

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Churchill Cellars v. Haider*, 2023 NSSC 32

**Date:** 20230131

**Docket:** Hfx No. 496425

**Registry:** Halifax

**Between:**

Churchill Cellars Ltd.

Plaintiff

v.

Jeff Haider, Devonian Coast Wineries Limited,  
Jost Vineyards Limited and Carl Sparkes

Defendants

**COSTS DECISION**

**Judge:** The Honourable Justice James L. Chipman

**Written**

**Submissions:** January 16, 2023, in Halifax, Nova Scotia

**Counsel:** Michael Simaan, for the Plaintiff  
Brian K. Awad, K.C., for the Defendants

**By the Court:**

**INTRODUCTION**

[1] After the November 7 – 9, 2022 trial I rendered my decision *Churchill Cellars v. Haider*, 2022 NSSC 352 on December 5, 2022 and awarded the Plaintiff \$152,187.53, representing the net amount of severance owed by two of the four Defendants to the Plaintiff. In the final paragraph of my merits decision I noted that absent an agreement on costs and prejudgment interest, I would receive written submissions.

**POSITIONS OF THE PARTIES**

**Plaintiff**

[2] Churchill seeks \$70,000 in costs, inclusive of HST and disbursements. Justification for this is set out in para. 2 of Churchill’s brief:

- a. is reflective of the partial indemnity costs incurred by the plaintiff in this action;
- b. is lower than the sum of costs that the defendant required the plaintiff to post as security for its costs in this action;
- c. takes into account the increased costs that the defendants forced the plaintiff to incur due to their failure to provide documents in a timely manner and in complete breach of their solicitor’s undertaking;
- d. consider the offer to settle which the plaintiff made prior to trial of this action.

[3] With respect to prejudgment interest, the parties agree that the rate of two percent shall apply. Churchill submits that the two percent should be compounded annually and apply from the date its cause of action arose (January 31, 2016) to the present. In the result, they submit \$22,628.07 in prejudgment interest should be awarded.

**Defendant**

[4] Jeff Haider notes that the claim against him was dismissed. Para. 1 of the Statement of Claim confirms that the amount sought against Mr. Haider was \$192,461.97. Mr. Haider says that this sum ought to represent the amount involved

and refers to Tariff “A”, submitting that a fair quantum of costs for Churchill to pay him is \$25,000 (\$19,000 plus \$6,000 for trial time).

[5] The corporate Defendants submit that the amount involved should be the severance awarded; i.e., \$152,187.53. With reference to this amount and Tariff “A”, the corporate Defendants argue fair costs for them to pay is \$22,000 (\$16,000 plus \$6,000 for trial time).

[6] Carl Sparkes does not make an individual costs submission.

[7] The corporate Defendants argue that the interest should not compound and that it should run for well under the seven years suggested by Churchill. They refer to Rule 41(k) of the *Judicature Act*, R.S.N.S., c. 240, submitting because of Churchill’s “undue delay in the litigation” that prejudgment interest should only begin running from July 1, 2019, to the present.

#### **GUIDING COSTS PRINCIPLES**

[8] Recently Justice Gabriel had cause to release a costs decision in *Belmont Financial Services Incorporated v. Watters*, 2023 NSSC 19. At paras. 12 and 13 he touched on costs principles, which I endorse, adopt and now set forth:

[12] The Court's overarching objective when determining a cost award is to do justice between the parties in the circumstances of the case. The award is discretionary, however, the provisions of Rule 77 offer some guidance as to how that discretion should generally be exercised. Those provisions, in tandem with the tariffs referenced at the end of Rule 77, are presumed to do justice between the parties in the various circumstances to which they speak. Departure from the Rules, although permitted, should only occur, in my view, when there is sufficient reason to do so.

[11] The Tariffs of Costs and Fees to be used in determining party and party costs are set forth below:

In these Tariffs unless otherwise prescribed, the “amount involved” shall be

(a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to

(i) the amount allowed,

(ii) the complexity of the proceeding, and

(iii) the importance of the issues;

(b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to

- (i) the amount of damages provisionally assessed by the court, if any,
  - (ii) the amount claimed, if any,
  - (iii) the complexity of the proceeding, and
  - (iv) the importance of the issues;
- (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
- (i) the complexity of the proceeding, and
  - (ii) the importance of the issues;
- (d) an amount agreed upon by the parties.

#### TARIFF A

##### **Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding**

In applying this Schedule the “length of trial” is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars (\$2,000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

<b>Amount Involved</b>	<b>Scale 1 (-25%)</b>	<b>Scale 2 (Basic)</b>	<b>Scale 3 (+25%)</b>
Less than \$25,000	\$ 3,000	\$ 4,000	\$ 5,000
\$25,000-\$40,000	4,688	6,250	7,813
\$40,001-\$65,000	5,138	7,250	9,063
\$65,001-\$90,000	7,313	9,750	12,188
\$90,001-\$125,000	9,188	12,250	15,313
\$125,001-\$200,000	12,563	16,750	20,938
\$200,001-\$300,000	17,063	22,750	28,438
\$300,001-\$500,000	26,063	34,750	43,438
\$500,001-\$750,000	37,313	49,750	63,188
\$750,001-\$1,000,000	48,563	64,750	80,938
more than \$1,000,000	The Basic Scale is derived by multiplying the “amount involved by 6.5%.		

#### **ANALYSIS AND DISPOSITION**

[9] In this case the “amount involved” was what the Court awarded, \$152,187.53. While I am alive to Mr. Haider’s pitch for what was sought against him in the Statement of Claim, this is not persuasive in these circumstances. In this regard, the main issue concerned the monetary claim brought against the corporate Defendants for severance.

[10] As for the length of the trial, all agree that it was three days.

[11] With respect to the appropriate Tariff “A” scale, I easily conclude that the basic Scale 2 is proper. In this respect, the trial was not overly complex and the issues did not transcend the involved parties.

[12] In the main, Churchill was the successful party. Having regard to the amount involved and Scale 2, I award Churchill \$16,750 costs plus \$6,000 (\$2,000 per day for each of the three days of trial).

[13] As for Mr. Haider, he shall receive a nominal costs award of \$5,000 (inclusive of prejudgment interest and disbursements), given that Churchill’s claim against him was dismissed. I base this overall costs award on my consideration of all of the factors which includes the fact that Mr. Haider and the other Defendants were represented jointly by one lawyer and that the bulk of the trial dealt with the issue of severance *vis-à-vis* the corporate Defendants and Churchill. I would add that it is not lost on the Court that in their joint costs submission that Defendants’ counsel stated: “since Haider and Jost were represented jointly by one lawyer, they are content that the court net any costs awards [as between them].” It is also noted that although the claim was dismissed against Mr. Sparkes, he did not seek – nor shall he receive costs. In all of the circumstances, it is my view that the lawsuit and merits decision dealt mainly with the severance issue between the Carl Sparkes controlled corporate Defendants and Churchill.

[14] In *Belmont*, Justice Gabriel augmented his costs award by 25 percent due to a formal offer to settle made by the successful party. He provided the relevant Rule at para. 6 of his costs decision:

[6] I will first consider the significance of the formal Offer to Settle, the existence of which is not disputed. Those portions of Civil Procedure Rule 10.09 which are germane to this issue follow:

10.09 (1) A party obtains a “favourable judgment” when each of the following have occurred:

- (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;
- (b) the offer is not withdrawn or accepted;
- (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.

(2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:

(a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;

(b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;

(c) fifty percent, if the offer is made after setting down and before the finish date;

(d) twenty-five percent, if the offer is made after the finish date.

[15] In *Belmont*, the formal offer to settle was made eight months before the trial commenced and well before the Finish Date. Here, Churchill's counsel sent a without prejudice offer to settle less than a week before the start of trial, on November 1, 2022, for "\$175,000 plus his entitlement to legal costs." The offer was left open until the start of trial when the email said it "shall be automatically withdrawn."

[16] Given the above quoted Rule 10.09, I do not regard the within (eve of trial) offer to be premised on a "favourable judgment." After all, the nebulous "entitlement to legal costs" coupled with the \$175,000 put the without prejudice offer clearly much higher than the ultimate award.

[17] With respect to prejudgment interest, Justice Keith recently extensively canvassed the issue in *Ogilvie v. Windsor Elms Village for Continuing Care Society*, 2022 NSSC 144, and I specifically reference, endorse and adopt his recitation of the law and reasoning at paras. 2, 3, 4, 11, 12, 13 and 19 for the purposes of this decision.

[18] I have reviewed the competing arguments in this case and see no basis for compounding the agreed upon interest rate of two percent. The Nova Scotia cases confirm that it is a rare day when the Court compounds prejudgment interest. In short, there is simply no justification to accede to Churchill's request to do so here.

[19] As for the time span, I return to *Ogilvie* and observe that in a relatively straight forward commercial case such as this, that five years to bring the action to trial would seem reasonable. Here, it took longer due to alleged delays and because Churchill erroneously initially chose to bring the lawsuit in Ontario.

[20] With respect to the delays, I have no affidavit evidence to support these allegations and I would add that there are mechanisms – Appearance Day and Chambers motions – to deal with such alleged derelictions.

[21] In the final analysis, I am of the view that prejudgment interest should be set at two percent, non-compounding for five years on the amount involved, \$152,187.53, for a total of \$15,218.75.

[22] With regard to disbursements, Churchill has submitted a schedule totalling \$8,923.88. An explanation for the amounts has not been provided and the Defendants are silent on disbursements in their submission. If the parties cannot sort through the disbursements issue, I will receive further submissions within seven days.

[23] In conclusion, Churchill shall receive \$22,750 in costs, \$15,218.75 prejudgment interest and a further amount in disbursements from the corporate Defendants. The corporate Defendants shall pay a net amount of \$32,968.75 ( $\$22,750 + \$15,218.75 - \$5,000$ ) plus agreed upon or (soon) adjudicated upon disbursements to Churchill and I will look forward to receipt of an Order reflective of this (and the merits decision) from Mr. Simaan.

Chipman, J.