

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Linders v. Ordinelli*, 2026 NSSC 158

**Date:** 20260511  
**Docket:** Hfx No. 500706  
**Registry:** Halifax

**Between:**

John Francis Linders

*Plaintiff*

v.

John Ordinelli and Penny Ordinelli

*Defendants*

<b>Costs Decision</b>
-----------------------

**Judge:** The Honourable Associate Chief Justice Darlene A. Jamieson

**Heard:** October 27 and 28, 2025 in Halifax, Nova Scotia

**Counsel:** David S. R. Parker and Elizabeth E. Dreise, for the Plaintiff

Jocelyn M. Campbell, KC and Hannah Helm, for the Defendants

## By the Court:

### Background

[1] On January 21, 2026, this court released its decision in this matter (reported as *Linders v. Ordinelli*, 2026 NSSC 27). Following a two-day liability only trial, the Plaintiff was not successful. As the successful party, the Defendants are entitled to costs. The parties were unable to resolve the issue of costs following the trial. As a result, I received written submissions from each party. The following is my decision on costs.

### Parties' Positions

[2] The Defendants filed a solicitor's affidavit of Hannah Helm sworn on February 23, 2026. It attaches the invoices for legal fees incurred by the Defendants in the amount of \$91,235.50, along with evidence of \$1,378.10 in disbursements.

[3] The Defendants claim disbursements of \$750, including HST. With respect to disbursements, the Plaintiff simply says disbursements should be taxed.

[4] The Defendants seek a costs award in accordance with Tariff A Scale 2, increased by 50% pursuant to Rule 10.09, based on a two-day trial and reasonable disbursements. The increased costs are claimed as a result of the Defendants having made formal settlement offers. They argue that that they are entitled to costs of \$23,125, based on an amount involved of \$125,000 and disbursements of \$750.

[5] The Plaintiff says an award of costs of \$8,000 plus taxed disbursements is appropriate, would do justice between the parties, and represents a fair and substantial but reasonable contribution to costs. He agrees that Tariff A is applicable and that the matter was not complex.

[6] The Plaintiff argues that the amount involved should be adjusted where liability and damages have been severed. He says otherwise, costs would be assessed as if there had been a full trial. He says the amount involved should be assessed at less than \$25,000, resulting in a costs award under Scale 2 of \$4,000 plus \$2,000 for each day of trial, totalling \$8,000 plus disbursements.

[7] With respect to the offers to settle, the Plaintiff says neither of the Defendants' offers were monetary, as there was no offer to pay money to the Plaintiff. He says it follows that the offers do not meet the requirements of Rule 10 and do not attract the

cost consequences of a formal offer to settle. He further says the offers do not align with the purpose of Rule 10, which is to incentivise settlement. He says in the alternative, if the offers do fall within Rule 10, then a 25% multiplier should be applied. He says the July 15, 2024, offer was, in fact, a series of separate offers, based on the timing of acceptance, with each subsequent offer revoking the previous one. He says the only valid offer at the time of trial, which was open from September 26, 2025, until commencement of the trial on October 27, 2025, qualifies as an offer made after the Finish Date under Rule 10.09(2)(d), and a multiplier of 25% applies.

[8] The Plaintiff further submits that he made reasonable settlement offers prior to trial that were rejected, forcing him to proceed to trial. He argues that this factor should be considered under Rule 10.03 to support his position on costs. The Plaintiff also argues that a costs award greater than \$8,000 plus disbursements would create significant financial hardship for him, and that costs should be reduced on this basis.

## The Law and Analysis

[9] *Civil Procedure Rule 77* governs costs following trial. The relevant portions state:

### 77.01 Scope of Rule 77

- (1) The court deals with each of the following kinds of costs:
  - (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
  - ...
- (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

### 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.

...

### 77.06 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.

...

**77.07 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:
- (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.

[Emphasis added]

[10] The tariffs state:

**TARIFFS OF COSTS AND FEES DETERMINED  
BY THE COSTS AND FEES COMMITTEE TO  
BE USED IN DETERMINING PARTY AND  
PARTY COSTS**

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
\$64,001-\$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%.		

[Emphasis added]

[11] The Nova Scotia Court of Appeal in *Armoyan v. Armoyan*, 2013 NSCA 136, said that awarding party and party costs pursuant to the tariffs is the norm. The Court of Appeal further said that it is a basic costs principle that a successful party should recoup a substantial contribution to their reasonable fees and expenses. *Grue v. McLellan*, 2018 NSSC 151, succinctly summarized the principles arising from the *Armoyan*, *supra*, decision as follows:

[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.

[12] Costs decisions are in the general discretion of the court and are for the purpose of doing justice between the parties. The starting point for determining costs after a trial is Tariff A Scale 2. With respect to setting the “amount involved” for the purposes of the Tariff, there is no dispute that the parties quantified damages at \$125,000 and proceeded to trial solely on liability. However, the Plaintiff argues that this amount should not be used as the amount involved as it would compensate the Defendants under the Tariff as if a full trial on liability and damages had taken place. He asks the court to set the amount involved at less than one fifth of the amount the parties agreed upon (the “less than \$25,000” range under Tariff A). The Plaintiff refers to caselaw where liability and damages were severed to argue that \$125,000 should not represent the amount involved. For example, in *Veinotte v. Chute*, 2020 NSSC 271, the court distilled the following principles from prior costs decisions after trials where liability was severed from damages:

14 *Young v. Hubbards Food Services Ltd.*, 1995 CarswellNS 234 (N.S.S.C.) and *Slaunwhite (Guardian ad litem of) v. Little*, 1998 CarswellNS 189 (N.S.S.C.) dealt with costs following trial on the issue [*sic*] liability, which, as in the case at hand, had been severed from the issue of damages. The following principles can be extracted from those cases:

1. The amount claimed, demanded or presented as a settlement offer, to the extent "reasonably attainable" represents the other party's risk, which is relevant to costs, including determining the amount involved.
2. In setting the amount involved, it is important to recognize that severing liability from damages promotes the "just, speedy, and inexpensive determination of the proceeding". Using the successful party's full damages risk as the amount involved would be a "disincentive" to such trial management measures. Therefore, the "amount claimed" factor in Preamble (b)(ii) to the Tariffs, is to be given less weight.
3. The extent of diminution in weight of the "amount claimed" or risk factor depends on the circumstances of the case. A relevant circumstance can include the likelihood that damages would have been agreed upon, had liability not been an issue.
4. The "complexity of the proceedings" factor, in Preamble (b)(iii), and the "importance of the issues" factor, in Preamble (b)(iv), remain significant.

5. It is still an "underlying principle" that a costs award should "represent a 'substantial contribution' towards the successful litigant's costs".

...

16 Whether it is achieved through adjusting the "amount involved", or through increasing or decreasing tariff costs, the ultimate goal of a costs award is "to do justice between the parties": CPR 77.02; *Young v. Hubbards Food Services Ltd.*, para. 16.

[Emphasis added]

[13] I am of the view that where damages have been agreed upon, the situation differs from a typical severance. First of all, Rule 77 provides that the amount involved "shall be ... (d) an amount agreed upon by the parties." Although the parties did not agree to a specific "amount involved" for cost purposes, they did agree to the quantum of damages. There is no question that a liability-only trial reduces trial time and expense; however, the court is not being asked to consider the full damages claim of a party, or the parties' settlement position pre-trial, and then determine an appropriate amount involved, as is often the case where there is simply a severance. Here, the parties have agreed that \$125,000 represented the totality of the risk.

[14] I see no reason to depart from the amount agreed upon between the parties as the quantum of damages. The parties, after negotiation, agreed that the damages payable if the Plaintiff succeeded at trial would be \$125,000. Such an agreement cuts both ways. Each party should have known that if their position was unsuccessful, they faced a costs award where the amount involved was very likely to be their agreed upon damage amount. In the circumstances, I see no reason to reduce this amount by more than \$100,000, as suggested by the Plaintiff, or at all. I do not suggest that the amount involved could never be reduced where the parties have agreed on the quantum of damages, but I am not satisfied, after considering all of the applicable factors, that a reduction is appropriate in the circumstances of the present case.

[15] I find support for my approach in *Driscoll v. Crombie Developments Ltd.*, 2006 NSSC 262, where the court, following a trial on liability only, determined costs using an amount involved based on the quantum of damages agreed on by the parties:

[26] As noted in *Rhyno*, the court, in determining the amount involved, has almost always chosen a figure equal or close to the amount awarded. Here, the parties agreed on quantum of damages just before trial in the amount of \$22,600. I

see no reason to depart from that figure as representing the "amount involved" for purposes of this taxation.

[16] In *Morash v. Burke*, 2007 NSSC 68, another case where the trial determined liability only, the court assessed costs on the same basis:

[16] In the present case, of course, we are not dealing with an amount claimed but rather an agreed settlement amount for which both Allstate and ING remained at risk and which continued to fuel the litigation.

[17] I am not persuaded that the "amount involved" should be set at \$125,000 under the grounds argued. This is not a situation in my view, where the matter should be considered as a non-monetary issue for costs purposes. The plaintiff's claim was ultimately quantified at \$162,500 overall by agreement of counsel and it was that amount for which either Allstate or ING would be found liable. I find that the "amount involved" should be appropriately set at \$162,500 as submitted by counsel for ING.

[17] I must also be cognizant that costs are to represent a substantial contribution to the Defendants' legal fees. Using an amount involved of less than the agreed upon \$125,000 would result in an award that does not remotely represent a substantial contribution to legal fees. The solicitor's affidavit indicates that the Defendants incurred legal fees of \$91,235.50 (exclusive of disbursements and HST). However, as I noted above, the parties agreed to the quantum of damages being \$125,000 and the Defendants have accepted this as the amount involved, regardless of whether it represents a substantial contribution to legal fees.

[18] There is no dispute between that parties that the scale to be applied is Scale 2. This case proceeded in the normal course. It was not unusually complex; there were no undue delays, etc. As I stated in *Singapore Technologies Marine Ltd. v. Nova Scotia (Attorney General)*, 2025 NSSC 256, at para. 11, Scale 2 is the starting point and there must be sufficient reason to depart from it.

[19] Pursuant to Tarriff A Scale 2, using \$125,000 as the amount involved results in costs of \$12,250. Under Tariff A, a further \$4,000 (\$2,000 per day) is added for the two days of trial. This results in a cost award of \$16,250 plus disbursements.

[20] The Defendants submit that pursuant to Rules 10.09 and/or 77.07, the court should exercise its discretion to increase the Tariff amount by 50%. Rule 10.09 states:

**Determining costs if formal offer not accepted**

- (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.

...

[Emphasis Added]

[21] The following settlement offers were made as between the parties:

1. Settlement offers were made by the Defendants on June 14, 2022, and on July 15, 2024. The July 15 offer states:

...

2. If the June 14, 2022 Offer to Settle is not accepted by August 31, 2024, it is revoked. Thereafter, the Defendants offer to settle this matter on the following basis:
  - a) If the Plaintiff agrees to a dismissal of his claim between September 1, 2024 and December 31, 2024, the Plaintiff will pay costs to the Defendants (less a 10% discount for the costs to which the Defendants are entitled, or the costs ordered by the court) in return for dismissal of the action against them and a release containing terms acceptable to the defendants.
  - b) If the Plaintiff agrees to a dismissal of his claim between January 1, 2025 and before the Finish Date on July 25, 2025, the Plaintiff will pay costs to the Defendants (less a 8% discount for the costs to which the Defendants are entitled, or the costs ordered by the

court) in return for dismissal of the action against them and a release containing terms acceptable to the defendants.

- c) If the Plaintiff agrees to a dismissal of his claim after the Finish Date and before September 26, 2025, the Plaintiff will pay costs to the Defendants (less a 5% discount for the costs to which the Defendants are entitled, or the costs ordered by the court) in return for dismissal of the action against them and a release containing terms acceptable to the defendants.
- d) If the Plaintiff agrees to a dismissal of his claim after September 26, 2025 and before the commencement of the trial on October 27, 2025, the Plaintiff will pay costs to the Defendants (less a 2% discount for the costs to which the Defendants are entitled, or the costs ordered by the court) in return for dismissal of the action against them and a release containing terms acceptable to the defendants.

...

- 2. On February 6, 2025, the Plaintiff offered to settle for \$131,526.43, all inclusive.
- 3. On March 31, 2025, the Defendants offered to settle damages for \$125,000 subject to a determination on liability. The Plaintiff agreed to this proposal and the parties advised the court that trial time would be reduced from eight to four days. Ultimately, only two days of trial were needed.
- 4. On April 22, 2025, the Plaintiff offered to settle for \$60,000 plus costs, disbursements and prejudgment interest.

[22] The Plaintiff says the Defendants' offers to settle do not fall within the scope of Rule 10. He refers to Rule 10.05 and says the offers do not fit under either 10.05(3)(c) or (d) because the Defendants offered to waive or reduce their costs claim in return for a dismissal of the claim and a release, whereas the Plaintiff's claim was monetary. Rule 10.05 states:

**10.05 Formal offer to settle an action**

- (1) A party who makes a formal offer to settle under this Rule 10.05 may take advantage of the applicable provisions for costs in Rules 10.08 and 10.09.
- (2) A party may make a formal offer to settle an action, or a counterclaim, crossclaim or third party claim in an action, by delivering an offer to settle.

- (3) A formal offer to settle must contain the standard heading of the action, be entitled in one of the following ways, and be dated and signed:
  - (a) “Offer to Settle by Claimant (Monetary)”, if it offers to settle entirely on the basis that money is paid to the party who makes the offer;
  - (b) “Offer to Settle by Claimant (Non-monetary)”, if it offers to settle on terms that include a requirement the other party do, or refrain from doing, something in satisfaction of a non-monetary claim;
  - (c) “Offer to Settle by Person Claimed Against (Monetary)”, if it offers to settle entirely on the basis that money is paid to the other party by the party who makes the offer;
  - (d) “Offer to Settle by Person Claimed Against (Non-monetary)”, if it offers to settle on terms that require the party making the offer to do, or refrain from doing, something in satisfaction of a non-monetary claim made by the other party.
- (4) The offer must include terms that would settle all claims in the proceeding between the party making the offer and the party to whom it is made, and the term that would settle costs must provide for one of the following:
  - (a) payment on acceptance of an amount stated in the offer;
  - (b) payment of an amount for costs to be determined by a judge;
  - (c) an option for the other party to choose between a stated amount for costs or determination by a judge.
- (5) The offer must also contain both of the following terms:
  - (a) it is open for acceptance until it is withdrawn or the trial begins;
  - (b) it may be accepted only by delivery of a written acceptance to the party making the offer.

[23] The Plaintiff says that offering to settle costs in a formal offer is a distinct issue from an offer on the merits of the claim and, therefore, is not a monetary offer under Rule 10.05. This proposed interpretation of Rule 10 is too rigid. The Rule is clear that a party who makes a formal offer under the Rule may take advantage of the applicable costs provisions. An offer to settle for dismissal of a claim plus a reduction in allowable costs cannot be disqualified as a formal offer under Rule 10 simply because it does not offer payment of a specific monetary amount in respect to the Plaintiff’s claim. First of all, it does give the Plaintiff some monetary reward in the form of a reduction in allowable costs. Further, such an offer is in keeping with the purpose of the Rule, which is to incentivise settlement in the face of cost consequences.

[24] On the Plaintiff's reasoning, a party would need only offer a nominal amount, for example \$1.00, in settlement of the claim to bring itself within Rule 10.05. I see no reason to interpret the Rule so rigidly or apply such arbitrary threshold requirements. I do not interpret the descriptions in 10.05(3)(a) through (d) to exclude the situation before me.

[25] The Plaintiff further argues that the Defendants forced him to go to trial by not making a monetary offer and rejecting his offers to settle. He says this supports his position on costs and refers to Rule 10.03, which allows the court to consider formal and informal offers to settle. The Plaintiff's claim was dismissed after trial so I fail to see how the Defendants' failure to offer to compensate him for a claim they felt would be dismissed, and which was dismissed, helps the Plaintiff's costs position in any way.

[26] The Plaintiff argues in the alternative that if the offers do fall within the scope of Rule 10, the appropriate multiplier is 25%, because the only offer open for acceptance at the time of trial was for the period of September 26, 2025, which was after the finish date, until commencement of the trial on October 27, 2025. I disagree. The Defendants made a formal offer to settle on July 15, 2024. It left open the prior offer to settle for a dismissal of the action and a waiver of costs until August 31, 2024, at which time the June 14, 2022, offer would be revoked. After that date, the July 15 offer remained in effect until trial; however, with respect to costs it set out a sliding scale of the discount percentage available to the Plaintiff if he accepted the offer. The costs discount fell from 10 % to 2% as time passed. The discount of 2% of the costs to which the Defendants would be entitled was in effect from September 26, 2025, until the first day of trial.

[27] I do not accept the Plaintiff's argument that each percentage on the sliding scale of cost discounts represents a revocation of the prior offer, meaning the court should disregard the July 15, 2024, formal offer and focus only on the date on which the final costs discount became effective. The Plaintiff had been fully aware of the terms of the formal offer to settle since July 2024. The offer was never revoked. The Plaintiff knew exactly the terms under which the Defendants were prepared to resolve the matter from July 15, 2024, until the commencement of trial.

[28] There is nothing in the Rules that precludes a graduated formal offer to settle, such as was presented on July 15, 2024. Rule 10.09 specifically refers to when "the offer is made". I am of the view that in the present case the offer was made on July 15, 2024, and the dates for the various discounts are just that, and do not represent completely new offers to settle each time the discount rate changes. As a result, the

applicable multiplier is 50%, as the offer to settle was made after setting down but before the Finish Date.

[29] The Plaintiff argues that any award greater than \$8,000 would create significant financial hardship for him and that it is appropriate to reduce costs as a result. The Defendants say Rule 77.04 has no application in the circumstances before the court as the Plaintiff has not made a motion under the Rule.

[30] Rule 77.04 deals with situations where a party cannot afford to pay costs and seeks an order that the party is to pay no costs. It states.

**77.04 Relief from liability because of poverty**

- (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
- (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
  - (a) the party is notified of a proceeding the party wishes to defend or contest;
  - (b) a claim made by the party is defended or contested.
- (3) An order against paying costs may be varied when the circumstances of the party change.
- (4) An order against paying costs does not apply to costs under Rule 88 - Abuse of Process, Rule 89 - Contempt, or Rule 90 - Civil Appeal.

[31] The purpose of Rule 77.04 was set out in *Canadian Residential Inspection Services Ltd. v. Swan*, 2013 NSSC 226, where Justice Warner stated:

[26] The purposes of *Rule 77.04* is not to afford a losing party the opportunity, post-trial, to seek exemption from a costs award.

[27] The *Rules'* policy is to provide access by the poor to the judicial system. Discretion to apply *Rule 77.04* might be entertained where the financial imbalance between the parties may prevent a poor litigant with a legitimate and reasonable claim from receiving justice. The policy was not intended to give an unfair advantage to one party over another.

[28] I adopt entirely the analysis of my colleague Justice Wright in *MacBurnie v. Halterm Container Terminal Ltd. Partnership*, 2011 NSSC 322 [In Chambers]. Justice Wright notes that costs are an important element of the litigation process. Their purpose is to indemnify a successful party, to encourage settlement, to

stop frivolous actions, to discourage unnecessary steps and to facilitate access to justice. These purposes are undermined when a party has an exemption from costs exposure.

- [29] Because of the imbalance that a cost immunity order would create, the Court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in *Rule 77.04* should be stringently applied and where there is a comprehensive body of evidence adduced in support.
- [30] In this case Swan has produced no evidence, let alone substantial evidence, of his financial circumstances, the first of the two criteria listed in *Rule 77.04*.
- [31] The timing of the request for exemption affects the second criteria. The Plaintiff has been put through lengthy pre-trial processes and a six-day trial without notice that the Defendants may seek exemption from a costs award if the Defendants lost.

[Emphasis added]

[32] I agree with Justice Warner's direction that such requests must be brought well before trial, and that an order relieving a party from paying costs is an extraordinary remedy that will not be granted without a comprehensive body of evidence to support it.

[33] The Plaintiff did not make a motion pre-trial or post-trial to be excused from paying any costs. In my view, contrary to the Defendants' position, the Plaintiff's request should not have been made under *Rule 77.04* as he is not seeking an exemption from paying any costs. Instead, he asks that the court consider his financial situation when assessing costs.

[34] Like Justice Hunt in *Hankey v. Hughes, supra*, (at para. 31), I accept that the court has weighed issues of impecuniosity when assessing costs in a number of cases. I believe there is a place within the overall costs assessment process for considering issues of hardship. Financial considerations are not listed as one of the factors to be considered in *Rule 77.07(2)*, but I am satisfied that they can be taken into account. Various courts have commented on this issue. See for example, *Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.*, 2015 NSSC 39, at paras. 6-8; *Mercier v. Nova Scotia (Police Complaints Commissioner)*, 2014 NSSC 309, at paras. 5-9; *Windsor v. Adu Poku*, 2003 NSSC 995; *Hill v. Cobequid Housing Authority*, 2011 NSSC 219, and *Kaye v. Campbell*, 1984 CarswellNS 47 (at para. 8, in family law context). In short, I am of the view that financial hardship can play some role when a court is weighing the question of what costs award will do justice

between the parties. However, there must be evidence led in support of such a request and its appropriateness for consideration in the particular circumstances.

[35] Whether the court will take into account financial implications of a costs award will depend on the specific circumstances. The Plaintiff has not led any evidence at all with respect to his position that he is “of modest means” and that a costs award in excess of what he is advancing would “create significant financial hardship for him as a retired individual living on a fixed income.” While the Plaintiff is not seeking an exemption from payment of any costs, his claim of financial hardship must be accompanied by evidence. Without evidence, I am not prepared to consider the Plaintiff’s claim that an award of more than \$8,000 in costs will cause him financial hardship.

[36] *Civil Procedure Rule 77.10* states that an award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award. The Defendants claim disbursements totaling \$750, inclusive of HST. Although the Defendants incurred actual disbursements of \$1,378.10, they seek only \$750. I have reviewed the listing of disbursements incurred and am satisfied in the circumstances of this matter that the disbursements claimed were necessary and are reasonable.

### **Conclusion**

[37] The Defendants are awarded \$23,125 in costs and \$750 in disbursements. I am of the view this will do justice between the parties in the present circumstances. I ask that the Defendants’ counsel prepare a costs order reflecting the above.

Jamieson, ACJ