

SUPREME COURT OF NOVA SCOTIA

Citation: *Irving Shipbuilding Inc. v. Beazley Syndicates AFB 2623*,
2025 NSSC 169

Date: 20250514

Docket: Hfx No. 509361

Registry: Halifax

Between:

Irving Shipbuilding Inc.

Plaintiff

v.

Beazley Syndicates AFB 2623 and AFB 623 at Lloyd's

Defendants

Restriction on Publication: Sealing Order
(See details on next page)

Judge: The Honourable Justice D. Timothy Gabriel

Heard: By written submissions

Final Written Submissions: March 25, 2025

Counsel: Daniela Bassan, K.C., Paul Steep, and Manon Landry, for
the Plaintiff
Robert Bell, Michelle Awad, K.C., Shannon Gaudet, and
Gavin Giles, K.C., for the Defendants

IT IS HEREBY ORDERED THAT:

1. All documents which relate to the security of Canada and which are or contain confidential and proprietary information belonging to non-parties to the within Application (the “Protected Information”) are hereby sealed and will not form part of the public record. This Order extends to the pleadings in an arbitration between the Applicant and Odense Maritime Technologies and document filed and transcripts of evidence given during arbitration, to be identified and designated as Protected Information at a later date.
2. No Protected Information may be published in any document or broadcast or transmitted in any way.

(Order granted in Chambers, April 7, 2022)

By the Court:***Background***

[1] On November 12, 2024 I heard a motion for production and reserved the decision. On February 17, 2025, in *Irving Shipbuilding Inc. v. Beazley Syndicates AFB 2623*, 2025 NSSC 52, I dismissed the Defendants’ (“Beazley”) motion with costs. *Inter alia*, findings were made to the effect that solicitor-client privilege had been established by the Plaintiff (“ISI”), which had not been waived, and that no review of the documents at issue, pursuant to CPR 85.06, was required at this time. It was noted, however, that the determination could be revisited should evidence become available to Beazley throughout the disclosure and/or discovery process, which warranted such a review in relation to any or all of the documents that were sought.

[2] The parties have been unable to agree on the quantum of costs and, as such, the Court must make that determination. ISI seeks lump-sum costs in the amount of \$45,000 plus disbursements of \$4,176.41. Its counsel cites the complexity of the motion; the inadequacy of the Tariff C amount when compared to ISI’s actual legal expenses; some prematurity issues and proportionality concerns with the motion; the impact of the last-minute adjournment in August 2024 requested by Beazley; and the fact that Beazley, itself, had earlier requested (if successful) that it receive its own costs “on a substantial indemnity basis”.

[3] In support of its submissions on costs, ISI has filed two affidavits. They consist of the Affidavit of Stewart McKelvey Associate, Kali Robertson (“the Robertson Affidavit”), and that of Thomas Sutton, Partner with McCarthy Tétrault LLP. The former explains the invoices issued by Stewart McKelvey (“the Stewart McKelvey fees”) to ISI, while the latter provides detail with respect to fees billed to ISI by McCarthy Tétrault (“the McCarthy Tétrault fees”).

[4] Cumulatively, ISI’s counsel state that they incurred “total discounted fees with taxes: \$201,910.95”. When disbursements are added to this amount, it results in \$206,087.36 (*ISI Costs Brief*, para. 9). The amount is said to have been discounted because the actual amount billed to ISI by McCarthy Tétrault was actually 40% higher than the figure used when its component to ISI’s overall cost was calculated. As counsel explains, “[t]his discount has been applied to account for the higher hourly rates for Ontario counsel as compared to Nova Scotia counsel” (*ISI Costs Brief*, para. 8).

[5] In counsel’s submissions, the further point is made that “... while most of the information from the Stewart McKelvey and McCarthy Tétrault dockets has been provided, the description of legal services has been categorized to best protect privilege and avoid any argument that privilege has been waived (*ISI Costs Brief*, para. 10). Exhibit B to the Robertson Affidavit and Exhibit B to the Sutton Affidavit outline the categories of legal services.

[6] I agree that some measure of circumspection is required given the nature of the Sealing Order granted on April 7, 2022, and also in light of the motion for production, which involved arguments by the Defendants that the Plaintiff had waived the privilege that would otherwise be attached to some of its solicitor-client communications, in respect of which this motion for quantification of costs arises.

Analysis

[7] It is trite to say that the Court’s discretion with respect to an award of costs is unfettered. With that said, *Civil Procedure Rule* (“CPR”) 77, and, in particular, the Tariffs which appear at the end of that Rule, offer some guidance to the Court as to the exercise of that discretion in various circumstances. It is appropriate that these guiding principles be applied by the Court in assessing costs, unless the party advocating a departure from same is able to show that such a departure is necessary in order to achieve a just result.

[8] As Wood, J. (now C.J.N.S.) stated appositely in *Homburg v. Stichting Autoriteit Financiële Markten*, 2017 NSSC 52:

[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.

[9] In this sense, I agree with the Respondent's position that, while a lump-sum award is an available option, it should be treated as an exception rather than the rule (*Beazley's Costs Brief*, March 11, 2025, para. 15).

[10] Many other general principles are enshrined in CPR 77. For example, CPR 77.02(1) provides that the objective which the Court seeks to attain by reason of an award of costs is "to do justice between the parties". CPR 77.05 tells us that "the provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise." Finally, the Court's discretion includes the ability to "award lump-sum costs instead of tariff costs" (CPR 77.08).

[11] Tariff C is referenced below:

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	\$1000-\$2000
1 day or more	\$2000 per full day

[12] As Justice Ann Smith put it in *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44, a lump sum award is appropriate when the Tariff amount “would not adequately serve the principle of substantial but not complete indemnity for legal fees of the successful party” (para. 6). In *Williamson v. Williams*, [1998] N.S.J. No. 498 (CA), the Court provided guidance as to what “substantial indemnity” means:

25 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.

[13] However, specific ratios or formulaic approaches are generally resisted. As Muise, J. observed in *Richards v. Richards*, 2013 NSSC 269, after referring to *Williamson*:

[11] This suggests, in my view, that party and party costs awards considerably below the range of 2/3 to 3/4 of solicitor and client costs, may now satisfy the "substantial contribution" requirement. However, as noted by Justice Moir, "the Courts have usually avoided percentages", and, as noted by Justice Goodfellow, in *Armour Group*, the "level of exceptional services required" may vary from case to case. Therefore, no fixed costs-to-expenses ratio can be used. Nevertheless, it appears that lower contribution ratios are more likely to be acceptable now, than they were in 1989.

[14] Many of the same cases have been cited by both parties. For example, in *Link v. Link*, 2021 NSSC 114 (aff'd 2022 NSCA 14), Rosinski, J. was dealing with an assessment of costs in the aftermath of a failed attempt by the Applicant to bring a derivative action on behalf of “Link Canada” in Nova Scotia against the Respondents.

[15] The Applicant argued that there had been no exceptional circumstances warranting a departure from CPR 77 Tariff C scale costs. The Court (in *Link*) disagreed and concluded that it had been appropriate for the Respondent to take the time to provide a substantial background to the corporate structure involving the group of companies which would be implicated by the order sought, and the associated litigation already underway in the United States (at the time). As was noted:

[13] The Respondents’ position implicates the interests of various corporations, but significantly also three individuals – each of whom likely have distinct legal needs and perspectives in relation to Jay’s allegations against them. Had they each had separate counsel their combined costs to defend against this proposed derivative action could well have been even greater. They were each entitled to take Jay’s claims of up to \$60-\$80 million US liability seriously and have their counsels counter with their own positions.

[14] Notably, both sides considered the matter sufficiently serious to each have two senior counsel in court to argue the matter.

[15] Assessing the factors relevant to whether leave should be granted was made more challenging than usual for the court, as a result of, *inter alia*: the lengthy history between the Link corporations and individuals involved; the multi-jurisdictional and integrated nature of the closely-held corporations; the intersection of an argued limitation period – including when/how the court should treat that issue in this context, and the anticipated effects on the potential main proceeding of which jurisdiction’s limitation period would likely be applicable.

[16] This proceeding was consequently extraordinary, *inter alia*, insofar as it placed especial corollary demands on counsel for the Respondents in particular. While heard in one day, the preparation and arguments far exceeded the norm.

[17] Bearing in mind the relevant Rules and the jurisprudence, including those argued by the parties for their respective positions, I find that the application of tariff “C” would not do justice between the parties.

[16] In *Medjuck v. Medjuck*, 2023 NSSC 345, which involved a two-day hearing, Chipman, J. had occasion to refer to the *Link* decision, and also went on to award lump sum costs in that factual milieu:

[21] I find the above-quoted comments to be of guidance as I consider appropriate costs to award. In exercising my discretion I have borne in mind the substance of the motions, which had they been successful, would have meant for potential exposure in the neighbourhood of three times the original pleaded \$7 Million. In assessing reasonable costs I also must consider Rule 77 and whether the Tariff C starting point should be set aside in favour of an award that more closely reflects the legal spend to deal with the motions. At the same time I have to bear in mind that these motions did not bring this litigation to an end, coming as they did prior to the close of pleadings and before any discoveries.

[22] Having regard to my Motion Decision, I am cognizant of the fact that the motions were unfounded, put forward by in many instances, deceptive evidence exposed through Mr. Giles, K.C.'s cross-examination of Harold. The stakes were high inasmuch as success for Harold would have meant for a claim within the realm of \$20 Million. I am also cognizant of the uncontradicted evidence of Mr. Giles, K.C. on this costs hearing and recognize that the Medjuck Defendants made a significant legal spend in their resistance to the motions. Harold's conduct and his failure to achieve almost all of what he sought on the motions causes me to readily conclude that this is a case where I am prepared to exercise my discretion and award more than bare Tariff C costs to the Medjuck Defendants.

...

[24] In all of the circumstances and to do justice between the parties, I hereby award \$4,000.00 to Medjuck and Medjuck and an identical sum to be split (\$2,000.00 each) between 51/56 and Universal. This figure is representative of the two days in Court on these motions (Tariff C - \$2,000.00 per day times two) with the multiplier considerations (owing to Harold's actions as described in the Motion Decision along with the complexity and voluminous overall documentary burden) offset by the "labouring oar" exercised by counsel for the Medjuck Defendants. In making these costs awards I am alive to the fact that Mr. McEwan represented both 51/56 and Universal.

[25] With respect to appropriate costs for the Medjuck Defendants I return to my above comments and the above excerpts from the motion costs decisions of Justice Rosinski. I am of the view that the constellation of factors here make it one of those rare motions where the Court must depart from Tariff C to effect a fair and appropriate costs disposition. The matter was sufficiently legally and factually complex and undoubtedly required significant pre-motions preparation by counsel for the Medjuck Defendants.

[26] In *Link* Justice Rosinski noted that what he had dealt with was "not an ordinary Application in Chambers". I say the same of the motions which occupied the Court's time here. In the end Justice Rosinski exercised his discretion and awarded the successful party 23.5 percent of their claimed reasonable costs.

[27] There are distinguishing features between *Link* and this case such that I am not prepared to award a percentage approaching nearly a quarter of what was

characterized as “reasonable” costs in *Link*. There was considerably more money at stake in *Link* and that decision resulted in a final disposition.

[28] Mr. Giles, K.C. was at one time – as he deposes to in his affidavit – a “taxing officer”. He must understand that such a role is not normally the job of the Court on a motion. Indeed, Mr. Giles acknowledged this fact during his remarks today. In any case, when I consider the relevant caselaw and all of the circumstances of this situation, I have exercised my discretion in order to do justice between the parties on costs (and disbursements) such that Harold shall pay the Medjuck Defendants the lump sum of \$20,000.00.

[17] In *Tri-Mac*, the Court was tasked with fashioning an appropriate award of costs in the aftermath of a six-day hearing. The following context was provided:

[7] The hearing in this matter extended over months and took about six days to complete. The date that was originally set was December 12, 2017. The day before the hearing Mr. Ostrom filed another motion seeking to strike portions of the affidavit of Dale Ostrom. That affidavit had been filed a month before. Dale Ostrom responded to that motion and it was withdrawn in court, on December 12, 2017. The matter was then adjourned to January 16-18, 2018. The argument took place over three full days. Even that was not enough. Bradley Ostrom was given the opportunity to file post-hearing submissions, which involved further costs to Dale Ostrom. I released my decision on the matter, on July 20, 2018. Bradley Ostrom made an attempt then to reopen the matter to have me essentially reconsider the decision that I had made. That resulted in further filing of materials that added to the costs. The materials that were filed were voluminous and complex and the arguments based upon those materials were without merit. The request to have the matter reopened failed but more importantly, it should never have been made. A party may waste his or her own money on unnecessary motions and meritless arguments, but they should not be allowed to drag someone else with them. The manner in which this matter was pursued was wasteful and that willingness to expend money in that way should not be forced upon the opposing party.

[8] This is a case in which a lump sum costs award is required to provide a level of indemnity for the successful party that approaches substantial. The legal fees charged to the defendants amounted to about \$75,000. The amount they seek in costs is \$25,000 with \$6,076.77 in disbursements. That is one-third recovery. The claim is entirely reasonable. Lump sum costs of \$25,000 and disbursements in the amount of \$6,076.77 are awarded.

[18] In *Homburg*, an award of \$40,000 in costs was made after a 2 ½-day motion which dealt with complicating factors such as jurisdiction and state immunity. This amount was arrived at by applying the maximum tariff amount with a multiplier of four and increasing it by a factor of two-thirds.

[19] In the case at bar, this was a one-day motion for disclosure of documents in relation to which the Plaintiff had claimed were privileged. The motion was not dispositive of the litigation. It was brought within the context of an overall action initiated by the Plaintiff in which damages are sought in excess of \$200 million, and in relation to which matters impacting upon national security are said to pertain (hence the earlier referenced sealing order).

[20] This was much more complex than a standard production motion. The Plaintiff has identified some of the additional complications brought about by the application:

26. First, Beazley's Notice of Motion as filed on July 15, 2024 was substantially more complex than the draft version provided to ISI on May 29, 2024 (which was relied upon in ISI's initial motion record preparations).
27. The final Notice of Motion identified seven new categories of privileged documents, which were difficult to follow and did not reflect the information and particulars in the sworn Affidavits of David Henley, K.C. and ISI's Privilege Logs (as further described and defined in ISI's Motion Brief of August 2, 2024).
28. Responding to the motion required ISI to spend considerable time cross-referencing Beazley's categorizations with the Henley Affidavits and Privilege Logs, including preparing the detailed Appendices 3, 4 and 5 to ISI's Motion Brief filed August 2, 2024.
29. Notably, the Court relied on ISI's categorization, not Beazley's, to reference the documents at issue and dispose of the motion.
30. Furthermore, the volume of material filed on the motion was significant (approx. 2,000 pages). Beazley also filed extensive materials in reply (including a Reply Affidavit with 10 additional Exhibits).
31. Both parties were also required to comply with additional filing procedures under the Confidentiality Order governing this proceeding.

[footnote removed]

(*ISI Costs Brief*, March 14, 2025, paras. 25 – 31)

[21] Another complicating factor arose by virtue of the manner in which this motion was set down. In its Notice of Motion, Beazley indicated that it would not require more than one half-day in Chambers. Accordingly, the matter was set down for a half-day hearing on August 21, 2024.

[22] Unfortunately, at the prehearing conference of August 20, 2024, Beazley sought an adjournment on the basis that a full-day hearing was required. By this

time, Mr. Sutton, Toronto co-counsel for the Plaintiff had already travelled to Halifax for the hearing when the adjournment was granted. I am satisfied that this resulted in wasted travel costs and preparation time.

[23] In sum, I have concluded that this is one of the rare and exceptional cases in which a departure from Tariff C costs is warranted. It is necessary that a lump sum be awarded to achieve a just result.

[24] With that said, it has been difficult, at times, to isolate work expended by Plaintiff's counsel for the benefit of this motion, and work which would be required, in any event, within the context of the overall advancement of this case to trial.

[25] Having considered matters as carefully as I can, based on the materials with which I have been provided, including the affidavits, the briefs, the thoroughness of the arguments, and the amount of research and preparation which would have been required for this motion, I consider that reasonable legal fees incurred by ISI in responding to Beazley's motion amounted to \$55,000. In the specific circumstances of this case, I consider that an award of \$30,250, or 55% of the Plaintiff's reasonably incurred fees, would suffice to do justice between the parties, and I so order. In addition, ISI shall recover its disbursements as claimed, in the amount of \$4,176.41.

[26] ISI seeks a direction that these costs be made payable forthwith. In *National Bank of Canada Limited v. Potter*, 2008 NSSC 213, Justice Warner adverted to the complexity of modern litigation, and to the effect that, generally speaking, the parties are better positioned to argue, and the Court is consequently better able to make appropriate costs determinations, at the time of the application itself, rather than waiting for the conclusion of the trial. Accordingly, he reasoned, "unless the cost award may be improved with the benefit of hindsight (after trial), the award should be paid when ordered" (para. 13). I respectfully agree.

[27] The circumstances in this case are such that the cost award noted above will be payable by the Defendants forthwith.

Gabriel, J.