

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Hatfield v. Kendall*, 2023 NSSC 247

**Date:** 20230731  
**Docket:** Syd No. 522342  
**Registry:** Halifax

**Between:**

Linda Hatfield

Plaintiff

v.

Mark Kendall

Defendant

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**Decision on Costs**  
*Civil Procedure Rules 77*

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**Judge:** The Honourable Justice Robin C. Gogan

**Written Decision:** July 31, 2023, in Sydney, Nova Scotia

**Counsel:** Linda Hatfield, in person  
Justin Cashin, for the Defendant

**By the Court:**

**Introduction**

[1] This is a decision dealing the cost consequences of an uncontested Application in Chambers.

[2] For the reasons that follow, I award costs to Ms. Hatfield in the amount of \$496.80. The cost award considers the remedial work done by Kendall.

[3] For context, the reasons that follow should be read in conjunction with the reasons in *Hatfield v. Kendall*, 2023 NSSC 246, a decision in a related proceeding where Kendall was ordered to pay costs to Hatfield in the amount of \$1,540.78.

**Background**

[4] This proceeding arises as a result of a contract between Hatfield and Kendall. Hatfield hired Kendall to construct a home at 1925 George Street, Louisburg Highway, Nova Scotia. The home was located on a parcel of property identified as PID 15283658.

[5] The relationship between the parties broke down and Kendall filed a builder's lien against Hatfield's property, registered at the Registry of Deeds on July 15, 2021,

with Instrument Number 118936708 (the “**Lien**”). Kendall concedes that the lien was never perfected.

[6] Hatfield discovered that the lien had been filed on October 5, 2022. She contacted Kendall the same day and requested that the lien be removed from her property record. Hatfield raised it with Kendall over repeated appearances in related proceedings. No steps were taken to rectify the lien. On March 23, 2023, Hatfield brought an Application in Chambers seeking an Order for removal. The application was never contested. Kendall agreed from the outset to rectify the parcel register.

[7] The parties appeared in Chambers on April 11, 2023, and May 29, 2023. When last before the Court, Kendall’s counsel believed the rectification was close to being complete. The documents required to remove the lien were recorded on May 29, 2023.

[8] Hatfield seeks costs. She was directed to provide written submissions seeking costs once she was satisfied that any record of the lien was removed.

[9] Hatfield’s submission on costs was filed on July 4, 2023. Kendall’s response was provided on July 19, 2023. Hatfield replied on July 28, 2023.

**Issue**

[10] What is the appropriate disposition of costs in the circumstances?

**Positions of the Parties**

*Hatfield*

[11] Hatfield seeks costs as a result of the need to have Kendall's lien removed from her property records. She says that the lien should never have been filed, was never perfected, and caused her stress and embarrassment as it was evident to anyone who searched title to her property.

[12] Upon learning of the lien, Hatfield asked Kendall repeatedly to remove the lien from the registry records. The Application in Chambers was required to have Kendall take the necessary steps. She says that she incurred legal fees of \$500 plus copying fees of \$17.25, law stamp and filing fees of \$246.80.

*Kendall*

[13] Kendall did not contest any aspect of the application. He concedes that the builder's lien was never perfected, and he agreed to remove it from Hatfield's property records before she brought her Application in Court. Kendall's counsel did

the work required to rectify the records at no cost to Hatfield. The work was complete by May 29, 2023.

[14] Kendall submits that Hatfield should be liable for costs in this matter. It was Hatfield's decision to pursue an application even though Kendall never disputed responsibility to remove the lien record. In the alternative, he submits that each party should bear their own costs.

### **Analysis**

#### *The Civil Procedure Rules – Rule 77*

[15] Costs are in the discretion of the Court. The objective of a cost award is to do justice between the parties. The discretion of the Court must be exercised in a manner consistent with *Civil Procedure Rule 77* which provides, in part:

#### **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.
- (4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:
  - (a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;
  - (b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
  - (c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;
  - (d) any other way the judge sees fit.

**77.06 Assessment of costs under tariff at end of proceeding**

- (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.
- ...
- (3) 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.

[16] In *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44, Justice Ann

E. Smith summarized the applicable principles when determining costs:

#### Costs

[2] The general rule is that costs follow the event. That rule is not absolute. There are no reasons why that rule should not apply here. The real issue is the amount of those costs.

[3] The starting point in determining the quantum of costs is the *Tariffs of Costs and Fees* under *Rule 77*. Costs on a motion are governed by Tariff C unless the judge orders otherwise: *Rule 77.05(1)*. A judge has the discretion to add or subtract from the tariff amount: *Rule 77.07*. Furthermore, a judge “may award lump sum costs instead of tariff costs”: *Rule 77.08*.

[4] The guiding principles in awarding costs were considered by the Nova Scotia Court of Appeal in *Armoyan v Armoyan*, 2013 NSCA 136. Hunt J. recently summarized the Court’s comments from *Armoyan* in *Grue v McLellan*, 2018 NSSC 151, [2018] NSJ No 262:

6 In *Armoyan v. Armoyan*, 2013 NSCA 136, the Nova Scotia Court of Appeal provided direction with respect to the principles to be considered when determining costs. Specifically, Justice Fichaud stated:

1. The court's overall mandate is to do "justice between the parties": para. 10;
2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in *Rule 77.07(2)*. These factors include an unaccepted written settlement offer, whether the offer was made formally under *Rule 10*, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.
3. The Rule permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15
4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16

5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17

6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding workload, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and

7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the Rules or case law: para. 18.

[22] The general rule is that costs are awarded to the successful party in the amount provided by the tariffs. CPR 77.02 confirms the judge's general discretion over party and party costs:

**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.

[23] For costs on a motion, the starting point is typically Tariff C, which sets a range of \$750-\$1000 for a hearing longer than an hour but less than half a day. Tariff C states:

**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.)

<b>Length of Hearing of Application</b>	<b>Range of Costs</b>
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

[24] A judge has discretion under Rule 77.07 to increase or decrease the tariff amounts. Rule 77.08 permits a judge to depart from the tariff and order a lump sum. Ultimately, costs are properly in the discretion of the presiding judge, who “may, at any time, make an order about costs as the judge is satisfied will do justice between the parties”. ...

### *Determination*

[17] With the foregoing principles as a guide, I turn to a determination of the question of costs on this application.

[18] In the present case, Hatfield brought an Application in Chambers to rectify her property record after Kendall filed a builder's lien. The lien was never perfected, and I consider that it never formed a valid charge against her property. Hatfield says that having it recorded caused her stress and embarrassment. I would note however that although the lien was not perfected, Hatfield and Kendall are parties to a proceeding which includes the issue of unpaid fees to Kendall. The issue of what, if anything, is owed to Kendall remains contested and outstanding.

[19] Hatfield chose to resolve the issue of the lien by making an Application in Chambers. Kendall agreed to rectify the lien issue before the first appearance in Chambers. In my view, the application could have been resolved by a consent Order requiring the rectification by a date certain. This would have been a resolution in keeping with the purpose of the *Civil Procedure Rules*. The objective of the *Rules* to ensure a just, speedy and inexpensive determination of every proceeding is intended to apply to all parties. Cost determinations should underscore the overall purpose of the *Rules*.

[20] In my view, Kendall should have moved more quickly to rectify the lien, but Hatfield should have been prepared to deal with an uncontested matter more efficiently.

[21] Considering the circumstances, I am only prepared to award Hatfield costs reflecting one Chambers appearance (less than one hour) plus disbursements. This results in a costs award of Tariff costs of \$250.00 plus disbursements of \$246.80. The total amount of \$496.80 shall be payable forthwith.

### **Conclusion**

[22] I have considered the parties' positions on costs. This proceeding was an Application in Chambers, the outcome of which has the effect of a final disposition. This is a matter that was uncontested and could have been resolved by a consent Order. Ultimately, Hatfield was the successful party. I am of the view that Hatfield is entitled to Tariff costs of \$250.00 plus disbursements of 246.80. The total amount of \$496.80 is payable forthwith.

[23] Order accordingly.

Gogan, J.