<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *Howe v. Rees*, 2023 NSSC 43

Date: 20230216
Docket: Hfx No. 500125
Registry: Halifax

Between:

Lyle Howe

Plaintiff

v.

Victoria Rees, Raymond Larkin, Nova Scotia Barristers Society

Defendants

DECISION ON COSTS

Judge: The Honourable Justice Peter Rosinski

Heard: By written submissions only

Counsel: Laura McCarthy, for the Plaintiff
Michael Brooker, K.C. and Sydney Hull, for the Defendants Ms. Rees and Mr. Larkin
Geoffrey Breen and Erin Mitchell, for the Defendant Nova Scotia Barristers Society

By the Court:

Introduction

[1] This costs decision arises as a result of my dismissing Mr. Howe’s civil claims against each of the defendants: 2022 NSSC 230. Therein I stated:

> [1] Mr. Howe, a disbarred lawyer, has sued the defendants for their alleged acts and omissions in relation to the administrative processes of the Nova Scotia Barristers Society ["the Society" or "NSBS"] that led to his interim suspension from practice on September 1, 2016, and ultimately contributed to a finding by a Hearing Panel of the Society of numerous instances of misconduct by him in its decision on July 17, 2020, which led to his disbarment by the Society on October 20, 2017.
>
> [2] In a statement of claim filed August 31, 2020, he claims against the defendants for *negligence* in their investigation and actions taken against him, *malicious prosecution*, and *defamation* in both slander and libel.
>
> [3] He has since conceded that he only claims defamation by the Society, not as against Mr. Larkin or Ms. Rees.
>
> [4] Before me are two motions:
>
> 1. Mr. Howe's motion seeking leave from the court to amend his pleadings; and
> 2. Mr. Larkin's motion for summary judgment on pleadings, and alternatively, that Mr. Howe's pleadings constitute an abuse of process pursuant to *Civil Procedure Rule* [“CPR”] 88.
>
> [5] Ms. Rees and the Society support Mr. Larkin's position.
>
> [6] I largely agree with the defendants in relation to the two motions.
>
> [7] For the reasons that follow, I deny leave to Mr. Howe to amend his pleadings, and grant Mr. Larkin's motions. Consequently, I dismiss Mr. Howe's existing civil suit against each of the defendants.
>
> …
>
> **C - A summary of the motions**
>
> **i) Mr. Howe's motion to amend his pleadings**

[19] His proposed amendments to existing pleadings should generally be granted provided: Mr. Howe is not acting in bad faith in requesting the amendments, and the defendant parties will not consequently suffer serious non-compensable prejudice-neither of which the defendants argue here; *and* that the proposed pleadings are tenable and sustainable — which the defendants say is not the case.

…

[21] However, his concerns are overstated because he overlooks the substantial insights he has had into the workings of the administrative procedures (including between 2011-2016) regarding his suspension and disbarment by virtue of him having been present for the proceeding throughout (with the exception of his non-attendance at the *ex parte* interim suspension hearing on September 1, 2016); as well as the Misconduct hearing, Sanction hearing of the Society, and the arguments in the Court of Appeal.

…

[24] By motion filed November 15, 2021 (pursuant to *CPR* 38.12 and 83.11), Mr. Howe has requested the court's permission to file an amended statement of claim which includes the three original causes of action pleaded, and adds the following causes of action against all three defendants:

- civil conspiracy;
- malfeasance in public office;
- individual and systemic discrimination based on race (Mr. Howe has conceded that he is not relying on a purported common law tort of discrimination pursuant to claimed breaches of Human Rights legislation, but rather on a *breach of section 15 of the Canadian Charter of Rights and Freedoms* "*Charter*"); and
- harm by way of the "unlawful means" tort.

[25] The defendants argue that the court should refuse permission to file an amended statement of claim because the causes of action are either untenable or unsustainable in law, based on the pleaded facts therein and Mr. Howe's written Answers to Demand for Particulars. They say that assuming that the facts he alleges can be proved to be true, it is plain and obvious that his pleadings do not disclose a reasonable cause of action — there is no chance that Mr. Howe might succeed, because his pleadings contain various "radical defects" that undermine each of his causes of action — Odhavji Estate v. Woodhouse, 2003 SCC 69, at paras. 14-16.

[26] They argue that all the causes of action in Mr. Howe's original and proposed amended statements of claim are doomed to failure based on the pleadings, because:[8]

1. in law, or on the pleaded facts, they disclose no reasonable cause of action;

2. even if they disclose a reasonable cause of action, that cause of action is defeated by common law and statutory immunities that protect the defendants;

3. such causes of action are defeated by the limitation period in section 8 of the Limitation of Actions Act, c. 35 2014 SNS; and

4. permitting them to proceed would effect an abuse of process (per *CPR* 88, violate the rule against collateral attack; and the doctrine of *res judicata* (issue estoppel)).

…

[30] At the outset, I will summarily dispose of the "unlawful means" tort, as it is doomed to fail - it is simply not available based on the pleadings (see AI Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12, and Justice Beveridge's reasons in Canada (Attorney General) v. Geophysical Services Incorporated, 2022 NSCA 41, at paragraphs 57-61). As Justice Farrar stated in Halifax Regional Municipality v. Annapolis Group Inc., 2021 NSCA 3, at paragraph 101: "Where there is but one outcome based on the law and uncontested facts, summary judgment should follow."

[31] Whether Mr. Howe's pleaded or proposed causes of action are considered as untenable, or unsustainable (including being extinguished by a limitation period), or are an abuse of process - they each fail.

ii) Mr. Larkin's motion for summary judgment on pleadings and claims of abuse of process

[32] I also have before me Mr. Larkin's motion for summary judgment on the proposed amended pleadings, should leave to amend the pleadings be granted, seeking dismissal of the proceeding against him, *and alternatively* for an order dismissing the proceeding against him as an abuse of process pursuant to *CPR* 88. Next, let me briefly outline the basic summary of the applicable principles. Civil Procedure Rule 13.03(1) provides the requirements for a judge to grant summary judgment on the pleadings:

…

[34] I have concluded that, the facts Mr. Howe has pleaded (in his original and proposed amended Statement of Claim and Answers to Demand for Particulars) could not support the drawing of inferences therefrom that are necessary for his causes of action to be found to be tenable, are otherwise not tenable, *and* there are other reasons why they are not sustainable.

[35] While bearing in mind Chief Justice Wood's comments in EllisDon Corporation v. Southwest Construction, 2021 NSCA 20, at paragraphs 27-8, I am satisfied that the Mr.

Larkin's motion for summary judgment in relation to all causes of action pleaded should be granted, insofar as all defendants are concerned.

D - A summary of my conclusions regarding the motions

[In the interest of brevity, I have omitted paras. 36-87]

[88] In relation to the applicable causes of action, I conclude that from Mr. Howe's pleadings one could not draw inferences that would be necessary to conclude that Mr. Larkin's conduct was motivated by racial discrimination and/or racial prejudice towards Mr. Howe.

[89] Even from paragraphs 21-25 of his proposed amended statement of claim (the alleged intentional misleading of the Complaints Investigation Committee about Mr. Howe's suggested retention as counsel by client DE (on one occasion only)), assuming those facts are true, one could not draw an inference that Mr. Larkin was acting in bad faith on and around the time of September 1, 2016 (or that he held or acted upon racially discriminatory beliefs) such that therefore he would be precluded from relying on the good-faith based common law and statutory immunities otherwise available.

[90] I am also satisfied that Mr. Larkin's arguments are persuasive (except as to negligence, and defamation) that to permit Mr. Howe's claims to proceed would be an abuse of process in relation to all causes of action in the original August 31, 2020, statement of claim, as well as the proposed amended statement of claim (insofar as they rely upon Mr. Howe's claims of racial bias, discrimination, and differential treatment). Those same claims were vigorously and comprehensively advanced by Mr. Howe before the Society's Hearing Panel (both the Misconduct hearing and the Sanction hearing), and at the Court of Appeal.

[91] Whether by being a collateral attack on earlier decisions, or *res judicata* (issue estoppel) considerations, with possibly the exception of his negligence and defamation claims, at the root of Mr. Howe's civil action are his claims of racial bias, discrimination, and differential treatment. These very issues between the Society and Mr. Howe during substantially the same time interval, have been exhaustively examined in the administrative law context and a subsequent appeal.

[92] I conclude it would be an abuse of process to allow those same issues to be re-litigated by way of Mr. Howe's civil action.

The position of the parties

A-Ms. Rees and Mr. Larkin

[2] In their brief Mr. Brooker summarizes their position:

The invoices submitted by my firm to April 1, 2022, total $56,621.17 inclusive of disbursements and HST.

It is submitted that there are special circumstances associated with this case that suggest that using Tariff C, even with the applicable multipliers, will not do justice between the parties. The special circumstances include, *inter alia*:

i) the complexity of the issues advanced by the plaintiff (and in particular, the new and additional allegations raised in the proposed amended statement of claim);

ii) the number and complexity of the motion briefs (three in total on behalf of Ms. Rees and Mr. Larkin);

iii) the extensive pre-motion appearances;

iv) the novelty of the issues raised by the plaintiff;

v) the relative unsettled nature of the law in Nova Scotia regarding some of the issues raised by the plaintiff;

vi) the conduct of the plaintiff in advancing claims which constituted an abuse of the litigation process including issues of *res judicata* and issue estoppel;

vii) the public interest in the matter; and

viii) the fact that the outcome of the motion was determinative of the proceeding.

The applicants are not seeking solicitor client costs (although such costs have been awarded in circumstances where courts have found there had been an abuse of process) but do submit **that a substantial award of costs must be made on a lump-sum basis in order to do justice between the parties and provide the successful litigants with a substantial indemnification for costs they have actually incurred herein.**

On behalf of Mr. Larkin and Ms. Rees, it is submitted that a substantial indemnification for the costs incurred to respond to the claims of Mr. Howe would be in the range of two thirds of the actual solicitor client costs. Accordingly, **Mr. Larkin and Ms. Rees (collectively) seek costs in the amount of $37,747.45**.

B- the Nova Scotia Barristers Society

[3] In the Society's brief, Mr. Breen summarizes its position:

As of May 1, 2022 the Society has incurred a total of $35,196 in legal fees exclusive of tax and disbursements (see affidavit of Angela M Power). … The Society was required to incur material fees in light of the complexity and seriousness of allegations raised.

Use of [Tariff C] does not result in a "substantial contribution" toward the Society's reasonable fees and disbursements as that phrase has been judicially interpreted. Nova Scotia courts have repeatedly held that a substantial contribution is more than 50% of reasonable fees incurred (see: *Armoyan*, [2013 NSCA 136]; see also *Williamson* [1998 NSCA 195]).

In summary, the Society respectfully submits that a lump-sum approach is supported by the following factors:

• a substantial contribution to actual fees cannot be achieved via the Tariff [C]

• final disposition of the matter in favour of the Society was supported by the fact that the main issues had either already been litigated, were statute-barred pursuant to the *Limitation of Actions Act*, or were unsustainable on the facts; and

• a substantial amount of the Society's costs were incurred as a result of the Plaintiff's considerable delays and last minute adjournments.

As outlined in the case law above, a substantial contribution to costs is generally viewed as landing somewhere between two-thirds and three-quarters of actual costs (*Williamson* at para. 25, as cited in *Armoyan* at para. 16). Substantial indemnity based on 2/3 is $23,300 and $26,400 based on 3/4. Therefore, the tariff costs come [sic] do not even approach substantial indemnity in this case. Taking the low end of that spectrum, it is our position that the Society is entitled to costs in the amount of $23,300 on a substantial contribution basis.

C- Mr. Howe's position

[4] In Mr. Howe's brief, Ms. McCarthy summarizes his position:

The authority for the court to grant costs is provided for in the Nova Scotia Civil Procedure Rules within Rule 77. **It is respectfully submitted that the Court ought to apply the provision of Rule 77.06 and Tariff C** in this case, which states in part:

TARIFF C

Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia

For applications heard in Chambers the following guidelines shall apply:

(1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

(a) the complexity of the matter,

(b) the importance of the matter to the parties,

(c) the amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application Range of Costs

Less than 1 hour $250 - $500

More than 1 hour but less than ½ day $750 - $1,000

More than ½ day but less than 1 day $1,000 - $2,000

1 day or more $2,000 per full day

The Plaintiff submits that Tariff C should be applied in this case because Tariffs are the norm, and there must be a reason to consider a lump-sum (*Armoyan*, 2013 NSCA 136 at para. 15).

…

This hearing was not ‘trial like’ as discussed in the *Armoyan* decision, which would militate toward a consideration of the cost award pursuant to Tariff C and not on Tariff A or as a lump sum award. The hearing was streamlined with hearing materials being filed in advance, no witnesses were called, and submissions were conducted in a one day hearing.

It is submitted that the issues before the court were not complex. If his Lordship disagrees, this factor can be addressed for the Tariff C provisions wherein the Tariff explicitly contemplates multiplying the costs award by two, three, or four [times]….

The Court should also take consideration of the fact that the adjournment in October 2021 of Mr. Larkin’s motion also resulted in a Consent Order wherein there was an agreed amount of costs paid to Mr. Larkin. [He] should not have additional costs payable as a result of that appearance being adjourned as costs relating to that adjournment has already been addressed in the Consent Order.

Rule 77.13 should be considered by this Court when assessing the counsel fees and disbursements…:

Counsel’s fees and disbursements: entitlement and assessment

(1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.

(2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:

(a) counsel's efforts to secure speed and avoid expense for the client;

(b) the nature, importance, and urgency of the case;

(c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;

(d) the general conduct and expense of the proceeding;

(e) the skill, labour, and responsibility involved;

(f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

… From the Applicant’s recollection, the Society was not actively participating in Mr. Larkin’s motion for summary judgement until after the Applicant filed his motion for amendment of the charges [sic]. Before the Applicant’s motion for amendment of the

> notice of application [sic] and statement of claim, counsel for the Society billed nearly $10,000.… Without the detailed invoices, it is unclear if the counsel fees are reasonable or not. Therefore, the Plaintiff is unable [to] make comment on whether the Tariff C would not account for a substantial contribution of the reasonable counsel fees and disbursements.
>
> Regarding the billings for Ms. Rees and Mr. Larkin, it is notable that their invoices contain time for two lawyers and notes they billed more than 283 hours on this file. This was a one-day hearing and the issues associated with the hearing were not so complex to account for such a significant amount of time being billed.…
>
> The reasonableness of counsel's fees should also consider the circumstances of the person who is to pay counsel [Rule 77.13(2)(c)]. It is the Plaintiff's understanding that the counsel fees for Mr. Larkin and Ms. Rees were paid through LIANS and not from Mr. Larkin or Ms. Rees.[1]
>
> Additionally, the court can consider Rule 77.04 regarding relief from liability because of poverty. The Plaintiff has lost his career as a lawyer… and as a result cannot be expected to have an income sufficient to pay a cost award and the amount sought by both defendants.… The Plaintiff was ordered to pay costs in the amount of $100,000 to the Society following his disciplinary proceedings. It would be unreasonable to expect him to pay tens of thousands more without an ability to practice law.
>
> In response to the "special circumstances" outlined… [by] Mr. Brooker, the Plaintiff respectfully disagrees with the submission that the issues raised were complex or novel. The issues were numerous, but not complex or novel…. Additionally, it is submitted that the prehearing motions were not extensive but rather productive and assisted the parties with delineating issues, addressing questions of the court, and setting expectations for the hearing.
>
> … The Plaintiff respectfully disagrees that significant costs ought to have been incurred as a result of the Plaintiff seeking an adjournment in October 2021 and once again in January 2022.… The October 2021 hearing was adjourned with a Consent Order that contemplated costs. Counsel for the Society should not have incurred significant costs as it pertains to this adjournment because the Society was not an active party to the motion of Mr. Larkin.
>
> The court should impose Tariff C when assessing the costs award to be imposed on the Plaintiff.

Analysis

[5] The issues include:

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[1] I note that the Rule is intended to deal with the situation of one's own lawyer's fees, rather than an opponent's lawyer's fees on a successful motion by the opponent, as is the case here. Moreover, even if the individual Defendants' fees have been paid by their insurer, that is no reason to not nominally award them costs.

1. should the Court rely upon Tariff C or award lump-sum costs?
2. what amount of costs should be awarded?

1-Should the Court rely upon Tariff C or award lump-sum costs?

[6] This is a case where pleadings were filed and these ensuing motions heard, but no production/disclosure was made, and no discoveries were conducted. Nevertheless, this is not a simple matter of costs for an interlocutory motion – Mr. Larkin's motion terminated Mr. Howe's lawsuit. To reach that outcome Defendants' legal counsels had to repeatedly attend to various matters, including as prompted by Mr. Howe's changing legal positions over time.[2]

[7] In summary, a timeline of the litigation includes:

1. Mr. Howe's Notice of Action/Statement of Claim was filed on August 31, 2020;
2. Particulars were provided as demanded to Rees/Larkin on February 18, 2021, and to the Society on March 3, 2021;
3. The Defendants filed their Notice of Defence on February 25, 2021, and March 18, 2021;
4. The Rees/Larkin Motion for Summary Judgment on Pleadings (CPR. 13.03) (which therewith also requested that the Court conclude that the pleadings were an "abuse of process") was filed on July 23, 2021[3];
5. Mr. Howe's motion to substantially amend those pleadings was filed on November 15, 2021.

[8] The Court ultimately heard arguments for the Plaintiff and Defendant motions over one full day on April 1, 2022, and filed its written decision on November 4, 2022.

[9] The Court dismissed the Plaintiff's claims in their entirety against each of the Defendants. Thus, the motion of Mr. Larkin was determinative of the entire proceeding.

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[2] A fulsome yet succinct exposition of the costs' implications arising from the nature and duration of the proceedings can be found in the Rees/Larkin's 3 briefs.

[3] Although strictly speaking it was Mr. Larkin who filed the motion, he and Ms. Rees have the same counsel and Ms. Rees' position was to be fully supportive of Mr. Larkin's position.

[10] The Society's position throughout was to support the motion of Mr. Larkin, and although it did not file its own motion, it actively resisted Mr. Howe's motion.[4]

[11] All parties submitted separate briefs in writing regarding Costs, and consequently no further oral argument ensued thereon.

[12] The Defendants' legal counsels have been involved in this matter since Mr. Howe's pleadings were originally filed August 31, 2020.

[13] The motions herein involved issues of legal argument, not evidence.

[14] The materials relevant to the motions were somewhat voluminous in their breadth, which correspondingly required commensurate time for Defendants' counsels to prepare, analyse and argue the issues before the court.

[15] Defendants' counsels time dedicated to this proceeding arose largely from the manifold discrete claims, which especially the proposed amended Action contained, but also because their response positions had to be repeatedly reconsidered over time as a result of Mr. Howe's changing positions regarding the issues.

[16] In summary, while the motions were dealt with on one day, and ultimately the Rees/Larkin motion was determinative, as it terminated this proceeding, the proceeding demanded effort and attention by the Defendants' counsels over a substantial period of time, on an intermittent basis.

[17] Can a "just" award of costs to the Defendants be accommodated under the Tariff C regime?

[18] I conclude that Tariff C should be applied.

[19] I turn to an examination of the Rules. [My underlining added].

[20] CPR 77.02 (1) states:

> The presiding judge may, at any time, make an order about costs as the judge is satisfied <u>will do justice between the parties</u>.

[21] CPR 77.05 (1) states:

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[4] See paragraphs 1-3 of the Society's brief filed December 23, 2021.

The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.

[22] CPR 77.06 (3) states:

Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding Judge orders otherwise, be assessed in accordance with Tariff C.

[23] CPR 77.07 states:

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: including a motion that is determinative of the proceeding [- see paragraph (4) of Tariff C and CPR 77.05(1)]

(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.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

[24] CPR 77.08 states:

77.08 Lump sum amount instead of tariff

A judge may award lump sum costs instead of tariff costs.

[25] While Tariff C is the starting point, the Rees/Larkin motion was determinative of the proceeding, and this is an opportunity for the Defendants' to recover their reasonable costs of the entire proceeding.

[26] Have the Defendants persuasively argued that therefore a lump-sum costs award is necessary to do justice between the parties?

[27] They have not.

[28] I find helpful Justice Wood's comments (as he then was) in *Homburg v. Stichting Autoriteit Financiele Markten*, 2017 NSSC 52 (affirmed 2017 NSCA 62), which motion to stay or dismiss an action involved 3 days of hearing, including the presentation of evidence and legal arguments.[5]

[29] The successful party's submission that a lump-sum was appropriate, was based on the 3-day application having been determinative of the entire proceeding, and on the very large difference between its billings to its client and the Tariff amounts available.

[30] Nevertheless, Justice Wood awarded costs based on Tariff C:

> **5** *Rule 77.08* permits the court to depart from the tariff calculation and award a lump sum. On its face the rule does not provide any guidance as to when this would be appropriate, however the jurisprudence does. **The Nova Scotia Court of Appeal in *Armoyan v. Armoyan*, 2013 NSCA 136 (N.S. C.A.), considered the circumstances when a lump sum cost award might be considered. The recommended approach is found in the following passage from the decision**:
>
>> 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:

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[5] His decision was approved of as well in *MacVicar Estate v. MacDonald*, 2019 NSCA 9, at para. 107: "A proper application of the Rule at the trial level …".

> 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**.

6 The court concluded that the circumstances of that case justified **awarding a lump sum** rather than tariff costs. **The court's rationale for reaching this conclusion included the following**:

1. **The proceeding was brought as a motion which would engage Tariff C but ripened into features of a complex trial involving ten days of hearings over eleven months**.

2. The matter involved an issue of jurisdiction between the courts of Nova Scotia and Florida and triggered broad consideration of comity, fairness, and efficiency in the administration of justice. **It would be artificial to determine a notional "amount involved" for purposes of Tariff A** (the trial tariff) if that were applicable.

3. The respondents had disobeyed court orders with respect to costs and engaged in litigation strategy which resulted in staggering legal accounts for the applicant. In order to do justice between the parties the "mercenary use of costs attrition" warranted a cost consequence.

4. The applicant made an informal settlement offer on terms which were more advantageous to the respondent than the court decision. Had it been accepted the applicant would have saved over $350,000 in legal fees.

5. **The tariff calculation** represented only 27% of the applicant's legal fees and disbursements and **did not approach a "substantial contribution"**.

…

9 **It is important to recognize that the substantial contribution principle underlies the tariffs but does not supersede them.** Most cost matters should be disposed of based upon an application of the tariffs with the built in discretion to adjust amounts for the factors identified in *Rule 77*. **The mere fact that the party's actual legal account is significantly more than the tariff does not automatically justify a departure.** To suggest otherwise would turn the court into a taxing master whose function is to first assess the reasonable solicitor client account and then apply some percentage recovery between 50% and 100%.

10 **The cost analysis should not start with an examination of the reasonableness of a party's account. The court is not equipped on a cost motion to inquire into all of the reasons why the account was rendered in a particular amount**. That will depend upon the terms of the fee agreement between solicitor and client, client instructions, efficiency of counsel, etc. By application of the tariff similar hearings will result in costs being awarded in roughly equivalent amounts and the predictability of such a result is desirable. If the focus is on calculating a substantial contribution to actual legal expenses, the result will be different in every case. The variation in counsel fees could be dramatic, even though the actual hearings are comparable in terms of duration and complexity.

11 In my view **the proper approach is to start with the presumption that the tariffs should be applied. If the party who wishes to depart from those rules can establish circumstances which show a lump sum is appropriate in order to do justice between the parties, then the court should engage in a principled analysis to determine the amount**. This would lead to an assessment of the party's reasonable expenses and identification of an amount that represents a substantial contribution to them.

12 The fact that consideration of legal fees incurred comes at the end of the analysis, and after a decision to award lump sum costs is made, is reflected in the following comments from the *Armoyan* decision:

> [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*.

13 **In this case the defendants' submission that a lump sum is appropriate was based primarily on the size of its solicitor client account and the relatively small contribution a tariff award would make towards that amount. They also referred to the complexity of the matter** and the significance of the issues to the defendants as part of the justification for a lump sum.

14 The hearing itself spanned three days and the last day concluded at noon. A day and a half was devoted to cross-examination of one of the defendants' deponents and *viva voce* testimony from a witness subpoenaed by the plaintiffs. Counsel submissions took approximately a half day for each party. **I would assess the hearing as three full days for Tariff C purposes**. **Because of the finding on sovereign immunity the decision was determinative of the entire proceeding which would bring into play para. 4 of Tariff C which reads:**

> (4) **When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors**:
>
> > (a) the complexity of the matter,
> >
> > (b) the importance of the matter to the parties,
> >
> > (c) the amount of effort involved in preparing for and conducting the application.

(**such applications might include**, but are not limited to, successful **applications for Summary Judgment**, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	**Range of Costs**
Less than 1 hour	$250 - $500
More than 1 hour but less than 1/2 day	$750 - $1,000
More than 1/2 day but less than 1 day	$1000 - $2000
1 day or more	$2000 per full day

15 I have no difficulty concluding that the complexity of the matter, the importance to the parties and the effort involved in preparing for and conducting the application would justify increasing the tariff amount by four times. There were extensive affidavits filed, including opinions with respect to Netherlands securities law, translation of documents and cross-examination using an interpreter. Using the maximum daily amount of $2,000 and the multiplier of four, the tariff amount I calculate is $24,000 plus disbursements.[6]

[My bolding added]

Conclusion

[31] I should *not* start my costs analysis with an examination of what amount would be a "substantial contribution" to the Defendants' reasonable solicitor-client legal fees.

[32] Tariff C is presumed to be sufficient compensation (CPR 77.06).

[33] It permits a *maximum* of $2,000 per day, times a multiplier of 4, or $8,000.[7]

[34] Although they did not state this expressly, it is a safe inference that if I conclude Tariff C should prevail, *each* Defendant would argue they are entitled to the maximum $8,000 under Tariff C. Their total claimed costs would then be $16,000.

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[6] I bear in mind that the *Homburg* case involved a 3-day motion, that terminated an action.

[7] I bear in mind that the amounts in Tariff C were established by the introduction of the new "Nova Scotia Civil Procedure Rules", effective January 1, 2009 (CPR 92.01(1)). We are now 14 years later.

[35] The legal issues, analysis and arguments that were presented by both Defendants necessarily overlapped.

[36] Although there are two Defendant groups here (i.e., Rees/Larkin and the Society), my examination of the legal issues and arguments made leads me to the conclusion that Rees/Larkin did the "lion's share" of the advocacy work involved in bringing about the termination of Mr. Howe's lawsuit against both Defendants.[8]

[37] The maximum Tariff C amount presumes that one or more of the factors combined in paragraph (4) would justify such a result.

[38] The Defendants rely on the following:

- the complexity of the issues advanced by the Plaintiff particularly in the proposed amended statement of claim [the multiplicity of legal issues did make for more work for counsel, but the areas of law were not "complex" or "novel" on their own]

- the number and complexity of the motion briefs [this is another way of stating the above-mentioned]

- the extensive pre-motion appearances [according to the court file notes, the first appearance in court was October 21, 2021, when by Consent Order the matter was adjourned with $250 cost payable to Mr. Larkin forthwith; the matter having been set for January 7, 2022 full day, an adjournment request was granted to the Plaintiff by telephone conference January 6, 2022 based on Ms. McCarthy's January 4, 2022 letter requesting an adjournment due to public health restrictions/Covid. Nor could Mr. Howe appear at the upcoming hearing via video as a result of them not having any childcare providers available to take care of their 2 young children with schools closed. Also Ms. McCarthy was expecting their third child to be born in the next couple of weeks. This adjournment was required as a result of circumstances beyond the

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[8] Although I do not exclusively rely on this measure of the effort expended by each of the Defendants, I note that the Society's 2 briefs (on the merits of the motions – December 23, 2021; March 17, 2022) accumulate to 18 pages; whereas the Rees/Larkin' briefs (on the merit of the motions – September 27, 2021, December 21, 2021, and March 18, 2022) total 127 pages. Moreover, I note the focus of their legal work would have been associated with drafting and responding to pleadings (including Demand for Particulars), and drafting and responding to legal arguments. There were not many appearances in court throughout this proceeding.

control of the Plaintiff and Ms. McCarthy. The motions proceeded on April 1, 2022.]

- The novelty of the issues raised by the Plaintiff [“they” were not “novel”]

- The relative unsettled nature of the law in Nova Scotia regarding some of the issues raised by the Plaintiff [given the many decisions cited by counsel, I would not characterize the legal issues herein as significantly involving “unsettled… law in Nova Scotia”.]

- The conduct of the Plaintiff in advancing claims which constituted an abuse of the litigation process… [while I concluded that Mr. Howe was precluded by virtue of the doctrines of the rule against collateral attack, *res judicata* (issue estoppel) and the like from continuing his civil action, I would not characterize his “conduct… in advancing claims” as itself an abuse of the litigation process]

- the public interest in the matter [I view this as a neutral factor]

- the fact that the outcome of the motion was determinative of the proceeding [this is a relevant factor and expressly considered such in Tariff C]

[39] The fact that the Rees/Larkin motion was determinative in ending the proceeding, makes this costs’ decision an opportunity for the Defendants to recover costs.

[40] They argue that as successful litigants in the proceeding, they are entitled to some portion of their entire reasonable legal costs arising from this proceeding. They each claim a lump sum award of two-thirds of their total costs, as a “substantial contribution” to their actual legal costs.

[41] For Rees/Larkin ($56,621.17) that is $**37,747.45**; and for the Society ($41,065.37) it is **$23,300**.

[42] These amounts do not by themselves preclude Tariff C’ s applicability as leading to a “just” result.

[43] They are significantly greater than the Tariff C maximums ($2,000 times 4 or $8,000 arguably for each Defendant).

[44] However, given my earlier conclusions about overlapping Defendants' work product/arguments, and the Tariff and other factors I identified[9], I am not persuaded that it would *not* be "just and appropriate" to award costs pursuant to Tariff C, even where Mr. Larkin's summary judgment motion terminated the entire proceeding.

2–What amount of costs should be awarded?

[45] I accept that, without having heard evidence precisely on this point, Mr. Howe's personal financial circumstances are precarious because, having been disbarred (including beforehand while suspended), he could not, and now cannot, pursue the legal professional career in which he practised - he was not permitted to re-apply for admission to the Bar until October 20, 2022; and that he was ordered to pay $150,000 costs to the Society arising from his disciplinary proceedings.[10]

[46] While he does not qualify under CPR 77.04, I agree with Justice Gogan, when she stated in *Hatfield*:[11]

> 29 While there is a very legitimate interest in improving access to the court system for impoverished litigants, there remains an overriding concern about removing the ultimate governor over the conduct of litigation. This balancing of legitimate interests is well served by the requirement to stringently apply the test under the *Rule* to a comprehensive body of evidence.
>
> 30 *There is a final theme emerging* from the decisions on *Rule* 77.04. It becomes evident as judges attempt to balance access to justice with the impact of cost consequences.

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[9] In pointing out the Defendants' overlapping work product and arguments, I am in no way being critical of counsel. However, the affidavit evidence presented by the Society does not permit me to discern which of its 2 lawyers did what work, at what hourly rate. As Justice Wood generally observed in *Homburg,* which is relevant to each of the Defendants' submitted costs affidavits: "The Court is not equipped on a cost motion [to examine the reasonableness of a party's account] ..." (para. 10)

[10] Notably, the Court of Appeal stated in its decision, 2019 NSCA 87: "214 **By consent of the Society**, the costs ground of appeal is allowed, in part and the remainder of the appeal is dismissed. The Sanction decision is amended such that **there is no requirement for Mr. Howe to pay costs in the amount of $150,000.00 as a condition precedent to apply for re-admission to the Society. The terms and conditions of that repayment will be a matter for Mr. Howe and the Society to agree on if he applies to re-enter the practice of law."** [My bolding added]

[11] The jurisprudence has been consistent that the strict requirements of this Rule must be met: [*MacBurnie v. Halterm Container Terminal Limited Partnership*, 2011 NSSC 322; *Canadian Residential Inspection Services Ltd. v. Swan*, 2013 NSSC 226; *Hatfield v. Intact Insurance Company,* 2014 NSSC 288]

> *It involves recognition that financial position of the party may be considered as part of the final cost assessment in a proceeding*. This was the approach taken by MacAdam J. in *Hill v. Cobequid Housing Authority*, 2011 NSSC 219 (N.S. S.C.). In that case, Justice MacAdam was asked to award no costs against an unsuccessful plaintiff in view of the plaintiff's financial circumstances. At para. 31, after an extensive analysis of the issue, he concluded:
>
> [31]...Financial considerations are not listed as one of the factors to be considered in Rule 77.07(2), but I am satisfied it is a factor that can be taken into account.[12]
>
> [My italicization added]

[47] I do not think it would be "just" to entirely disregard Mr. Howe's personal circumstances, including that he is from a marginalized community.

[48] Tariff C contemplates a maximum daily amount of costs of $2000, and a maximum multiplier of four times for a total of $8000.

[49] CPR 77.02 (2) states: "**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.

[50] As Justice Wood noted in *Homburg*: "It is important to recognize that the substantial contribution principle underlies the tariffs, but does not supersede them."

[51] $8,000 to each Defendant, represents only a modest contribution to each of their claimed "substantial contribution" amounts toward their total legal fees. I am nevertheless satisfied that it would *not* be "just" to order $16,000 in costs against Mr. Howe.

[52] In all the circumstances, I am driven to the conclusion that a total of $10,000 is a "just" result as between these parties in this proceeding.

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[12] Justice Campbell concurred in *Big X Holdings Inc. v. Royal Bank of Canada*, 2015 NSSC 350, at para. 63: "The case law in Nova Scotia appears to have developed *to allow the consideration of the financial circumstances of the party against whom the award of costs is to be made. That does not seem to be limited to* matrimonial matters or to *cases in which a party would have been granted an exemption from costs had a motion been made under Rule 77.04. Financial circumstances are relevant not only to deciding whether costs will or will not be awarded, but also to determining the amount."* [My italicization added]

[53] Of the total $10,000, it seems "just" to me to allocate that total as follows as between the Defendants, keeping in mind their comparative efforts, work, product, legal positions, and incurred costs claimed:

1. Rees/Larkin - $8,000
2. The Society - $2,000

Rosinski, J.