

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Optimo Group Inc. v. Maynard Holdings Ltd.*, 2023 NSSC 415

**Date:** 20231221  
**Docket:** 514660  
**Registry:** Halifax

**Between:**

Optimo Group Inc.

*Plaintiff*

v.

Maynard Holdings Limited

*Defendant*

**DECISION ON COSTS**

**Judge:** The Honourable Justice John P. Bodurtha

**Written Submission:** March 17, 2023

**Oral Decision:** December 21, 2023

**Written Decision:** December 22, 2023

**Counsel:** Hamid Nikkhah, self-representative, for the Plaintiff  
Gavin Giles, K.C., Counsel for the Defendant

**By the Court (orally):**

**Background**

[1] Maynard seeks an award of costs from an Order vacating multiple Claims of Lien for Registration, which Optimo had recorded sequentially against certain lands and premises owned by Maynard at 5665 Roberts Street, Halifax, NS (PID No. 00170050).

[2] During the hearing Maynard argued three distinct points:

- (a) that Optimo had filed its Lien out of time;
- (b) that Optimo had abandoned Maynard's project months before its Lien was filed; and,
- (c) that Optimo's claims underpinning its Lien amounted to an abuse of process.

[3] Optimo recorded a Builders' Lien against Maynard's property. Optimo recorded its Lien three times for various amounts, \$1,875,489 on May 2, 2022, then the amended amount of \$811,445.35, on May 12, 2022, and finally the seconded amended amount of \$745,604.66 on May 17, 2022.

[4] After a half-day hearing, I found that Optimo had abandoned its work on Maynard's project, and that Optimo had failed to substantiate its last day of work, which was a key precursor to any finding that Optimo's Lien had been filed within the applicable time limitation.

[5] The motion resulted in considerable preparation, detailed affidavits, comprehensive briefs and authorities, and cross examinations of the Affiants.

[6] My decision of *Maynard Holdings Limited v. Optimo Group Inc.*, 2023 NSSC 66 validated Maynard's arguments and advised that if the parties are unable to reach an agreement on costs, I would accept submissions on costs. Maynard filed their costs submissions. The Court provided Optimo with multiple opportunities to respond to Maynard's costs submissions. Optimo failed to provide any submissions to the Court.

[7] My decision regarding costs follows.

**Issue**

[8] What is the appropriate amount of costs to be awarded by this Honourable Court following the motion?

**Analysis**

*Applicable Civil Procedure Rules*

[9] *Civil Procedure Rule 77.02(1)* reads:

77.02(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

[10] *Civil Procedure Rule 77.06(1)* reads:

77.06(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.

[11] The applicable tariff is Tariff C, as set out in *Rule 77.05*:

77.05 Assessment of interlocutory costs

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

(2) A judge may assess costs, and provide for payment of costs, when a motion is withdrawn or abandoned.

[12] Pursuant to *Civil Procedure Rule 77.05(1)* costs on a motion are to be determined under Tariff C unless the judge hearing the motion orders otherwise.

[13] Tariff C reads:

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

[14] *Civil Procedure Rule 77.07* provides factors which are relevant to increasing tariff costs:

### **Increasing or decreasing tariff amount**

77.07 (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.

(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.

[15] *Civil Procedure Rule 77.03(3)* speaks to costs following the event, which is the general presumption in a proceeding and reads:

77.03(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

[16] In *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44, Justice A. Smith, spoke about costs under Tariff “C”:

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 (N.S. C.A.). Hunt J. recently summarized the Court's comments from *Armoyan* in *Grue v. McLellan*, 2018 NSSC 151, [2018] N.S.J. No. 262 (N.S. S.C.):

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 work load, 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.

5 These principles provide the broad background for costs awards generally.

6 Courts will depart from Tariff C amounts when the basic award of costs under the Tariff would not adequately serve the principle of substantial but not complete indemnity for legal fees of the successful party. ...

### *Legal Fees*

[17] A costs award should represent “a substantial contribution towards a party’s reasonable legal fees and expenses but should not amount to complete indemnity.”: *Lyle v. Myer*, 2019 NSSC 387, at para. 23.

[18] In determining what amounts to a “substantial contribution” towards a party’s costs, the Nova Scotia Court of Appeal suggests that this means something more than fifty per cent (50%) and less than one hundred per cent (100%) of those costs: *Williamson v. Williams*, 1998 NSCA 195, at para. 25.

[19] Counsel for Maynard submits their legal fees (exclusive of HST) is \$34,668.50. I note there is no evidence such as an invoice before this Court that \$34,668.50 was the amount actually billed to Maynard. Maynard argues that its entitlement to costs should be \$22,500.00 plus HST.

### *Calculation of Tariff Costs Against Optimo*

[20] The hearing was more than a half day but less than a full day. Tariff C under *Rule 77* provides that costs for a hearing of more than a half day but less than a full day are set between \$1,000-\$2,000, subject to judicial discretion.

[21] Justice Fichaud’s second point in *Armoyan v. Armoyan*, 2013 NSCA 136, at paras. 12 and 13 speaks to the discretion the Court has to increase or decrease tariff costs applying the factors listed in *Civil Procedure Rule 77.07(2)*.

### *Civil Procedure Rule 77.07(2) Factors*

[22] Maynard argues that this Court should consider factors under *Civil Procedure Rule 77.07(2)* based on the following:

- Maynard entered into an agreement with Optimo to secure Optimo’s Lien claim by way of a significant cash payment into this Court of \$795,604.66. This cash payment represented \$745,605.66, together with \$50,000 as an “allowance” towards Optimo’s claims to Costs relative to its Lien and related claims filings;
- Maynard was consistently adapting to the various Lien claims filed by Optimo before settling on the amount of \$745,604.66; and,

- Optimo's confusion regarding their last day of work required Maynard to review multiple documents and conduct extensive cross-examination.

[23] I agree with the submissions of counsel for Maynard and find that the factors listed under *Civil Procedure Rule 77.07(2)(d)* and (e) are applicable in increasing tariff costs. Optimo's conduct throughout the litigation affected the speed and expense of the proceeding.

[24] I am mindful of these factors under *Civil Procedure Rule 77.07(2)* in reaching my decision. Based on the additional work caused by the conduct of Optimo and the significant payment into court, I am increasing the amount of tariff costs under Tariff A pursuant to *Civil Procedure Rule 77.07* by an additional \$5,000.

### **Conclusion**

[25] After reviewing the submissions of Maynard, I award \$2,000 under Tariff C, plus increased tariff costs in the amount of \$5,000 pursuant to *Civil Procedure Rule 77.07*, resulting in total costs of \$7,000, plus HST.

[26] I am satisfied that this award will do justice between the parties, pursuant to *Civil Procedure Rule 77.02(1)*.

[27] I ask that counsel for Maynard prepare the form of Order.

Bodurtha, J.