees it has incurred plus reimbursement for all disbursements (i.e. a total sum of $290,000).

[57] The letter also included a formal offer to settle which provided that ONC would consent to the dismissal of Mr. Matthews's claims against it in exchange for a payment to ONC of $25,000 in costs.

[58] Ms. Barteaux submits that her estimate of ONC's fees cannot be used by Mr. Mitchell to justify his own billings because ONC carried a much heavier burden with respect to the evidence. She points out that ONC drafted more than twice as many pages of affidavit evidence and written submissions as Mr. Matthews, and that, if exhibits are added into the calculation, ONC filed more than 10 times the volume of material as Mr. Matthews. I agree with Ms. Barteaux that her pre-hearing estimate of ONC's fees should not be used to justify Mr. Mitchell's fees, both for the reason she cited and because, as will become clear, I find that Mr. Mitchell's conduct of this litigation created more work for ONC than would otherwise have been necessary.

[59] In any event, Mr. Mitchell conceded at the hearing that his time records contained numerous irrelevant entries, including items unrelated to this file and

entries related to interlocutory proceedings for which costs orders have already been made. Ms. Barteaux prepared a colour-coded version of Mr. Mitchell's time dockets in which she identified $142,217 in billings allegedly arising from unrelated matters or motions for which costs had already been decided. Deducting those amounts reduces the estimated fees to $282,783. Although Mr. Mitchell disputed the alleged irrelevance of several entries, he accepted that most of the items identified by Ms. Barteaux should not be considered by the court.

[60] The parties agree that when deciding whether to depart from the tariffs and order a lump sum, counsel's time records and billings are not determinative. The successful party is entitled to a substantial contribution to their *reasonable* legal fees, not their *actual* legal fees. In some cases, the actual legal fees will be reasonable. This is not one of those cases. Having carefully reviewed the materials, I find that a reasonable amount for the applicant's legal fees would be in the range of $250,000 to $275,000. I further find that an award under the tariffs would not represent a substantial contribution to those fees.

[61] In my view, this is an appropriate case to award a lump sum. I recognize that the court has discretion to increase the tariff award to account for formal settlement offers and/or to decrease it to account for delay and inefficiencies, both of which are relevant here, but I find that it is better to "channel that discretion directly to the principled calculation of a lump sum": *Armoyan*, at para. 18.

[62] Mr. Mitchell submits that Mr. Matthews made two formal offers to settle for a lesser sum than he was ultimately awarded in damages, and that this fact warrants a substantial increase in the cost amount awarded. Mr. Mitchell says the first settlement offer was outlined in his letter to Mr. Jamieson, Mr. Emond, and Mr. Brown, dated July 29, 2011. ONC submits that this letter was not a formal offer to settle pursuant to Civil Procedure Rule 10 – it was a demand letter. Ms. Barteaux points out that Mr. Mitchell referred to it as such in his affidavit. She argues that it would be improper to treat the demand letter as a formal offer to settle because the judicial proceeding was not commenced until August 9, 2011. I agree. Rule 10 refers to settlement "of a proceeding or of a claim in a proceeding".

[63] ONC concedes, however, that Mr. Matthews did make a formal offer to settle on February 21, 2012, and that if the tariff is applied, the court has discretion under Rule 10.09(2)(b) to multiply the tariff amount by 75%. ONC submits that there are very few reported decisions where the court has exercised its discretion to apply the multiplier pursuant to Rule 10.09(2). It says the court should decline to increase the

applicant's costs due to his counsel's conduct during the litigation. ONC cites *MacNutt v. Acadia University*, 2016 NSSC 208, where Chipman J. stated:

> [9] Rule 10.09 deals with determining costs if a Formal Offer is not accepted. I note the accelerated costs are entirely discretionable and in all of the circumstances I have chosen to decline Acadia's request to in effect double their costs award. …

[64] Justice Chipman's reasons for declining to exercise his discretion are explained in the remainder of the paragraph, not quoted by ONC:

> By exercising my discretion in this way, I am mindful of, among other things, Ms. MacNutt's status as a self-represented party. I doubt she was aware of the significant costs consequences associated with her failure to respond to Acadia's Formal Offer. Further, it is noteworthy that she advanced a Formal Offer to Acadia on March 11, 2014 and then did not receive Acadia's Formal Offer until almost two years later.

[65] *MacNutt* confirms that every case must be considered on its own facts. In my view, Mr. Matthews's settlement offer is an important factor in determining a costs award that will do justice between the parties. While Mr. Mitchell's conduct of the proceeding is also relevant, the fact remains that ONC's acceptance of Mr. Matthews's reasonable settlement offer in February 2012 would have saved the parties nine years of litigation and hundreds of thousands of dollars in fees.

[66] I will now consider ONC's submission that Mr. Mitchell's conduct of the case justifies a reduction in his client's costs, and even an order that Mr. Mitchell pay certain costs personally to ONC. At the same time, I will deal with Mr. Mitchell's allegations of "tactical" conduct on ONC's part to slow the pace of the proceeding. Since Mr. Mitchell says this tactical conduct began immediately after the filing of the notice of application, I will start there.

Early process

[67] The notice of application was filed on August 9, 2011. At a motion for directions held on August 31, Mr. Mitchell estimated that the application could be heard in three days, and could be ready for hearing in three months. ONC advised Pickup J. that it intended to file three motions – one for summary judgment on the evidence with respect to the oppression claim, one to convert the application to an action, and one to remove several respondents. Mr. Mitchell suggests these motions were intended to delay the proceeding, but there is no evidence to support that allegation. In my view, the three motions were reasonable in the circumstances.

[68] Mr. Mitchell also says ONC delayed in filing its notice of contest and the notices of motion until he threatened to bring (and did bring) Appearance Day motions. The notice of contest was filed on September 22, 2011. I do not consider that an inordinate amount of time, for two reasons. First, Ms. Barteaux was busy responding to allegations from Mr. Mitchell that she was in a conflict of interest. Mr. Mitchell's own time records indicate that he was billing for work on that issue until the motion for directions. Second, Mr. Mitchell had incorrectly named one of the parties and needed to amend his notice of application.

[69] ONC filed its three motions on November 17, 2011. While the motions could probably have been filed sooner, I do not consider the short delay to be evidence of a larger strategy to delay the proceeding.

[70] On November 18, 2011, Mr. Mitchell filed an Appearance Day Notice seeking to set a date for a motion for directions and to have ONC provide disclosure and particulars of the three motions. The motion was set for December 2. ONC took the position that its notices of motion complied with the Rules and that the scope of disclosure and the need for a motion for directions would depend on the outcome of its three motions. Justice Duncan dismissed the applicant's requests and set ONC's three motions down for hearing on March 1, 2012, the soonest available date.

[71] Justice Wood issued his decision on the motions on April 12, 2012. ONC was successful in having the additional respondents removed but the court did not allow the summary judgment motion or the motion to convert the matter to an action. ONC filed an appeal of the decision on April 26.

[72] On May 28, 2012, the parties appeared before Justice Wood to deal with the form of the orders and costs on the motions. At that time, the court directed document disclosure on the application in court by both parties by August 31. Although the decision was under appeal, no stay issued. To this point, I find no meaningful delay by either party.

Disclosure and discovery

[73] Issues with discoveries and disclosure consumed the next three years. While Mr. Mitchell submits that ONC was responsible for delay during the disclosure and discovery process, the evidence before the court does not support that allegation. Having reviewed the communications between counsel, I find that Ms. Barteaux often had to prod and push Mr. Mitchell to obtain further disclosure, to clarify what additional production he was seeking from ONC, to identify individuals he wished

to discover, and to set dates for their examinations. On multiple occasions, Mr. Mitchell attempted to obtain discovery subpoenas from the prothonotary, rather than from a judge, as is required on an application. He persisted in this behaviour in the face of repeated reminders and objections from both Ms. Barteaux and the prothonotary. Mr. Mitchell repeatedly ignored communications from Ms. Barteaux and deadlines imposed by the court. The following recital of events, while lengthy, is far from exhaustive.

[74] On August 31, 2013, Ms. Barteaux wrote to Mr. Mitchell advising that ONC's affidavit of documents contained approximately 400 tabs and that counsel was still dealing with redactions. She requested a one-week extension to the deadline for providing Mr. Mitchell with the documents. Mr. Mitchell did not respond.

[75] ONC provided its first affidavit disclosing documents containing 411 documents to Mr. Mitchell on September 6, 2012. On the same day, Mr. Mitchell disclosed a book of documents on Mr. Matthews's behalf. ONC subsequently took the position that Mr. Matthews's disclosure was incomplete.

[76] On October 1, 2012, the parties appeared before Justice Wright on a motion for directions. Justice Wright set the matter down for a full day on December 19 to allow the parties to bring cross motions on production and certain discovery issues.

[77] On October 29, 2012, Mr. Mitchell advised by letter that he would provide a first supplementary book of documents. On the same date, he indicated that he wanted to discover Daniel Emond, Robert Orr, and Martin Jamieson. On November 5, Ms. Barteaux advised Mr. Mitchell that it was not necessary to subpoena Mr. Orr because, although he was no longer in the control of ONC, she would arrange for his attendance at discovery.

[78] On November 14, 2012, Ms. Barteaux wrote to Mr. Mitchell seeking the applicant's first supplemental book of documents and identifying the documents requested. On November 28, Mr. Mitchell sent Ms. Barteaux a copy of Mr. Matthews's Skype messages and employment information with TASA for the period of February-June 2011 and said he had yet to prepare the first supplemental book of documents.

[79] On December 12, 2012, Mr. Mitchell advised that he had made a scheduling error and needed to seek an adjournment of the motions scheduled for December 19. The next day, Ms. Barteaux sent Mr. Mitchell a CD containing a supplemental

affidavit disclosing documents. On December 17, she sent further documents and advised that a second supplemental affidavit would be filed in due course.

[80] On December 21, 2012, ONC's appeal of Justice Wood's decisions on its motions was dismissed.

[81] Over the next two months, Mr. Mitchell did not contact Ms. Barteaux to reschedule the December 19, 2012 appearance or to set dates for discovery. In an effort to move things along, Ms. Barteaux wrote to him on February 20, 2013:

> It is important to Ocean Nutrition Canada Limited that we proceed with any further pre-discovery motions that need to be made, and discovery, within the next couple of months. I have a number of available dates in April if it is necessary to attend before Justice Wood (or another judge) on any production or discovery issues. Please provide me with dates that you are available as soon as possible. … Please also provide me with dates in May that Mr. Matthews will make himself available in Halifax for discovery.

That letter prompted a conference call with Justice Wood and cross motions for production were scheduled for April 30, 2013.

[82] On March 4, 2013, Ms. Barteaux wrote to Mr. Mitchell proposing June 17 to 21, 2013 for the discoveries of Mr. Matthews, Mr. Jamieson, Mr. Wilson, and Mr. Emond. Mr. Mitchell did not respond. She wrote to him again on March 14 about the June dates, and he eventually agreed. On March 15, both counsel wrote to the court to confirm they would be proceeding with the cross motions on April 30, 2013.

[83] On the applicant's motion for production, Mr. Mitchell sought only "further and better" production without providing any particulars in regard to the 644 documents that ONC had disclosed. He did not address what was missing or the issues he had with redaction. Instead of filing a brief, Mr. Mitchell filed the affidavits disclosing documents provided by ONC, in their entirety. As Wood J. noted in his costs decision on the motions [2013 NSSC 158]:

> [4] When Mr. Matthews filed his motion documents on April 11, 2013 he did not include a brief. The notice of motion was very general and simply sought better production, directions with respect to redaction of documents and directions with respect to the scope of electronic searches to be carried out by the Respondent. In addition, the form of order filed by Mr. Matthews was blank and included no particulars with respect to documents or directions being sought. The affidavit filed on behalf of Mr. Matthews included a letter dated April 11, 2013 from his counsel,

> Blair Mitchell, to Ms. Nancy Barteaux, who was counsel to the Respondent. This letter set out various demands for documents to be produced.

[84] To assist the court, Ms. Barteaux prepared a chart summarizing the outstanding production issues. Mr. Mitchell requested an electronic copy of the chart so he could use it to respond, and Ms. Barteaux agreed to provide it. Justice Wood described the outcome of the Matthews motion as follows:

> [8] Much of the work by counsel and the court with respect to the Matthews' motion involved reviewing a significant volume of redacted documents. During that process the Respondent agreed to remove a number of redactions voluntarily. I ordered additional documents to be unredacted. The end result was that approximately one-quarter of the redactions challenged by Mr. Matthews were set aside by agreement or court order.
>
> [9] With respect to the remaining disclosure sought by Mr. Matthews, I was not satisfied that there was an evidentiary basis to order production. In many cases I suggested that the issue should be pursued through the discovery examination process to determine what evidence might be obtained with respect to the existence and relevance of the documents in questions.

[85] Justice Wood went on to award costs to ONC on the motion:

> [15] I am satisfied that success on the merits was divided and that in normal circumstances I would have fixed costs of the motion in the amount of $1000 for a half-day hearing payable in the cause. <u>However, I think there is merit to Ms. Barteaux's position that the Respondent was put to unnecessary additional expense trying to anticipate the matters in issue and this arose specifically from the failure of Mr. Matthews to file a brief and draft form of order as required by Civil Procedure Rule 23.11 as part of the initial motion documents.</u> As a result, I will award costs of $750 on this motion in favour of Ocean Nutrition in any event of the cause. Since the additional expenses incurred by Ocean Nutrition responding to this motion were unnecessary I believe payment of these costs should not wait until conclusion of this litigation. As a result, I will order that they be paid on or before June 30, 2013.
>
> [Emphasis added]

[86] As to ONC's motion, it was seeking various documents that Mr. Matthews said did not exist or were not in his possession. ONC also sought a direction requiring Mr. Matthews to produce an affidavit disclosing documents pursuant to Civil Procedure Rule 15. Mr. Matthews had previously provided books of documents without an affidavit. Justice Wood found that the motion documents were the first indication from Ms. Barteaux that ONC was seeking an affidavit disclosing

documents from Mr. Matthews. In any event, Mr. Mitchell consented on his client's behalf to the direction requiring an affidavit during the hearing. Ms. Barteaux then requested deferral of much of the production requests until after she had obtained and reviewed the affidavit disclosing documents. To the extent that there were any remaining production requests by ONC, Wood J. dismissed them as having no evidentiary basis. As with Mr. Matthews's motion, Wood J. suggested that many of these issues should be pursued through the discovery examination process. Mr. Matthews was awarded costs of $750, to be paid at the conclusion of the proceeding.

[87] On May 13, 2013, Mr. Mitchell wrote to Ms. Barteaux to say that he had the week of July 15, 2013 reserved for additional discovery. Ms. Barteaux replied with a lengthy letter summarizing the history of communications between the parties and with the court to demonstrate that the week of July 15 had never been discussed. She also asked who Mr. Mitchell wanted to discover other than Daniel Emond, Martin Jamieson, and Craig Wilson. Mr. Mitchell refused to say. Ms. Barteaux reminded Mr. Mitchell that in an application, he either needed agreement or a discovery subpoena if he wished to discover someone else.

[88] On May 22, 2013, Mr. Mitchell wrote that he wanted to discover Robert Orr on July 15. The next day, he wrote to the prothonotary for a discovery subpoena for Mr. Orr. Ms. Barteaux wrote to the prothonotary on the same day outlining the history of the discovery discussions. On May 24, Ms. Barteaux wrote to Mr. Mitchell to confirm that she had spoken to Mr. Orr and determined that he was available for July 15 and 16, if necessary. On the same date, the prothonotary wrote to Mr. Mitchell advising that she could not issue the subpoena because subpoenas in an application require permission of a judge. After numerous communications back and forth between counsel, the discovery subpoena issue (and several others) ended up before Wright J. in chambers. Justice Wright granted the subpoena for the dates already arranged between Mr. Orr and Ms. Barteaux.

[89] On May 29, 2013, Mr. Mitchell made a motion to have Martin Jamieson removed as ONC's designated litigation manager. The court followed up with counsel on two occasions to set a date, but received no response. Mr. Mitchell did not pursue the motion.

[90] Discoveries of Mr. Matthews, Martin Jamieson, and Craig Wilson took place June 17-20, 2013. Discovery of Robert Orr began on July 15, but could not be completed because Mr. Mitchell advised that he needed to attend in chambers the next morning.

[91] On July 18, 2013, Ms. Barteaux provided Mr. Mitchell with ONC's third supplemental affidavit of documents.

[92] On July 22, 2013, Mr. Mitchell wrote to Ms. Barteaux asking about the possibility of discoveries of Mr. Orr, Mr. Emond, and Mr. Perez during the week of September 23. Ms. Barteaux responded that she was not available during that week. She asked Mr. Mitchell to provide dates in October, November, and December when Mr. Matthews was available and she would canvas the dates with Mr. Orr, Mr. Emond, Mr. Perez, and Mr. Jamieson. Mr. Mitchell did not respond.

[93] On July 30, 2013, Ms. Barteaux sent revised orders arising out of the April 30, 2013 appearance for his review and signature. Mr. Mitchell did not respond. She sent another letter on August 19, 2013. Again, he did not respond.

[94] Having received no response about discovery dates, Ms. Barteaux's associate emailed Mr. Mitchell on August 21, 2013, confirming that counsel and the deponents were available to continue discoveries during the week of January 6-10, 2014. Counsel asked Mr. Mitchell to identify who he intended to discover that week, and confirmed that Ms. Barteaux needed to discover Mr. Orr. The next day, Mr. Mitchell's assistant confirmed that he and Mr. Matthews would be available for the January dates.

[95] On September 5, 2013, Ms. Barteaux wrote to Mr. Mitchell for a third time in relation to the April 30, 2013 court appearance. She advised that she and her client continued to await receipt of the signed revised order. She also advised that they continued to await receipt of Mr. Matthews' affidavit of documents, or, alternatively, an indication as to when they could expect it. On September 16, she wrote a fourth time. Finally, on September 24, 2013, Ms. Barteaux wrote to advise that if she did not receive the revised orders signed by Mr. Mitchell, she would be sending them to Justice Wood along with copies of the letters to Mr. Mitchell, and asking the court to issue the revised orders in their present form. On October 1, 2013, Mr. Mitchell called Ms. Barteaux's associate to confirm that the revised orders they wanted issued were those enclosed with the July 30 correspondence. The associate confirmed that that was the case and Mr. Mitchell said he would get back to them shortly. The orders were issued on October 7, 2013.

[96] On November 12, 2013, Ms. Barteaux followed up with Mr. Mitchell by email regarding whom he wished to discover in January 2014 and where the discoveries would take place. On November 25, she followed up by letter, seeking the same information. She wrote again on December 6.

[97] On December 12, 2013, Ms. Barteaux wrote to Mr. Mitchell in response to ONC's undertakings to the June and July 2013 discoveries. She also asked him to respond regarding the undertakings of Mr. Matthews and the status of the affidavit of documents. On the same day, she sent him ONC's fourth supplemental affidavit of documents.

[98] On December 20, 2013, Mr. Mitchell spoke with Ms. Barteaux's associate by telephone, indicating that there was a witness he wanted to discover on January 3, 2014, and asking whether all those who needed to be in attendance on behalf of ONC were available on that day. Mr. Mitchell would not disclose the identity of the witness. Ms. Barteaux wrote to Mr. Mitchell on the same day, stating in part:

> It is our position that your late request for a discovery on January 3, 2014 is entirely unreasonable in light of the circumstances. Specifically, on August 21, 2013, we confirmed with you our availability to resume discoveries in this matter from January 6-10, 2014. Since then, we have written to you on August 22, 2013, November 13, 2013, November 25, 2013, and December 6, 2013 to ask you to advise us who you wished to discover during that week. We have not received a reply to any of those letters nor have you otherwise indicated who you wished to discover prior to today's telephone call, which was initiated by Isabelle French.

Ms. Barteaux concluded by advising Mr. Mitchell that he would need to obtain a discovery subpoena for anyone he wished to discover.

[99] Discoveries of Mr. Orr and Mr. Emond were completed on January 6-9, 2014.

[100] On May 9, 2014, Mr. Mitchell sought discovery subpoenas for Phil MacLennan, Morgan Dunbar, Stan Spavold, and David Brown. He had not sought subpoenas or documents from those individuals prior to that date. Mr. Mitchell again attempted to obtain these subpoenas from the prothonotary. The prothonotary again directed him to file a motion. Mr. Mitchell subsequently filed a motion for subpoenas which included an additional witness, bringing the total to five. On May 27, Ms. Barteaux wrote to the prothonotary to ask that the motion for subpoenas be heard at the same time as the motion for date and directions.

[101] On June 16, 2014, ONC responded to the undertaking request from the January 2014 discoveries. By that time, ONC had filed its fifth supplemental affidavit of documents and had not received responses to the undertakings obtained from Mr. Matthews during his June 2013 discovery.

[102] On June 17, 2014, a hearing was held before Justice Moir. In a letter, he confirmed agreements reached by the parties before him and directed that Mr. Matthews file a sworn affidavit of documents by July 15, 2014. Justice Moir stated the deadlines were "mandatory". Mr. Mitchell failed to meet the deadline, filing an unsworn affidavit of documents on August 22, 2014. He advised the court that he intended to file a sworn one "shortly". Mr. Mitchell provided Ms. Barteaux with a sworn copy on August 25, 2014, but did not file it with the court because the notary in Peru where Mr. Matthews resided had failed to sign the exhibits.

[103] On January 26, 2015, the parties again appeared before Justice Moir. He had strong words for Mr. Mitchell:

> **THE COURT:** Well, what do you think, Mr. Mitchell? I mean, you started this thing years ago and we don't even have hearing dates yet. And I set you a bunch of deadlines that were said in my letter to be mandatory because of the situation.
>
> **MR. MITCHELL:** Yes, My Lord.
>
> **THE COURT:** And you just ignored them all.
>
> **MR. MITCHELL:** My Lord, yes. Yes, that's – there's no point in looking to gainsay that proposition, My Lord. The status of –
>
> **THE COURT:** So the sensible thing is to dismiss the proceeding. If I've got a party who won't comply with directions from the Court in a process that's supposed to be heavily under judicial management, there's only one answer that I can give you and that's you're abusing the process and I'm going to dismiss.
>
> [Emphasis added]

[104] At one point, Justice Moir noted:

> **THE COURT:** The problem is I'm managing something that pretends to be an application when it is in fact an action. That's the problem.

[105] On January 30, 2015, Moir J. sent a letter to the parties confirming his directions. He refused to approve discovery subpoenas for Mr. Brown, Mr. MacLellan, Mr. Thomson, and Mr. Perez. He approved discovery subpoenas for Ms. Dunbar, Mr. Spavold, and Megan Harris, and set deadlines for their examinations. Justice Moir directed that any motion by the applicant for production of any allegedly undisclosed documents or production of documents in an unredacted form must be made by February 28, 2015. He also directed the applicant to file his pre-hearing brief by September 30, 2015. The hearing was set for 6 days – November 2-5, 9, and 10, 2015.

[106] Megan Harris and Stan Spavold were discovered on May 7, 2015. Mr. Mitchell did not discover Morgan Dunbar.

The hearing

[107] The deadline for Mr. Matthews' brief set by Justice Moir was September 30, 2015. On October 8, Ms. Barteaux wrote to Justice Leblanc, the hearing judge, to advise that she had not received the applicant's brief. On October 8, 2015, Mr. Mitchell responded that he had "diary errors" and could file his brief by October 14.

[108] On October 9, 2015, Ms. Barteaux and Mr. Mitchell had an email exchange wherein she told him that she had not advised any of ONC's affiants that they would be required for the hearing, and that for others it would be necessary to obtain a subpoena. She confirmed that most were out of province – and in the case of Mr. Spavold, out of the country – and that she needed to hear from him that day. Mr. Mitchell responded that he was out of the office but wanted her to produce Mr. Jamieson, Mr. Emond, Mr. Wilson, and Mr. Spavold. He also confirmed that he would subpoena Mr. Orr.

[109] On October 15, 2015, Ms. Barteaux wrote to Mr. Mitchell regarding his still unfiled brief and the order of witnesses for the hearing. She confirmed the attendance of Mr. Wilson and Mr. Spavold, and put Mr. Mitchell on notice that if he did not subsequently require either of them, his client would be responsible for the cost of having them attend.

[110] On October 20, 2015, Mr. Mitchell filed the applicant's brief and authorities. ONC filed its submissions and authorities seven days later.

[111] During the first day of the hearing on November 2, 2015, Justice Leblanc raised concerns about hearsay in the affidavit of Martin Jamieson, filed by ONC. Mr. Jamieson's affidavit consisted of 358 paragraphs, with five large volumes of exhibits.

[112] On Friday, November 6, 2015, Mr. Mitchell wrote to Justice Leblanc, transmitted by fax, raising several issues. Although the letter was copied to Ms. Barteaux, she did not receive it due to issues with her office's fax machine. Mr. Mitchell opened the letter by confirming that: (1) the applicant no longer wished to call Meghan Harris, and (2) the applicant had asked Ms. Barteaux on November 2 to produce Stan Spavold and Craig Wilson as the first witnesses for ONC. Mr. Mitchell went on to advise of his client's intention to move for an order striking

significant portions of Mr. Jamieson's affidavit on hearsay grounds. Mr. Mitchell also proposed to call Paul Empey (a former ONC employee) "in rebuttal" on the afternoon of November 9, 2015.

[113] Mr. Mitchell had previously obtained a subpoena for Mr. Empey but had not filed an affidavit from him or indicated that he would be calling him as a witness. Cross-examination of the applicant's first two witnesses took longer than anticipated and Daniel Emond, a witness for ONC, had travel plans that might have interfered with his availability to testify. Accommodations were made to allow Mr. Emond to take the stand out of order, testifying between witnesses for the applicant. Mr. Mitchell then sought to call Paul Empey to rebut Mr. Emond's evidence before ONC opened its case.

[114] On Sunday, November 8, 2015, Ms. Barteaux received a brief email from Mr. Mitchell at approximately 4:00 pm to advise that Craig Wilson would not be required. She received another email at 8:10 pm advising that Stan Spavold would also not be required. According to Ms. Barteaux, she had prepared Mr. Wilson and Mr. Spavold for 6.5 hours on November 6, 2015, and had completed further preparation for Mr. Spavold on November 8.

[115] On November 9, 2015, Justice Leblanc heard from the parties on the Paul Empey issue. After considering the authorities cited by Ms. Barteaux, Mr. Mitchell conceded that Mr. Empey's evidence was not proper reply evidence. He therefore asked the court to exercise its discretion to allow Mr. Empey to be called as part of the applicant's case-in-chief. Justice Leblanc adjourned for a period of time before deciding that Mr. Empey's evidence could go in, so long as Ms. Barteaux had the opportunity to speak to Mr. Empey beforehand.

[116] With respect to the motion to strike portions of the Jamieson affidavit, Justice Leblanc was prepared to adjourn the application to allow Ms. Barteaux to properly respond to the extensive challenge to the affidavit's contents, but that proved unnecessary. Ms. Barteaux was given the opportunity to amend Jamieson's affidavit, and that of Craig Wilson, and to obtain additional affidavits from any other potential witnesses. At some point thereafter, Mr. Mitchell decided to cross-examine Mr. Wilson after all.

[117] Another issue that arose during the hearing related to disclosure of the amount DSM offered to purchase ONC in March/April 2011. Mr. Mitchell had asked both Mr. Jamieson and Mr. Orr for this figure during discoveries and ONC objected on both occasions. Mr. Mitchell asked the question again at the hearing, first from Mr.

Orr. Mr. Orr then sought personal legal advice to determine his obligations under a non-disclosure agreement he had signed at the time of the negotiation between DSM and ONC in 2011. Justice Leblanc did not require Mr. Orr to answer the question. Mr. Mitchell then sought the answer through Martin Jamieson. After argument by ONC objecting to Mr. Jamieson answering the question, Justice Leblanc directed the parties to make written submissions following the conclusion of Mr. Jamieson's evidence on November 13, 2015, and he would decide the issue prior to the date scheduled for Mr. Wilson to be cross-examined (November 27). Mr. Jamieson was to be recalled to answer the question if the decision was that he was required to do so.

[118] Mr. Mitchell subsequently sought adjournment of the November 27, 2015 motion. ONC objected to the adjournment but it was granted. The conclusion of the hearing was delayed to January 28, 2016. ONC pursued recovery of its witnesses' travel costs and some were granted.

[119] Eventually, Justice Leblanc refused to order disclosure of the purchase price. He held that Mr. Mitchell should have filed a motion prior to February 28, 2015 – the deadline set by Justice Moir for any further motions for production.

Post-hearing submissions

[120] On January 28, 2016, the final day of the hearing, Justice Leblanc set deadlines for the parties' respective post-hearing written submissions. The applicant's submissions were due on March 7, 2016. On March 7, Mr. Mitchell wrote to the court advising that he could not meet the deadline. Justice Leblanc granted an extension, which then extended ONC's date for reply to April 15, 2016. Mr. Mitchell then sought an extension for reply.

[121] On October 12, 2016, Justice Leblanc wrote to the parties seeking submissions on two recently released Ontario Court of Appeal decisions and another issue. Justice Leblanc directed that submissions were due by November 10. On November 9, Ms. Barteaux wrote to Mr. Mitchell to inquire whether he would be filing his submission the next day as directed. Mr. Mitchell then wrote to the court to state that he had been reminded of the date for filing and that he "expected" he would meet the deadline, but if he did not, he would not expect Ms. Barteaux to file. Mr. Mitchell did not file his submissions until November 15, 2016.

Post-decision submissions

[122] In his decision issued January 30, 2017, Justice Leblanc directed the parties to file submissions on costs within 45 days of the decision if they could not reach agreement.

[123] On February 28, 2017, Mr. Mitchell provided Ms. Barteaux with a proposed form of order. On March 6, Ms. Barteaux responded, pointing out that Mr. Mitchell had been required under the Rules to provide the draft order by February 13. She went on to object to the form of the order. She also provided him with a draft form of order.

[124] On March 2, 2017, Ms. Barteaux wrote to Mr. Mitchell asking for his position on costs as soon as possible so the parties could determine whether written submissions would be necessary while there was still ample time to prepare them before the March 22 deadline. Ms. Barteaux also had plans to be out of the country for most of April. Mr. Mitchell did not respond.

[125] On March 10, 2017, Mr. Mitchell wrote to Justice Leblanc advising that the parties had not come to a consensus with respect to the quantification of loss. He went on to state:

> Costs also remain unresolved. As there remain disputes on quantification, the Applicant would submit that they might best be addressed when those other matters are resolved.

[126] Ms. Barteaux wrote to Justice Leblanc on March 13, 2017. She noted that there had been no discussions between the parties with respect to costs. She confirmed that she had written to Mr. Mitchell on March 2 and he had not responded. She submitted that the parties should at least attempt to resolve costs prior to having the court deal with the issue. On March 23, Justice Leblanc wrote to the parties and proposed that Mr. Mitchell would have until March 31 to fill submissions on costs, and that Ms. Barteaux would have until April 7 to respond. He indicated that he reserved the morning of April 20 to hear from the parties on the issue of the STIP calculation and rate of prejudgment interest.

[127] On April 3, 2017, Mr. Mitchell wrote to Justice Leblanc acknowledging that the cost submissions had been due on Friday, March 31, and advising that the applicant's submission was not ready. Ms. Barteaux wrote to Justice Leblanc in response to Mr. Mitchell's correspondence, pointing out that she still had no indication of the applicant's position on costs and that her schedule for April 4-6 was completely booked. She stated that Mr. Mitchell's failure to provide her with the

applicant's position on costs was resulting in additional costs to her client and causing great inconvenience to her in dealing with the matter in a timely manner. On April 3, Justice Leblanc wrote to Mr. Mitchell, copied to Ms. Barteaux, directing that the applicant's cost submissions were to be filed no later than April 7, and that Ms. Barteaux could file reply submissions by April 14, 2017. Any reply from the applicant was to be filed by April 19. Justice Leblanc confirmed that he was maintaining the courtroom booking for April 20 to deal with the STIP issue and prejudgment interest.

[128] Mr. Mitchell provided costs submissions on April 7, 2017. On April 10, Justice Leblanc held a conference call with the parties. During that time, Ms. Barteaux objected to the form of the submissions made by Mr. Mitchell with regard to costs. She said they were inadequate to allow for proper response. According to Ms. Barteaux, Justice Leblanc confirmed that she could seek an order for costs to respond to the incomplete submissions made by Mr. Mitchell.

[129] On April 13, 2017, ONC filed submissions with respect to the STIP and prejudgment interest. On April 19, Justice Leblanc's judicial assistant contacted Mr. Mitchell to note that his submissions on the STIP and prejudgment interest had not been received, and she understood they were due the day before. Mr. Mitchell responded that he understood that they were due that day, and that he had been looking to review transcripts before making final submissions. By further email, the judicial assistant asked counsel to have a conference call that afternoon prior to the scheduled appearance the next day. Mr. Mitchell filed his submissions on the STIP and prejudgment interest later that day.

[130] On May 12, 2017, Justice Leblanc issued the supplemental decision dealing with the STIP and rate of prejudgment interest.

Analysis

[131] As noted earlier, ONC submits that Mr. Mitchell's conduct warrants a reduction in the applicant's costs, and orders that Mr. Mitchell pay costs personally to ONC. Ms. Barteaux is seeking a costs order in the amount of $2,500 payable by Mr. Mitchell to ONC in relation to his conduct at the hearing, and a second costs order payable by Mr. Mitchell in the same amount in relation to his submissions on costs.

[132] In particular, ONC says Mr. Mitchell caused delay during the discovery and disclosure process and created numerous inefficiencies in relation to the hearing due

to his lack of preparation, his failure to object to Mr. Jamieson's affidavit in a timely manner, his indecision regarding witnesses, his attempts to obtain disclosure of the offer from DSM, his refusal to drop the oppression claim, and his repeated failure to meet filing deadlines. ONC further submits that Mr. Mitchell's costs submissions were incomplete, inaccurate, and addressed issues outside the scope of the court's direction.

[133] *Civil Procedure Rule* 77.12(2) governs awards of costs against a solicitor:

> 77.12 (2) A judge who determines that expenses are caused by the improper or negligent conduct of counsel may order any of the following:
>
> (a) counsel not recover fees from the client;
>
> (b) counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
>
> (c) counsel personally pay costs.

[134] The court also has inherent jurisdiction to order costs personally against a lawyer. In *Robinson v. Gallagher Holdings Limited*, 2019 NSCA 97, the Court of Appeal, *per* Scanlan J.A., explained the distinction between costs ordered pursuant to Rule 77.12 and costs ordered pursuant to inherent jurisdiction:

> [25] Costs pursuant to CPR 77.12 differ from costs that may be ordered pursuant to the Court's inherent jurisdiction. Courts may award punitive amounts under the inherent powers of the court. There should be no punitive aspect to costs awarded under CPR 77.12(2) (*Galganov v. Russell (Township)*, 2012 ONCA 410). That does not mean that actions which might warrant punishment or discipline are not part of the overall considerations the court may take into account when assessing costs under that provision. …
>
> [26] The main issue to be addressed under CPR 77.12(2) must be related to an assessment or determination as to what expenses are caused by improper or negligent conduct of counsel. Once that is ascertained a judge has discretion to order any one, or a combination of three things:
>
> - Counsel not recover fees from the client;
> - Counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
> - Counsel personally pay costs.
>
> …

In this case, ONC seeks costs against Mr. Mitchell pursuant to Rule 77.12, not the court's inherent jurisdiction.

[135] ONC cites *Rowe v. Lee*, 2007 NSSC 31, where costs were ordered against plaintiff's counsel for his failure to file a memorandum of law, which resulted in two adjourned chambers dates. Justice Pickup summarized the situation as follows:

> [24] It is obvious from the materials filed by plaintiff's counsel that the failures to file a memorandum resulted from errors and decisions for which plaintiff's counsel was fully responsible and, therefore, in my view, it would be inappropriate to award costs against his client.
>
> [25] The issue is whether the defendants should be granted an award of costs personally against the plaintiff's solicitor.
>
> [26] The obligation on plaintiff's counsel was clear. He was to have a memorandum filed for his initial application which had been set for hearing on July 13, 2006. No memorandum was provided and despite having correspondence from the presiding justice who rescheduled the matter to September 6, 2006, plaintiff's counsel did not comply with the specific direction that he have his memorandum filed by August 28, 2006.
>
> [27] The presiding justice did not hear the plaintiff's application in the absence of a pre-hearing memorandum and the hearing was scheduled for a third date, November 1, 2006, at which time I heard the matter.
>
> [28] Despite being aware of the adjourned date of November 1, 2006, plaintiff's counsel did not file the required memorandum of law until Monday, October 30, 2006. This is outside the filing deadline required of Rule 37.08 which requires the applicant's memorandum to be filed with the court at least four clear days before the hearing.
>
> [29] I take seriously the fact, that despite direction from a presiding justice, as to the date of the adjourned hearing and as to the need for a memorandum of law, no such memorandum was filed. Counsel are responsible for their own preparation and must ensure that proper safeguards are in effect to ensure timely filing of documents with the court. This is not a stand-alone incident of missing a single filing date. Plaintiff's counsel missed two filing dates and was late filing his memorandum on the third adjourned date.
>
> [Emphasis added]

[136] Justice Pickup held that the explanation provided by plaintiff's counsel did not excuse his conduct:

> [31] Plaintiff's counsel has brought forward a number of reasons for not filing the memorandum of law in a timely fashion. These reasons can be can categorized as follows:
>
> - inadequacies in his office staff
> - personal medical appointments

- client pressures

> [32] The reasons articulated by plaintiff's counsel for not complying with the Civil Procedure Rules are not unique to him. Difficulties with office staffing, client pressures and balancing one's personal life are issues faced by all practicing lawyers in Nova Scotia. Despite these pressures, the vast majority of practicing lawyers are able to file memorandums of law and other required documentation within the time frames set out in the Civil Procedure Rules.
>
> [33] I accept that it is a rare circumstance where costs should be awarded personally against a solicitor. However, on the facts before me, this is one of those cases.

[137] The court concluded that plaintiff's counsel's failure to file the memorandum of law resulted in lost court time, along with undue expense, frustration, and unnecessary work for the defendants:

> [34] The effect of plaintiff's counsel's failure to file the memorandum of law is lost court time.
>
> [35] The defendants have been put to undue expense and frustration. The defendants have incurred additional costs as counsel incurred additional time to respond to the adjournments of the scheduled court appearances. Here counsel had to prepare for two adjourned dates.
>
> [36] Despite plaintiff's counsel not filing his memorandum of law, all documentation, including a memorandum of law, was filed by the defendants' counsel within the time requirements set out in the Civil Procedure Rules. Due to the delay in filing the plaintiff's memorandum of law, it is apparent that more work would be necessary on the part of the defendants' counsel to properly prepare for each adjourned dated. Having to respond to plaintiff's counsel's brief, after the defendant had filed its own brief, would entail additional and unnecessary preparation.

[138] Although defence counsel filed evidence indicating that the additional time required to respond and prepare for the adjourned proceedings amounted to $3,723 in fees, Pickup J. awarded costs personally against plaintiff's counsel in the amount of $900, payable forthwith.

[139] ONC also cites *R. v. Liberatore,* 2010 NSCA 26, where MacDonald C.J.N.S. ordered costs personally against appellant's counsel for his failure to file his factum on time. On August 28, 2009, the appellant appealed his conviction for possessing and trafficking cocaine. The appeal was set for January 19, 2010, and the appellant was directed to file his brief by October 26, 2009. With the Crown's consent, the

appellant was released pending appeal upon conditions, including his duty to surrender should the appeal be dismissed. No factum was filed on October 26.

[140] On December 22, 2009, the appellant requested an adjournment of the appeal to give his counsel more time to file his factum. The relief was granted. The appeal was adjourned to March 10, 2010, and the deadline for the appellant's factum was extended to January 22. Appellant's counsel was twice warned that if the factum was not filed by then, the appeal would be dismissed without further notice to him.

[141] The January 22, 2010 deadline came and went, with no factum from appellant's counsel. On February 9, Bateman J.A. dismissed the appeal, triggering the appellant's obligation to surrender into custody. The appellant immediately filed for leave to have the dismissal reviewed by a panel of this court. In his supporting affidavit, appellant's counsel explained that he had not filed the factum because he had been overwhelmed by the pressure of his other commitments and family responsibilities.

[142] MacDonald C.J.N.S. held that although the dismissal was reasonable, this was an exceptional case warranting leave to prevent an injustice. The court went on to order appellant's counsel to personally pay costs to the Crown:

> [19] Having reached this conclusion, there must still be consequences for Mr. Atherton's inaction which has caused unnecessary delay and significant disruption. Thus I direct him to personally pay $500.00 costs forthwith to the Crown. I make this order pursuant to Rule 77.12 (which applies to this matter by virtue of Rules 90.02 and 91.02) …
>
> [20] I realize that ordering costs against counsel personally is an extraordinary remedy, particularly in the criminal law context. However, the facts of this case are extraordinary and such relief is not unprecedented. For example, see *R. v. Smith* [1999] M.J. No. 15, affirmed by the Man. C.A. in [2000] M. J. No. 75. See also *R. v. Chapman* (2006), 204 C.C.C. (3d) 457 (O.C.A.).

[143] Finally, ONC cites *Trenholm v. H & C Trucking Ltd.*, 2014 NSSC 418, where Justice Wood both reduced the plaintiff's party and party costs due to her counsel's conduct at trial and ordered counsel to pay $2,500 in costs personally due to his failure to file costs submissions.

[144] After 20 days of trial, Wood J. issued a decision on March 21, 2014, awarding damages to the plaintiff in the amount of $101,000. The court directed that the parties file written submissions within 45 days from the date of the decision if they were unable to agree on costs. Plaintiff's counsel requested several extensions of time and

sent letters to the court promising that the materials were almost ready. Deadlines came and went. On July 25, 2014, defence counsel wrote to the court as follows:

> It has become extremely difficulty for me to explain to my client why I am unable to conclude this matter given the various time line requirements. I fully expect that it is costing the individual plaintiffs considerable ongoing legal expenses as well as my own clients.
>
> I am now in a position that I will be on vacation until August 12 and still nothing to review. Might I suggest that we set a date to appear before you and have an actual taxation so as to bring this matter to a conclusion. If the process is not fixed I am fearful that it may be difficult to conclude this matter this year.

[145] On July 31, 2014, Wood J. wrote to counsel, stating in part:

> I share Mr. Ritch's frustration with Mr. Richey's inability to provide his submission on costs. I am not prepared to set a hearing date as I still believe the issue is capable of being disposed of based upon written submissions.
>
> I believe that it is appropriate to consider a cost award specifically as it relates to the process for finalizing trial costs. Mr. Richey's failure to adhere to deadlines and overall delay in making submissions are factors that I will take into account in that award. I will also consider if it is appropriate for Mr. Richey to be personally liable for some portion of those costs.
>
> [Emphasis added]

[146] Over the next few months, plaintiff's counsel sent more letters to the court promising that the materials would soon be filed. That never happened. On October 15, 2014, Wood J. wrote to counsel advising that he was currently working on the costs decision and would release it as soon as it was completed. He indicated that if plaintiff's counsel wanted the court to consider any submissions, he should ensure that they were filed by October 31. On November 24, Justice Wood released his decision, without hearing from plaintiff's counsel.

[147] The defendant argued that no costs should be awarded to the plaintiff due to the unfocused trial and the conduct of plaintiff's counsel. Justice Wood rejected that submission, writing at para. 27:

> The defendants' argument is not overly forceful on that point and in my view there is no merit to it. The plaintiff is entitled to an award of costs. To the extent that there were specific problems causing needless expense to the defendants, those can be dealt with through the exercise of judicial discretion in the assessment process.

[148] Justice Wood went on to address plaintiff's counsel's lack of preparation and his overall conduct of the trial. Although he disagreed with the defendant that certain medical witnesses had been unnecessary, Wood J. agreed that time was wasted by irrelevant motions and lack of preparation:

> [32] The defendant submits that once the Tariff amount has been set there should be a reduction in the award of costs due to Mr. Richey's handling of the trial. For example on June 3, 2014, the first day of trial, we were unable to proceed because the plaintiff's exhibit books were not ready. In addition there were several motions within the trial to deal with the relevance and admissibility of the file from the Section B insurer. After my initial determination that the file was irrelevant and not admissible Mr. Richey continued to try and have the contents entered as evidence. One example was showing the letters from the file to the plaintiff and her father. I accept the defendant's submission that unnecessary time was spent on these issues.

[149] The court also accepted that there should be costs consequences for plaintiff's counsel's indecision regarding the calling of witnesses, and for the defendant's success on various mid-trial motions:

> [33] The plaintiff opened her case on June 4, 2013. At that time a Mr. Seitl and Ms. Fenn were potential witnesses. The trial was adjourned on June 25 until December 2 for continuation of the plaintiff's case. At that time Mr. Richey was unable to confirm whether Mr. Seitl and Ms. Fenn would be called. Mr. Ritch wanted to know whether he needed to prepare cross-examination questions. Mr. Ritch advised that he would begin preparation for their testimony unless Mr. Richey informed him they would not be called. I directed Mr. Richey to inform Mr. Ritch if he decided not to call these witnesses and said if notification came too late it might be a factor to consider on costs. Mr. Richey sent an email to Mr. Ritch informing him the witnesses would not be called late on the evening of December 5, the day before they were scheduled to appear. Presumably Mr. Ritch had completed his preparation by that time. His client should not bear the cost of this unnecessary work which arose solely because Mr. Richey could not make a timely decision about these witnesses.
>
> [34] The defendants also say there should be a reduction to reflect their success on various motions including those related to efforts during the trial to introduce the Section B materials. There were a number of pre-trial motions on the issue of expert reports in which costs were in the cause which would ultimately go to the plaintiff's credit. Mr. Ritch suggests a net reduction in the amount of $5,250.00 for these motions. Included is an amount of $2,000.00 for the loss of the first day of trial due to unavailability of the plaintiff's document books.

> [35] I do not necessarily endorse the defendant's suggestion that mid-trial motions can be assigned a specific cost amount, however, I agree that some adjustment in favor of the defendant is appropriate in the circumstances. …

[150] Justice Wood concluded that the plaintiff's costs award should be reduced by 15%:

> [36] In my view there were problems with the plaintiff's conduct of the case particularly as it related to the Section B file, the lack of preparation for the first day of trial and the indecision concerning witnesses. Any remaining inefficiencies were not so egregious that the plaintiff should be penalized. I believe a 15% reduction in the Tariff costs would be appropriate to account for these issues as well as the various mid-trial motions.

[151] The court went on to award costs against plaintiff's counsel personally for his failure to file costs submissions:

> [43] Logically there is no reason why there should not be a separate assessment of costs in relation to the taxation process particularly if it is time consuming. In my letter to counsel of July 31, 2014, I advised that I would be considering a separate award relating to the finalizing of trial costs. I also suggested that I would consider making Mr. Richey personally liable for some portion of those costs.
>
> [44] In my view Mr. Richey's behaviour in dealing with the question of costs and his inability to file submissions in a timely fashion (or, in fact, at all) has resulted in additional work on the part of defence counsel. There was correspondence from Mr. Ritch to Mr. Richey seeking information on costs and additional correspondence with the Court. In addition, preparing a brief when there is nothing specific to respond to is presumptively inefficient. I do not think it appropriate that the defendant bear these increased legal expenses. They should be the responsibility of Mr. Richey since it was his action and inaction that caused them to be incurred. I would award the defendant costs of the taxation process in the amount of $2,500.00 and make them payable personally by Mr. Richey.
>
> [Emphasis added]

[152] Mr. Mitchell's submissions in response to ONC's position that costs should be reduced due to his conduct were difficult to follow and often focused on the merits of the litigation itself, the credibility of witnesses, and other irrelevant matters. With respect to the discovery and disclosure process, he noted that his client wanted to be involved in every discovery examination and was living in Peru at the time, which made scheduling more difficult. He offered no explanation for his numerous failures to respond to communications from opposing counsel, his repeated attempts to

obtain discovery subpoenas from the prothonotary, or his multiple failures to meet court-imposed deadlines.

[153] With respect to his conduct at the hearing, Mr. Mitchell submits that his client's costs should not be reduced because of his decision to call Paul Empey as a witness. He refers to Justice Leblanc's conclusion at para. 21 of his decision (2017 NSSC 16) that ONC would not suffer any prejudice:

> I exercised my discretion to allow Mr. Empey to testify as part of the applicant's case-in-chief because I was not satisfied that, in the particular circumstances of this case, the respondent would suffer any prejudice as a result.

[154] As to his failure to object to Martin Jamieson's affidavit, Mr. Mitchell points out that Justice Leblanc criticized Ms. Barteaux for waiting until her post-hearing submissions to raise objections to Mr. Matthews's affidavit. Justice Leblanc wrote as follows in his decision:

> [26] During argument on the Jamieson affidavit, which occurred after Dave Matthews' cross-examination, Ms. Barteaux stated that Matthews' affidavit also contained inadmissible evidence and noted that the respondent might elect to bring a motion to strike those portions of the affidavit at a later time. She did not object to the content of Matthews' affidavit on the first day of the hearing when I raised my concerns about Jamieson's affidavit.
>
> [27] No formal motion was made by the respondent during the hearing. However, in the respondent's post-hearing brief, Ms. Barteaux identified approximately seventy items within the applicant's affidavit that she argued were hearsay, opinion or submission and should be excluded. Mr. Mitchell says that Ms. Barteaux's failure to object to the affidavit's contents at an earlier time means the contested evidence must be admitted.
>
> [28] I am concerned about the lack of attention paid to the rules of affidavit evidence in this proceeding. A judge should not need to point out to the parties on the first day of a hearing that their affidavits are brimming with potentially inadmissible evidence. An application in court is intended to be an efficient, cost-effective alternative to a trial. That intention is frustrated when arguments are made during the hearing, or after the hearing, on the admissibility of evidence that has been in the hands of the parties for more than a year.
>
> [29] It is unacceptable for counsel to review an opposing party's affidavit, see that it contains hearsay or other inadmissible evidence, and choose not to object unless or until the opposing party challenges counsel's own affidavits. Parties should arrive at the hearing having either reached agreement on the evidentiary issues, or had the matter resolved by a judge on a motion under Rule 39.04.

[155] With respect to the oppression claim, Mr. Mitchell says it was brought in good faith, and emphasizes that ONC lost its motion for summary judgment on the claim and its appeal of that decision.

[156] In my view, there is merit to many of ONC's submissions. I am satisfied that during discovery and disclosure, it was ONC pushing the matter forward, not the applicant. I find that Mr. Mitchell's failure to respond to opposing counsel and to meet court-ordered deadlines, as well as his repeated attempts to obtain discovery subpoenas from the prothonotary, created delay, frustration, and extra work for the respondent during this stage of the proceeding.

[157] With respect to Mr. Mitchell's conduct at the hearing, I do not accept that his client should be penalized for his failure to object to Mr. Jamieson's affidavit. Although Mr. Mitchell should have objected earlier, the fact remains that ONC should not have filed a hearsay-ridden affidavit in the first place. Nor do I accept that the applicant should be penalized for maintaining the oppression claim. The claim was, frankly, not well argued, and it did not require significant additional work on the respondent's part to defend. For example, it did not require the respondent to call additional evidence unrelated to the constructive dismissal claim.

[158] I am satisfied, however, that Mr. Mitchell's conduct at the hearing created inefficiencies, inconvenience, and unnecessary work for the respondent. The applicant's costs award should be reduced to account for this fact. Mr. Mitchell's inadequate preparation led to his last-minute decision not to cross-examine witnesses who were scheduled to take the stand the following day, and who had already completed hours of preparation with Ms. Barteaux. While one of the witnesses was later cross-examined, the other was not. With respect to Mr. Mitchell's mid-hearing request to call Paul Empey as a witness, Justice Leblanc's conclusion that ONC would not be prejudiced in terms of trial fairness did not mean there would be no costs consequences for the applicant. Finally, Mr. Mitchell's attempts to obtain disclosure of the amount DSM offered to purchase ONC created extra work for the respondent and prolonged the hearing. As Justice Leblanc held, if Mr. Mitchell considered that information relevant, he should have filed a motion for production before the deadline imposed by Justice Moir.

[159] Following the hearing, Mr. Mitchell failed to meet the deadline set by Justice Leblanc for the applicant's post-hearing submissions. He did not inform the court that he would not be filing on time until the day submissions were due. Mr. Mitchell

missed another court-imposed deadline when he was late filing supplementary submissions on two Ontario Court of Appeal decisions.

[160] Mr. Mitchell's conduct during the proceeding is troubling. In particular, his repeated failures to respond to communications from opposing counsel and his disregard for court-ordered deadlines cannot be condoned by the court. It should not be necessary for counsel to send three or four letters in order to provoke a response from the other side. This discourteous behaviour promotes frustration and acrimony between counsel, making litigation – an already difficult process – even more challenging.

[161] In my view, Mr. Mitchell's conduct justifies a reduction in the applicant's costs award, and an order that he pay costs personally to the respondent. Taking into consideration the formal settlement offer, I award the applicant party and party costs in the amount of $210,000. The award will be subject to a 10% reduction ($21,000) to account for Mr. Mitchell's conduct. I also order Mr. Mitchell to pay costs personally to the respondent in the amount of $2,500 to account for the extra work that was made necessary by his actions.

[162] I will now address Mr. Mitchell's costs submissions. I agree with ONC that Mr. Mitchell's initial submissions were inadequate. He filed extensive time records without removing irrelevant entries, which generated additional work for the respondent. Mr. Mitchell should have carefully reviewed these entries prior to filing his materials instead of leaving that task for the respondent and the court. Mr. Mitchell also failed to file any evidence to support his disbursements. In his supplementary submissions, Mr. Mitchell neglected to address the multitude of time entries previously identified by ONC as irrelevant. Instead, he attempted to respond to them for the first time at the hearing. This was an inefficient use of court time. Finally, Mr. Mitchell's supplementary submissions raised issues that were outside the scope of the court's direction for his reply, again creating more work for the respondent. To account for these deficiencies, I order Mr. Mitchell to pay costs personally to the respondent in the amount of $1,500.

Disbursements

[163] Mr. Mitchell claims $16,189.53 in reasonable disbursements on his client's behalf. These disbursements are set out in a list attached to Mr. Mitchell's affidavit. Mr. Mitchell has not filed any invoices and submits that he is unaware of any

requirement to prove disbursements. ONC says reasonable disbursements must be proved and, as such, there should be no award for disbursements in this case.

[164] In *Landry v. Kidlark*, 2019 NSSC 128, Arnold J. restated the law on proof of disbursements:

> [40] Necessary and reasonable disbursements are recoverable, but they must be proven. In *MacQueen v. Sydney Steel Corp.*, 2012 NSSC 461, Justice Murphy adopted the following statement of the law at para. 48:
>
> > Recovery of disbursements is limited to expenses incurred and normally paid. The strict practice is to file an affidavit of payment of disbursements before recovery.

[165] Likewise, in *Burns v. Sobeys*, 2008 NSSC 102, Warner J. wrote at para. 27:

> The Claimant is obligated to prove its disbursements are actual and reasonable.

[166] In *Trenholm*, Wood J. stated:

> [38] In order to make an award for disbursements the Court needs evidence with respect to the amount of the plaintiff's expenditures. Typically this would be accomplished by way of an affidavit with attached receipts. In this case I have nothing from the plaintiff to substantiate any disbursement amount. …

[167] Justice Wood went on to make an award for disbursements despite the lack of evidence only because the defendant agreed that the expenses claimed were reasonable and recoverable:

> [40] Although I have no evidence from the plaintiff of disbursements incurred I do have the defendant's submissions in which they acknowledge they are satisfied that disbursements totalling $26,405.79 are reasonable and recoverable. I believe I can take this admission from an adverse party as sufficient evidence to support that quantification.

There is no such admission from opposing counsel in this case.

[168] The law on recovery of disbursements is not new and Mr. Mitchell should be familiar with it. While it is open to the court to refuse to make any award for disbursements where, as in this case, counsel fails to file the necessary evidence, I will review the expenses claimed by the applicant. Where I find that those expenses, if proved, would be reasonable and necessary, I will allow Mr. Mitchell 30 days from the release of this decision to file the necessary invoices and other evidence with the

court. Disbursements for which such evidence is not filed will not be awarded, and I trust that Mr. Mitchell, as an officer of the court, will not seek to recover them from his client.

[169] Mr. Mitchell claims $8,425.65 for discovery and transcript costs. I accept that these expenses, if proved with invoices, are reasonable and necessary.

[170] Mr. Mitchell claims $3,059.82 for "Printing/Binding", which he indicates was performed by Fed Ex. Mr. Mitchell's list of disbursements does not distinguish between printing and binding. The list provides only a series of dates and amounts. It does not indicate the nature of the materials nor the cost per page. As a result, it is impossible to determine whether the expenses listed relate to interlocutory motions or proceedings for which costs have already been awarded.

[171] Practice Memorandum 10 deals with taxable disbursements. It states as follows:

> The following is intended to standardize allowances for disbursements when costs are awarded. A party is always free to submit that a variation would be reasonable. Such a submission needs to be supported by evidence.

Mr. Mitchell had not submitted any evidence that a variation from the rates outlined in the Practice Memorandum is reasonable.

[172] The Practice Memorandum provides that one half of the number of photocopies posted to the client account for the claim are recoverable at a rate of 10 cents per page. As for binding, one half of the amount actually charged by commercial printers is recoverable. If Mr. Mitchell files the Fed Ex invoices and other evidence to prove the amounts spent per page on printing and binding, and that these expenses related to proceedings in this court for which costs have not already been awarded, the disbursements will be recoverable in accordance with the Practice Memorandum.

[173] Mr. Mitchell claims $1,481.35 for courier costs. Practice Memorandum 10 states that the courier company invoice amounts for deliveries to other parties, witnesses, and the court are recoverable. Costs of deliveries to clients are not.

[174] Mr. Mitchell's disbursement list provides only an amount and a date for each courier-related expense. It does not identify the courier company, the recipient, or the nature of the materials being sent. If Mr. Mitchell files the courier invoices and other evidence necessary to identify the recipients and prove that these expenses

related to proceedings in this court for which costs have not already been awarded, I will allow those expenses which are recoverable under the Practice Memorandum.

[175] Mr. Mitchell claims $292.28 for audio recordings of various court appearances. ONC likens audio recordings to written transcripts of proceedings and submits that these expenses should not be allowed. It cites Mark Orkin's *The Law of Costs*, 2d ed., loose-leaf (Toronto: Thomson Reuters, 2017), which states at §219.6(2a):

> The cost of real-time reporting will be allowed only in exceptional circumstances. … The cost of transcripts ordered simply for convenience of counsel was not allowed.

[176] Mr. Mitchell has not satisfied me that the audio CDs were a reasonable or necessary expense and I make no award for them.

[177] Mr. Mitchell claims $447.17 for witness fees. These expenses, once proved, are recoverable.

[178] The two remaining disbursements are the most hotly contested. The first relates to hotel room expenses for discoveries. Although Ms. Barteaux had arranged for June 2013 discoveries to be held in a boardroom at her office, Mr. Mitchell and his client insisted that they take place at a "neutral, third party location". On May 23, 2013, Ms. Barteaux advised Mr. Mitchell that her client was not prepared to cover the cost of discovery in a hotel when there was space available at her law firm. She indicated that if Mr. Mitchell wished to have the discoveries held in another location, his client should cover the cost. Mr. Mitchell replied the next day, stating:

> We do not wish to have discovery examinations in your offices.
>
> Accordingly, we will be proceeding to cover your share of the expenses of an appropriate, neutral, third party location.
>
> Your office booked the discovery in your offices, but certainly did not do so with my consent.

Mr. Mitchell now seeks to recover $2,001.86 for this expense.

[179] Mr. Mitchell argues that the expense is reasonable because, due to the nature of his claim, Mr. Matthews was not comfortable being in offices closely associated with ONC. In addition, he submits that using opposing counsel's offices was

problematic because he and his client would not have free access to the room between examinations to review the voluminous documentary materials stored there.

[180] I am not satisfied that this disbursement was reasonable or necessary. It is not unusual for there to be hostility between parties involved in litigation. Nor is it uncommon for discovery examinations to involve a significant volume of documents. Discoveries are routinely held in law firm boardrooms for cost-efficiency and convenience reasons. While Mr. Matthews would have been justified in refusing to attend for discovery at ONC's offices, the same cannot be said with respect to the offices of its counsel. In my view, if a litigant is not comfortable doing discoveries at opposing counsel's law firm for the reasons cited in this case, it is only open to them to insist on a different location if they are prepared to pay the associated costs.

[181] The last disbursement claimed relates to the cost of a tax opinion obtained by Mr. Matthews with respect to the amount of the remittance ONC was required to make to CRA. In Justice Leblanc's supplemental decision, he concluded that ONC was required to remit 50% of the damage award to CRA. ONC subsequently obtained its own tax opinion that the appropriate withholding rate was 30% and submitted it to the Court of Appeal when it sought a stay pending appeal, partly on the basis of irreparable harm in paying 50%. No stay was granted but the remittance was dealt with in the appeal decision. The majority of the Court of Appeal held that it was an error for Justice Leblanc to have addressed the issue of the amount to be withheld and remitted to CRA without input from the parties. Unfortunately, the majority did not go on to rule on what the proper withholding would be, finding that the determination was irrelevant in light of its other conclusions. It did note, however, that "the appellant argued convincingly in its factum, and at the appeal hearing, that the appropriate amount to be withheld should have been 30%": *Ocean Nutrition Canada Ltd. v. Matthews*, 2018 NSCA 44, at para. 108.

[182] On October 30, 2020, following the release of the Supreme Court of Canada's decision, I had a telephone conference call with counsel to address next steps in the matter. On November 5, I wrote to counsel, summarizing the matters discussed during the call. I acknowledged that the parties were to attempt to agree to alter the order of Justice Leblanc in relation to the appropriate remittance:

> Counsel also indicated that they will attempt to agree on the appropriate remittance that Mr. Matthews' former employer, Ocean Nutrition Canada Limited, should make to the Canada Revenue Agency out of the long-term incentive plan payment awarded to Mr. Matthews by former Justice Arthur J. Leblanc. It was noted that an

> advance ruling could be obtained from CRA which would require the cooperation of Mr. Matthews. Hopefully, this cooperation will be forthcoming so the appropriate amount can be determined in advance of payment of the remittance. …

[183] Instead of seeking an advance ruling from CRA, Mr. Mitchell obtained an opinion from a tax practitioner in New Brunswick that 20% was the appropriate remittance. In the end, however, the parties agreed to the withholding rate of 30%. The applicant now seeks to recover the cost of the tax opinion, which was $5,304.38.

[184] Mr. Mitchell suggested that ONC caused this disbursement to be incurred by Mr. Matthews because it changed its position on the appropriate withholding rate. The evidence does not support that assertion. I find that ONC has always maintained that 30% was the appropriate withholding rate. Ms. Barteaux explained in her submissions that when Mr. Jamieson gave evidence about a 50% tax rate, it was in relation to payments made under the LTIP to individuals who were still employees at the time. Without hearing from the parties on the issue, Justice Leblanc applied that same rate to the damage award. Ms. Barteaux's comments are consistent with the following observation by the Court of Appeal in this matter:

> [107] The parties were not given an opportunity to address the issue of what amount should be withheld and remitted to Revenue Canada. The hearing judge based his decision on evidence at the hearing that when payments were made to current employees under the Long Term Incentive Plan, Ocean Nutrition remitted 50% of those payments to the CRA. However, the hearing judge did not consider whether a damage award would stand on the same footing as a payment made to individuals still employed with the company.

[185] During the conference call on October 30, 2020, both ONC and the court understood that Mr. Matthews would seek an advance ruling from the CRA, and, in turn, ONC would agree to amending Justice Leblanc's order to reflect whatever remittance CRA advised was required. Withholding and remittance taxes are the responsibility of the employer under the *Income Tax Act*. As such, ONC was not prepared to agree to a remittance amount other than the 30% advised by its own tax counsel unless the amount was based on an advance ruling from CRA itself. That is an entirely reasonable position. Unlike a legal opinion obtained by opposing counsel, ONC could have relied on an advance ruling in the event that there was ever an allegation that ONC had not met its income tax obligations.

[186] Accordingly, I find that the tax opinion was not a reasonable or necessary expense and I make no award for it.

Prejudgment interest

[187] In his supplemental decision (2017 NSSC 123), Justice Leblanc said the following about prejudgment interest:

> [20] With respect to pre-judgment interest, the standard rate is five percent, as per Civil Procedure Rule 70.07. Both the Rule and s 41(i) of the *Judicature Act*, RSNS 1989, c 240, provide the court with a discretion, however. Rule 70.07 sets the rate at five percent, calculated simply, "unless a party satisfies a judge that the rate or calculation should be otherwise." The applicant seeks the usual rate, while ONC says the court should depart from the presumptive rate and apply a rate of 1.6 percent.
>
> [21] According to ONC, a five percent rate would give the applicant a windfall, rather than placing him in the position he would have been in had he received the funds when they were owed, and had access to interest on the funds during that period. ONC says the length of the period for which pre-judgment interest is owed further supports a lower rate. ONC particularly emphasizes the different stipulated rates in other jurisdictions; I am not convinced that this (in itself) is a good reason to depart from the presumptive rate in this jurisdiction.
>
> [22] I have no evidence that it was necessary for the applicant to borrow funds at a higher rate of interest, or that he had to forgo investments that would have brought a higher rate of return. I note that in *Garner v. Bank of Nova Scotia*, 2015 NSSC 122, [2015] N.S.J. No. 166, a wrongful dismissal case, Smith A.C.J. gave pre-judgment interest at a rate of 2.9 percent. This rate was agreed by the parties (para. 248). Nevertheless, this seems to me to be a reasonable rate, and *Garner* involved broadly similar subject matter to this case.
>
> …
>
> [25] I award pre-judgment interest at the rate of 2.9% per annum on the amount awarded. The period for which the interest is to be paid will be determined as part of the costs hearing.
>
> [Emphasis added]

[188] The awarding of prejudgment interest is governed by ss. 41(i) and (k) of the *Judicature Act*:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> ...
>
> (i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate

> as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> ...
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.
>
> [Emphasis added]

[189] The parties have raised two issues in relation to prejudgment interest. The first is whether Justice Leblanc determined whether prejudgment interest should be calculated on a simple or compound basis. The second relates to the duration for which prejudgment interest should be paid.

The calculation of prejudgment interest

[190] On December 17, 2020, Mr. Mitchell filed an affidavit from Mr. Matthews to set the foundation for an order for compound interest. ONC submits that the issue of simple versus compound interest has already been decided, and the principle of *res judicata* bars the applicant from relitigating it. ONC relies on *Kasperson v. Halifax (Regional Municipality)*, 2012 NSCA 110, where Beveridge J.A. summarized the principle as follows:

> [23] *Res judicata* tries to ensure finality of litigation by stopping parties from resurrecting disputes that have already been finally litigated. There are two ways *res judicata* can be established. The first is cause of action estoppel. This precludes a person or their privies from bringing an action against another party when the same cause of action has already been finally adjudicated upon in earlier proceedings by a court of competent jurisdiction. The second is issue estoppel. This precludes re-litigation by a party of issues that a court has decided in an earlier proceeding.

[191] The pre-conditions for establishing the issue estoppel form of *res judicata* were set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para. 25:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,

> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[192] ONC submits that the pre-conditions are all met in this case:

> (1) The rate of prejudgment interest including that simple interest is appropriate has been decided;
>
> (2) The appeal period for this decision has long past, and the decision is final; and
>
> (3) The parties to the decision have not changed.

[193] In response, Mr. Matthews submits that Justice Leblanc did not explicitly address whether the interest would be simple or complex, and issue estoppel does not apply to determinations which must be inferred by argument from the judgment. In *Danyluk*, Binnie J., for the court, wrote:

> 24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis by Binnie J.]
>
> This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." …
>
> [Emphasis added]

[194] However, Binnie J. went on to state:

> The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of

> mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> [Emphasis added]

[195] When the parties appeared before Justice Leblanc on April 20, 2017, they knew that prejudgment interest would be one of the issues considered. At the hearing, which I have listened to, counsel for Mr. Matthews asked the court to apply Civil Procedure Rule 70.07, which provides:

> The rate and calculation to be used for prejudgment interest on a liquidated claim is five percent a year calculated simply, unless a party satisfies a judge that the rate or calculation should be otherwise.
>
> [Emphasis added]

[196] In the course of his submissions, Mr. Mitchell twice read the entire Rule aloud to Justice Leblanc. There was never a suggestion from Mr. Mitchell that the rate should be calculated other than simply. The parties left the hearing with the understanding that the only outstanding issue in relation to prejudgment interest was the duration for which interest should be awarded. That issue was held over because ONC's counsel intended to make submissions with respect to delay, and needed time to review the entire file before preparing them.

[197] Furthermore, Justice Leblanc stated in his decision:

> [22] I have no evidence that it was necessary for the applicant to borrow funds at a higher rate of interest, or that he had to forgo investments that would have brought a higher rate of return. I note that in *Garner v. Bank of Nova Scotia*, 2015 NSSC 122, [2015] N.S.J. No. 166, a wrongful dismissal case, Smith A.C.J. gave pre-judgment interest at a rate of 2.9 percent. This rate was agreed by the parties (para. 248). Nevertheless, this seems to me to be a reasonable rate, and *Garner* involved broadly similar subject matter to this case.

[198] In *Garner v. Bank of Nova Scotia*, 2015 NSSC 122, Smith A.C.J. (as she then was) noted:

> [248] The parties have agreed to prejudgment interest of 2.9% (simple interest) on special damages. …
>
> [Emphasis added]

[199] In my view, Rule 70.07 creates a presumption in relation to both the rate (5%) and the calculation (simple). Mr. Mitchell asked the court to apply Rule 70.07,

without suggesting that it be applied only in relation to the rate. He made no argument and led no evidence that compound interest was appropriate in this case. The question of whether the calculation should be simple or compound is not one which must be inferred by argument from the judgment. It was determined necessarily (even if not explicitly) in Justice Leblanc's decision. If Mr. Mitchell wished to file an affidavit from Mr. Matthews and make an argument in favour of compound interest, he should have done so in front of Justice Leblanc. It would be unjust to allow him to make these submissions now. The time has passed and the issue has been decided.

The duration of prejudgment interest

[200] Mr. Matthews submits that prejudgment interest is payable from June 26, 2011, the date he accepted ONC's repudiation of the employment contract by resigning. ONC says that prejudgment interest is payable from the date that ONC was acquired by DSM, triggering a payout under the LTIP.[1] ONC submits that the court should exercise its discretion to reduce the period for which prejudgment interest is awarded because the applicant has caused delay in the litigation. In addition, ONC asks that prejudgment interest not be awarded for a period of several months during which Justice Leblanc was receiving medical treatment. Mr. Matthews denies that he is responsible for any delay in the proceeding, and says interest should not be reduced for periods of institutional delay. He alleges that it was in fact ONC that was responsible for the slow pace of the proceeding (an allegation which I have already rejected).

[201] For his position that prejudgment interest is payable as of June 26, 2011, Mr. Matthews relies on the Supreme Court of Canada's judgment in this case, and the Nova Scotia Court of Appeal's decision in *Sklar-Peppler Furniture Corp. v. George C. Sweet Agencies Ltd.*, [1995] N.S.J. No. 136 (C.A.). In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, Kasirer J. wrote:

> [53] … As the court recognized in *Taggart*, and reiterated in *Paquette*, when employees sue for damages for constructive dismissal, they are claiming for damages as compensation for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice (see also *Iacobucci v. WIC Radio Ltd.*, 1999 BCCA 753, 72 B.C.L.R. (3d) 234, at paras. 19 and 24; *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683,

[1]Although Ms. Barteaux's costs submissions indicate that the "Realization Event" occurred on August 18, 2012, ONC's pre-hearing brief and Justice Leblanc's decision on the application indicate that it actually took place on July 18, 2012.

95 B.C.L.R. (3d) 260, at paras. 10-12 and 25; *Keays*, at paras. 54-55). Proceeding directly to an examination of contractual terms divorces the question of damages from the underlying breach, which is an error in principle.

[54] Moreover, the approach in *Paquette* respects the well-established understanding that the contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal …

[55] Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

[56] The first question is whether Mr. Matthews would have been entitled to the LTIP payment as part of his compensation during the reasonable notice period. Since the Realization Event was triggered within the 15-month reasonable notice period, Mr. Matthews argues that he is *prima facie* entitled to damages for the lost LTIP payment as part of his common law damages.

[57] Ocean argues that Mr. Matthews cannot satisfy the first stage of the analysis. It points this Court to *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, 47 C.C.E.L. (4th) 218, where the Court of Appeal for Ontario presented the first question by asking whether the bonus was "an integral part of his compensation package" (para. 21). Relying on this formulation, Ocean contends that, under the first step, Mr. Matthews has a common law entitlement to damages for all compensation and benefits that are integral to his compensation. Ocean maintains that the LTIP payment was not integral to Mr. Matthews' compensation since he did not have a vested right at the date of termination.

[58] The trial judge confronted this submission and concluded that Ocean was attempting to introduce an extra requirement into the analysis that is not supported by the jurisprudence (para. 387). I agree. The test of whether a benefit or bonus is "integral" to the employee's compensation assists in answering the question of what the employee would have been paid during the reasonable notice period (see, e.g., *Brock v. Matthews Group Ltd.* (1988), 20 C.C.E.L. 110 (Ont. H.C.J.), at p. 123, aff'd (1991), 34 C.C.E.L. 50 (C.A.); *Paquette*, at para. 17). Thus, in *Paquette* and *Singer*, where the bonuses at issue were discretionary, the Court of Appeal for Ontario considered this so-called "integral" test since there was doubt as to whether the employee would have received those discretionary bonuses during the reasonable notice period.

[59] This case is different. The purpose of damages in lieu of reasonable notice is to put the employee in the position they would have been in had they continued to work through to the end of the notice period. It is uncontested that the Realization Event occurred during the notice period. But for Mr. Matthews' dismissal, he would

> have received an LTIP payment during that period. In such circumstances, there is no need to ask whether the LTIP payment was "integral" to his compensation.…
>
> [Emphasis added]

[202] In *Sklar-Peppler*, a case involving the wrongful termination of a sales agency agreement, the appellant submitted that if the respondent was awarded pre-judgment interest from the time the cause of action arose, he would obtain an amount greater than his loss. The appellant argued that the respondent sales agent would be getting interest on monies which he would not have had for the entire 18-month notice period upon which the award of damages was based. It suggested that pre-judgment interested should be calculated as if the damages were the same as a loss of wages in a claim of damages for personal injuries. The Nova Scotia Court of Appeal rejected this position, holding that prejudgment interest in wrongful dismissal cases should be calculated from the date of termination:

> 6 The law is clear that the objective of pre-judgment interest is to place the respondents in the position they would have been had the breach not been committed. …
>
> …
>
> 12 It is clear that in this case the jury award was based on what advanced notice of termination the appellant should have given to Mr. Sweet if it intended to terminate the agency relationship. The income Mr. Sweet would have acquired had a proper notice of termination been given would have come into his hands over the 18-month period had he been given advance notice that the agency would be terminated in 18 months. There is some attraction to the argument that the pre-judgment interest reflect this fact. However, on analysis I reject it.
>
> 13 A damage award for termination without notice is calculated on what would have been reasonable notice for termination. The appellant apparently decided to terminate the agency without any notice and without payment. In order to terminate without notice the appellant would have been required to pay an amount of money that was equivalent to the income respondents would have earned over the reasonable notice period. **The appellant would have been required to pay this sum up front, that is, as of the date of termination of the agency.** Therefore, the respondent would have had the money represented by the award as of the wrongful termination date; the date the cause of action arose. In my opinion the calculation of pre-judgment interest in this case should not be treated in the same manner as a loss of wage claim in a personal injuries case. The fact that there has been a termination of the business relationship without notice and without payment in lieu of notice distinguishes these cases from the calculation of pre-judgment interest in loss of wage claims that arise in personal injuries cases where the employment of the injured party would have continued but for the injuries suffered. In the latter the wages lost would not have come into the hands of the plaintiff other than over the

> period the plaintiff was unable to work whereas in a wrongful dismissal suit or a wrongful termination of agency suit without notice the money would have to have been paid at the time of termination.
>
> [Emphasis added]

[203] ONC's position on this issue is set out at paras. 31 and 34 of its brief filed on April 14, 2021:

> 31. As quoted by the Applicant, the SCC clarified in *Matthews* that "The purpose of damages in lieu of reasonable notice is to put the employee in the position they would have been in had they continued to work through to the end of the notice period." The SCC went on to find that his entitlement to the LTIP would have arisen *during* the notice period, not at the time of his constructive dismissal:
>
> > It is uncontested that the Realization Event occurred during the notice period. But for Matthews' dismissal, he would have received an LTIP payment during that period.
>
> …
>
> 34. At the time Mr. Matthews was constructively dismissed, all the facts required to establish a cause of action for recovery of the LTIP did not exist. There was no way of establishing that Mr. Matthew's [*sic*] entitlement would ever arise, and if it did, that it would happen during the relevant notice period. As a result, ONC submits that the Applicant's cause of action for recovery of damages for the LTIP did not arise until the factual circumstance arose on August 18, 2012, the date when the LTIP, less applicable tax, became payable and the amount payable was known. As a result, ONC submits that the accrual of pre-judgement [*sic*] interest should not commence until that date.

[204] ONC's suggestion that there was a cause of action "for recovery of damages for the LTIP" is technically incorrect. By virtue of his constructive dismissal, Mr. Matthews was entitled to damages representing the salary, including bonuses, that he would have earned during the 15-month notice period. As the Supreme Court of Canada confirmed, Mr. Matthews's damages would have included the payout under the LTIP. The occurrence of the Realization Event did not create a new cause of action; it merely added to the damages that flowed from the constructive dismissal.

[205] That said, I disagree with Mr. Matthews' argument that the entirety of his damage award, including the portion related to the lost LTIP payout, was due and payable at the date of termination. In *Sklar-Peppler*, the Court of Appeal stated at para. 13:

> In order to terminate without notice the appellant would have been required to pay an amount of money that was equivalent to the income respondents would have earned over the reasonable notice period. The appellant would have been required to pay this sum up front, that is, as of the date of termination of the agency.

[206] However, the Supreme Court of Canada clarified, in the case at bar, that there is no implied term in an employment contract to provide pay in lieu of notice. There is only an implied term to provide reasonable notice. Kasirer J. explained:

> [73] It also bears noting that the Court of Appeal of Alberta in *Styles* suggested that *Paquette*, one of the cases I rely on here, is premised upon an erroneous reading of this Court's decision in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315. In *Styles*, the Court of Appeal noted that "[t]he common law implies a term of reasonable notice, or pay in lieu, in those circumstances. The payment in lieu is not 'damages' for a breach of the contract, but rather one component of the compensation provided for in the contract. If an employer fails to give proper notice or pay in lieu, the breach is in the failure to pay, not in the termination" (para. 34 (footnote omitted)). …
>
> [74] On my reading, this Court in *Sylvester* confirmed that "[d]amages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the employment contract to provide reasonable notice of termination" (para. 15 (emphasis by Kasirer J.)). Authority elsewhere confirms this same idea: there is no such implied term of the contract to provide payment in lieu (see, e.g., *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, 277 O.A.C. 15, at para. 44).
>
> [75] As explained by the Court of Appeal for British Columbia in *Dunlop v. B.C. Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334, at pp. 338-39, there are three principal reasons why this is an important distinction. First, there are issues surrounding the complexity of an implied term to provide pay in lieu of notice, and whether such a term can readily be implied into an employment contract. Second, implying a term to provide pay in lieu of notice "would mean that if an employer elected to give pay in lieu of notice, the employer would be complying with the contract and not breaking it", and thus "the contract would require the full payment to be made immediately". Third, if the employer elected to invoke such an implied term and gave no notice of termination, "there would be no obligation on the part of the employee to mitigate damages by seeking other employment" since the term requires a payment in full without regard to the employee's actual losses. Ensuring that courts and litigants properly understand this distinction is thus important as it can profoundly affect employees' financial lives. To the extent that some cases suggest otherwise, I respectfully disagree.
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> [Emphasis added]

[207] The objective of pre-judgment interest, as noted in *Sklar-Peppler*, is to place the dismissed employee in the position they would have been in had the breach not been committed. In other words, the employee is compensated as if the employer had given reasonable notice of termination – not, as suggested in *Sklar-Peppler*, as if the employer had provided immediate payment of the total amount the employee would have earned over the reasonable notice period.

[208] In this case, if ONC had complied with its contractual obligation to provide Mr. Matthews with reasonable notice of termination, he would have received a payout under the LTIP on July 18, 2012. Subject to my finding on delay, prejudgment interest will therefore be calculated from that date.

[209] As to the duration of prejudgment interest, ONC says it should terminate on December 31, 2015 rather than on June 2, 2017, the date Justice Leblanc issued his order, to account for delay attributable to the applicant and to Justice Leblanc's illness. ONC cites *Holland v. Midland Walwyn Capital Inc.*, 1993 CarswellNS 329 (S.C.), where Davison J. stated:

> 55 In this case, in my view, there has been undue delay. Five years have passed since the cause of action arose. Counsel traded recriminations about the cause of the delay but both parties, by use of the rules of court, had the opportunity to advance the proceeding with more dispatch. It is in the interest of a plaintiff to do so and this is recognized by the terms of s. 41 (k). In my view in the absence of good reason, systemic or otherwise, the court should not consider a period of more than three years when awarding interest.
>
> [Emphasis added]

[210] There is one point I wish to address before considering whether the normal duration of prejudgment interest should be reduced. It is unclear to me why the respondent says prejudgment interest would normally accrue only until Justice Leblanc's order and not, instead, to the date of the Supreme Court of Canada's judgment. The respondent's submissions presume that post judgment interest at the statutorily mandated rate of 5% would apply from June 2, 2017, until the date the award was paid following the Supreme Court of Canada's judgment. In my view, that position is inconsistent with s. 41(i) of the *Judicature Act*, which provides that prejudgment interest applies "for the period between the date when the cause of action arose and the date of judgment after trial *or after any subsequent appeal*". I find that prejudgment interest in this case would normally accrue until the date of the Supreme Court of Canada's judgment on October 9, 2020. Post judgment interest

would apply for the period between October 9, 2020 and December 18, 2020, the date ONC paid Mr. Matthews.

[211] As noted earlier, the court has discretion under s. 41(k) of the *Judicature Act* to reduce the rate or duration of prejudgment interest where the claimant has been responsible for undue delay. In *Holland*, Justice Davison expressed his view on how that discretion should be exercised, but this court has not adopted a general rule limiting prejudgment interest to a period of three years. Each case must be decided on its own facts.

[212] I have already reviewed the history of this matter in great detail. I rejected the applicant's allegation that ONC was responsible for delay in the early part of the proceeding. I noted that Mr. Mitchell repeatedly failed to respond to opposing counsel's attempts to move the matter forward. I reviewed the missed filing deadlines. I accept that some reduction of the period of prejudgment interest is appropriate on account of delay caused by the applicant. In my view, a reduction of six months is appropriate. I therefore order that prejudgment interest not start to accrue until January 18, 2013 (six months after July 18, 2012).

[213] I am not prepared to further reduce prejudgment interest to account for delay related to Justice Leblanc's illness. Pursuant to s. 41(i) of the *Judicature Act*, a successful claimant is entitled to prejudgment interest, subject to a discretion in the court to decline or reduce interest for reasons set forth in s. 41(k). Those reasons do not include institutional delay. It is therefore unsurprising that ONC has not provided any cases where a reduction of interest has been made for institutional delay.

[214] There is one final matter in relation to prejudgment interest. ONC has argued that interest should not accrue for the period after Justice Leblanc's order when Mr. Matthews had the judgment amount in his possession. Mr. Matthews disagrees, pointing out that when Justice Leblanc's decision was overturned by the Court of Appeal, Mr. Matthews repaid ONC the judgment amount plus interest.

[215] The judgment was first satisfied on June 15, 2017, when ONC paid Mr. Matthews $542,425.68. It remained fully satisfied for a period of 367 days, until Mr. Matthews returned the money by way of two cheques to ONC on June 17, 2018. Mr. Matthews repaid a total amount of $548,026.68, for a difference of $5,836 in interest on the judgment amount. Since the applicant had the judgment amount for approximately one year, interest accrued at 1.076% per annum.

[216] In my view, it would be unfair to award no interest to Mr. Matthews for the period from June 15, 2017 to June 17, 2018, but it would be equally unfair to award interest for the same period at 2.9% when Mr. Matthews actually earned less than that himself. Section 41(k)(ii) of the *Judicature Act* allows the court to reduce the rate of prejudgment interest if "the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded". I would therefore reduce the rate of prejudgment interest for the period from June 15, 2017 to June 17, 2018 to 1.076% per annum. In my view, Justice Leblanc's decision setting the rate of prejudgment interest at 2.9% does not prevent me from making this adjustment. That decision was rendered before the decisions of the Court of Appeal and the Supreme Court of Canada, and therefore dealt only with the rate applicable while the judgment remained outstanding, not the period for which it was satisfied.

[217] To summarize, from January 18, 2013 until June 15, 2017, prejudgment interest is payable at a rate of 2.9%, calculated simply. From June 16, 2017 until June 17, 2018, the interest rate will be 1.076%. From June 18, 2018 until October 9, 2020, interest will again be payable at 2.9%.

[218] Post judgment interest applies from October 10, 2020 until December 18, 2020, in accordance with the *Interest on Judgments Act*, R.S.N.S. 1989, c. 233.

Conclusion

[219] Mr. Matthews is awarded lump sum party and party costs in the amount of $189,000. Mr. Mitchell is ordered to pay costs personally to ONC in the amount of $4,000. Prejudgment interest is payable from January 18, 2013 until October 9, 2020. From January 18, 2013 until June 15, 2017, the rate will be 2.9% per annum, calculated simply. From June 16, 2017 until June 17, 2018, the rate will be 1.076%. From June 18, 2018 until October 9, 2020, the interest rate will revert to 2.9%.

[220] Mr. Mitchell will have 30 days from the release of this decision to file invoices and any other necessary evidence to prove the disbursements I have found to be recoverable. Any disbursements for which evidence has not been filed will not be awarded.

McDougall, J.