

SUPREME COURT OF NOVA SCOTIA

Citation: *Veno v. Ensor Estate*, 2013 NSSC 377

Date: 20131122

Docket: Yar. No. 243074

Registry: Yarmouth

Between:

Neil Veno

Plaintiff

v.

Estate of Jill Ensor, by personal representatives, Rose Marie Sampson and Darrell
Sampson

Defendant

Judge: The Honourable Justice Patrick J. Duncan

Heard: By Correspondence

**Final Written
Submissions:** November 07, 2013

Counsel: Michael K. Power Q.C., counsel for the Plaintiff
Allen C. Fownes, counsel for the Defendant

By the Court:

Introduction

[1] As reported in the decision of *Veno v. Ensor Estate* 2013 NSSC 335 I granted the defendant's application brought pursuant to **Rule 82.18** seeking dismissal of the plaintiff's action on the basis that the matter had not been brought to trial in a reasonable time. At the conclusion of that decision I invited the parties to make submissions as to costs, if they were not otherwise able to reach agreement. They have not agreed as to costs and so have filed written submissions on the issue.

Position of the Defendant

[2] The defendant says that as the successful party it should receive costs calculated in accordance with **Tariff A** - Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding. It seeks a total award of \$18,083 plus disbursements.

Position of the Plaintiff

[3] The plaintiff disagrees and submits that **Tariff C** - Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia - applies and that the starting point should be based on a hearing that lasted more than one hour and less than a half day, and which was determinative of the matter.

[4] The plaintiff says that having lost the right to pursue his action, not on the merits but for unreasonable delay, he has already suffered a harsh consequence and that the order for costs should be mitigated as a result.

[5] The plaintiff relies upon the authority set out by Bourgeois J., in *Braithwaite v. Bacich* 2011 NSSC 213, which dealt with an identical argument.

Analysis

[6] The decision to dismiss the plaintiff's claim was in response to a motion brought in Chambers. **Nova Scotia Civil Procedure Rule 77.05(1)** directs that:

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

[7] The fact that the motion was determinative of the claim is addressed in paragraph 4 of **Tariff C** which states:

(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 the 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.)

[8] I have come to the same conclusion as advocated by the plaintiff, and as found in *Braithwaite*, that **Tariff C**, not **Tariff A**, should be applied in assessing costs. **CPR 77.06(2)** contemplates the application of **Tariff A** at the conclusion of a trial or the hearing of an application in court, neither of which occurred in this case.

Conclusion

[9] The court has a general discretion in assessing costs. **CPR 77.02** states:

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.

(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.

[10] I am satisfied that a remedy pursuant to **Tariff C** will adequately respond to the circumstances of this case.

[11] The motion hearing lasted approximately two hours and so the starting point for the assessment of costs is in the range of \$750 to \$1000, being that set out in the Tariff. It is open to multiply the amount by a factor of 2, 3 or 4, as set out in paragraph 4 of **Tariff C**.

[12] The motion did not involve complex issues. Preparation for the motion would have been somewhat time consuming as counsel for the defendant Estate would necessarily have had to review the history of the matter dating back 8 years. In that time, the original defendant had passed away and so the motion had to be prepared without the benefit of her instructions. The lengthy passage of time after discoveries were held saw the original solicitor retire and move from the area and so he was not readily available for consultation without incurring costs to the defendant. The motion counsel elected to proceed with the motion without consulting the former counsel, in an effort to contain the costs to the Estate.

[13] The matter was important to the parties as there was a claim by the plaintiff that sought at least half of the value of the defendant's estate as at the time of the end of their relationship in 2004. It was a substantial claim that counsel for the defendant estimates as being in excess of \$200,000.

[14] Having regard to these circumstances I have decided to apply a multiplier of 2 to the upper amount of the range. In the result, I order that the plaintiff pay costs to the defendant in the amount of \$2,000 plus disbursements which are to be taxed.

[15] Order accordingly.

Duncan J.