SUPREME COURT OF NOVA SCOTIA
Citation: *Freeman v. Ponhook Lodge*, 2024 NSSC 1

Date: 20240102
Docket: 468073
Registry: Halifax

Between:

H. Charles Freeman, Richard Freeman, The Estate of Elfreda Freeman, and the Eldreda Freeman Alter Ego Trust (2015)

Plaintiffs

v.

Ponhook Lodge Limited, a body corporate

Defendant

Judge:	The Honourable Justice Darlene Jamieson
Final Written Submissions:	September 6, 13 and 15, 2023
Counsel:	Roderick (Rory) H. Rogers, K.C., Sarah A. Walsh, for the Plaintiffs Alex Embree, for the Defendant

By the Court:

Background

[1] On August 10, 2023, this court released its decision in this matter (reported as *Freeman v. Ponhook Lodge*, 2023 NSSC 255). Following a seven-day trial, the Plaintiffs were successful. I determined that they were entitled to a permanent injunction restraining the Defendant from inviting, encouraging or condoning the use of the right-of-way over the Plaintiffs' property by members of the public to access the Proposed Campground or other commercial establishment.

[2] As the successful party, the Plaintiffs are entitled to costs. The parties were unsuccessful in resolving 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

[3] Disbursements are not in issue. The Plaintiffs claim disbursements of $9,268.22, including HST. The Defendant agrees that this is an appropriate amount to be ordered for the Plaintiffs' disbursements.

[4] The Plaintiffs say they should recover 85% of their incurred legal fees on a lump sum basis. The Plaintiffs have paid legal fees in the amount of $252,382.69, plus $37,857.40 in HST, for a total of $290,240.09.

[5] The Plaintiffs base their claim for 85% of their legal fees on their having made two settlement offers (November 2018 and March 2022) which they say were more favourable to the Defendant than this court's decision. They say the terms of the settlement offers would have allowed Ponhook Lodge to either: (1) develop and operate their Proposed Campground on the Freeman Rim Property adjacent to the current campground, rather than the Ponhook Rim Property (November 2018 offer); or (2) subdivide the Ponhook Rim Property into eight lots, which the Defendant could have sold (March 2022 offer). They further say that the November 2018 offer was made early in the process and would have avoided four years of litigation. They say that while the March 2022 offer was made later in the litigation and shortly before the trial, acceptance of that offer would have saved significant costs and resources.

[6] The Defendant says Tariff A should apply and the “amount involved” should be determined by using the total value of the Plaintiffs’ land affected by the lawsuit. It says that while no appraisals are before the court, their 2022 taxable values are in evidence. The Defendant further says that as the Plaintiffs did not view the taxable values as fair market value, a multiplier should be used. It points to a letter from the Plaintiffs offering to buy vacant land at 1.5789% above the tax assessed values. Given the connection of the Plaintiffs to their land, the Defendant suggests that applying a multiplier of two would be appropriate. The Defendant submits that the above calculation of an amount involved does not exceed an acceptable level of subjectivity.

[7] Using the Defendant’s method of calculation results in an amount involved of approximately $1,474,600. The Defendant submits that using this "amount involved" and considering there were seven days of trial, Tariff A dictates an appropriate award for party and party costs of $109,849. Rounding up the award to $110,000, the Defendant notes that this represents 44% of incurred fees without HST and 38% with HST.

[8] In support of the Defendant's submission that a costs award of $110,000, representing 44% (or 38% with HST) of the Plaintiffs' legal fees is appropriate, counsel provided a series of reverse calculations. These calculations show what the "amounts involved" would be under the Tariff, using various percentages of the Plaintiffs' actual legal fees. For example, an award of 50% of the Plaintiffs’ legal fees would mean the notional amount involved would be $1,719,107; for 60%, it would be $2,106,000; for 75%, it would be $2,686,353; and for 85%, it would be $3,073,252 (without HST). The Defendant’s point is that for the Plaintiffs to achieve what they are claiming in legal fees under Tariff A, the amount involved would have to be over three million dollars.

[9] The Defendant also submits that the Plaintiffs’ legal fees are unreasonably high. It argues that Plaintiffs’ counsel billed 827.6 more hours than the Defendant’s counsel, and while three lawyers (never more than two at a time) worked on the Defendant’s case, 16 different people worked on the Plaintiffs’ case.

[10] The Defendant recognizes that a party has a right to choose their own legal team, but says that where the fees and hours are so divergent, and the work product is relatively similar, the fees cannot be said to be reasonable. The Defendant further argues that this is an appropriate case to award less than 50% recovery when legal fees are not reasonable.

[11] With respect to the November 2018 settlement offer, the Defendant simply directs the court to consider the authorities noted in the brief. No further position is advanced. With respect to the March 1, 2022 settlement offer, it argues that it should not be considered because it offered an unworkable term and was therefore incapable of acceptance. The basis of its argument is that Queens County would not allow subdivision of the Defendant's land without a 66 foot right-of-way, and the offer contemplated only a 50 foot wide right-of-way. In the alternative, the Defendant submits that it was reasonable for the Defendant to decline the offer. It says there was no time before trial (which began on March 7) for the Defendant to engage Queens County to see if it would reconsider the requirement for a 66 foot right-of-way, and the Defendant had no obligation to alert the Plaintiffs to the issue.

[12] The Plaintiffs say the March 2022 offer was capable of acceptance because the by-law states that the minimum proposed street shown on a plan of subdivision shall be 20 meters or such lesser width, not less than 15 meters (50 feet). The Plaintiffs say that it is not clear, based on the evidence, whether the County even considered whether 50 feet would be a sufficient width for a road.

The Law

[13] 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.

…

77.08 Lump sum amount instead of tariff

A judge may award lump sum costs instead of tariff costs.

[14] 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

Amount Involved	**Scale 1 (-25%)**	**Scale 2 (Basic)**	**Scale 3 (+25%)**
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
$65,001-$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%.		

[15] Civil Procedure Rule 10.03 addresses settlement offers in relation to determining costs. It states:

> **10.03 Settlement offers and costs**
>
> A judge who determines costs may take into consideration a written offer of settlement made formally under this Rule or otherwise, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs.

[16] Rule 77.02(1) provides direction to the court to "do justice between the parties." The starting point in determining party and party costs is the Rule 77 tariffs. 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, and there must be a reason to consider a lump sum. 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. Substantial contribution does not mean complete

indemnity but is intended to be more than 50% and less than 100% of reasonable legal fees incurred (paras. 15 and 16).

[17] The Civil Procedure Rules do not provide guidance on when a court should use its discretion under Rule 77.08 to depart from the tariffs in favour of a lump sum award of costs. However, in *Armoyan*, *supra,* the court noted that some cases bear no resemblance to the assumptions in the tariffs; for example, there may be no amount involved. Other factors, such as failed settlement offers, inject additional subjectivity into the process. The court said that 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 the court's discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the Rules and the case law (para. 18).

[18] Lump sum costs have been awarded in a number of cases where there was no "amount involved." The below cases illustrate that this court has often awarded lump sum amounts in property disputes where there is no amount involved and the issues relate to rights-of-way, adverse possession claims, etc. The following are some of the circumstances where lump sum awards were made:

1. *Armoyan, supra* - There was no amount involved, as the issue was whether the courts of Nova Scotia or Florida should take jurisdiction. The court noted that what started as a motion had ripened into a complex hearing spanning more than 10 days of hearing time over a period of 11 months. After considering the conduct of the unsuccessful party and a rejected settlement offer, the court ordered 66% of the base legal fee amount before the settlement offer, 80% after the offer, and 80% of the base sum in the Court of Appeal.
2. *Burgoyne v. Hutton*, 2016 NSSC 302. The court noted there was no amount involved (although the parties had agreed to an "amount involved" of less than $25,000) as the matter involved questions of the existence and scope of rights of way, as well as associated issues of trespass. The matter combined two applications in court, and involved significant effort in affidavit preparation, voluminous affidavits from title searchers, a survey expert, a significant amount of evidence dating to the 1960s, preparation of post hearing written submissions, etc. Because there was not complete success, the court determined that an appropriate percentage would be 50%. The

portion of the fees claimed was actually slightly below the 50% and this lesser amount was awarded.

3. *Henneberry v. Compton*, 2014 NSSC 412. The respondents were largely successful in opposing a claim for adverse possession of an area of land within their rear boundary line. The applicants had some minor success. The court rejected the use of an arbitrary rule of thumb approach based on the number of days of trial and adopted a lump sum approach. The judge noted that the first settlement offer was similar to the trial outcome, while the second was more advantageous to the applicants. The judge ordered a recovery of approximately 57% of the fees incurred, which would have been higher but for the minor success of the applicants.

4. *Laamanen v. Cleary*, 2017 NSSC 153 aff'd 2018 NSCA 12. This matter involved a right-of-way dispute. The court said that a lump sum cost award was appropriate as there was no amount involved and trying to proceed under Tariff A was akin to picking a number out of the air. The judge noted that the applicants were the successful party, and they were not to be deprived of their reasonable costs by "a parsing of their success on individual claims advanced" (para. 16). The court reviewed several settlement offers and found the first one to be more favourable to the respondents than the court's decision. The court noted that this was "a significant factor" in considering costs (para. 21). The Notice of Application was filed in January 2016 and the settlement offer was advanced early in the process, in July 2016. The hearing of the matter took place in January 2017. A costs award of 75% of the reasonable legal fees was ordered.

5. *Roode v. Johnston*, 2019 NSSC 22. The judge in this case granted an order quieting the title based on adverse possession, and an order declaring a right-of-way by prescription in favour of the plaintiffs over an existing pathway to a beach. The judge rejected the defendants' argument that costs should be based on the assessed value of the portion of the plaintiff's land in issue. In awarding lump sum costs, the court took into account a settlement offer which was essentially equivalent to the court's decision. The court held that an award of 75% of the legal fees incurred was appropriate.

6. *Shannon v. Frank George's Island Investments Ltd*., 2015 NSSC 133. This case required the court to determine whether lanes were private

roads and whether they benefitted the respondent's island. The court rejected the argument that there was divided success, finding that the applicants were the overall successful party. The court noted that costs are to be determined not on an argument-by-argument basis, but on the overall success in the matter. The applicants were seeking 60% of their legal fees and Justice Chipman concluded that this percentage was reasonable.

Analysis

Tariff or lump sum?

[19] Clearly, utilizing the tariffs is preferable when awarding costs, as it provides the parties with predictability. However, some cases simply bear no resemblance to the tariffs' assumptions. This is one such case. There is no amount involved here. In the circumstances of this matter, artificial assumptions and calculations would be necessary in order to utilize the tariffs. The Defendant says the amount involved should be the assessed value of the Freeman properties that would have been impacted by use of the right-of-way for a campground, multiplied by a factor of two to account for the assessed value not being equivalent to market value and also the importance of the land to the Plaintiffs. An assessed value has been used by the Defendant, as there is no evidence before this court of the market value of the Freeman properties. The Defendant applied a multiplier based on the value the Plaintiffs were prepared to pay for adjoining vacant land as part of a failed settlement proposal, and rounded it up to a multiplier of two to account for the importance of the land to the Plaintiffs. However, some might say a truer amount involved is the loss in value of the property with a right-of-way for campground use versus the value without such a right-of-way. Another option is the so-called rule of thumb approach based on the number of days of trial. The point is that this is all arbitrary guesswork akin to pulling numbers out of the air. I do not agree that the assessed value of the land involved, or even its market value, represents an appropriate amount involved in a right-of-way dispute. There are simply too many variables involved for this to be a useful or predictive costs exercise.

[20] The Freeman property began as a family cottage property. If the assessed value of the seasonal cottage was $50,000, would this be a reasonable amount involved for a right-of-way dispute? Using assessed values or market values of the land in issue, or a portion of the land in issue, is generally not representative of the interests at stake in such land disputes. The circumstances of each case are wildly divergent. Assessed or market values cannot be used with any consistency. It is an

arbitrary exercise to assign an amount involved that does not even address the considerations set out in Rule 77 where there "is a substantial non-monetary issue involved", being the complexity of the proceeding and the importance of the issues. The preferred route is an award of lump sum costs that takes into account all the relevant factors, while addressing the substantial contribution principle.

[21] Despite the Defendant's arguments, I find that its suggested calculations require a very high degree of subjectivity, and the tariffs were intended to avoid such artificiality of calculation. This type of arbitrary calculation should only be considered as an absolute last resort, where, for example, there is no evidence of actual legal fees incurred upon which to calculate a lump sum.

[22] This matter has no amount involved, but important issues were at stake for the parties. In my view, this is exactly the type of case that the discretion to award a lump sum amount in the Civil Procedure Rules was intended to address. Plaintiffs' counsel has provided their detailed statements of account setting out actual fees and disbursements incurred. This is important information for the court to have in cases where there is no amount involved. It allows the court to assess the reasonableness of actual fees, thereby removing any burden on the court to assign artificial amounts based on highly subjective factors.

[23] There are a number of factors to consider in determining an appropriate lump sum amount that would do justice between the parties. They include, but are not limited to: the substantial contribution principle, which dictates that recovery should generally be more than 50% and less than 100% of incurred reasonable fees; the actual fees and disbursements incurred by the successful party and their reasonableness in the circumstances of the matter; the complexity of the matter and the number of days of trial or hearing; the importance of the issues to the parties; and the factors set out in Rule 77.07 (2), including any formal or informal written settlement offers, the conduct of a party affecting the speed or expense of the proceeding, etc.

[24] In relation to the percentage (generally greater than 50% and less than 100%) to be awarded as substantial contribution, I note again that this percentage will vary, in a principled way, according to the circumstances of the case (*Armoyan*, *supra*, para. 37).

<u>Settlement offers in 2018 and 2022</u>

[25] The November 2018 settlement offer which contemplated a land swap is difficult to assess in terms of whether it is as favourable or more favourable than the trial decision. If one considers only whether the Defendant could have operated a campground on the swapped land, then clearly it would have allowed for this, subject to working out a plan with government authorities for a bridge crossing. Given this is a right-of-way dispute, I have also considered the Defendant's connection with the land itself in relation to this land swap proposal. If there was evidence that the land had deep personal importance to the Wamboldts who are the shareholders of the Defendant company, then a land swap might not be more favourable than the ultimate result of retaining their land but with the inability to operate a campground. However, in September 2018, the Defendant had itself proposed a land swap involving the same land. In short, the Defendant was prepared to swap the land if agreement could be reached on all terms. In addtion, the Defendant had intended to operate a campground on its property and had not placed any limit on the ultimate number of campsites to be developed. The Wamboldts expressed no intention to live on the land themselves.

[26] Under the November 2018 settlement scenario, the Plaintiffs would swap a portion of their land (55 acres) on the Rim (the Freeman Rim Property), that was in essence adjacent to the Existing Campground, in exchange for the Ponhook Lodge Property (35 acres) where the Proposed Campground was intended to be developed. However, access to the Freeman Rim Property would require construction of a bridge. Contribution to the cost of the bridge was part of the offer. As a result, the Defendant would have the opportunity to construct and develop its Proposed Campground.

[27] The following terms were agreed to by the parties in this timeframe and set out in an email dated November 21, 2018: (1) the Plaintiffs would contribute $60,000 towards the cost of a bridge/crossing; (2) the Plaintiffs would assume responsibility for the cost of running power lines to the new boundary between the Rim Property and the portion of the Rim Property to be swapped to the Defendant; and (3) the Plaintiffs would assume responsibility for surveying and engineering costs. Two terms remained in dispute - the total acreage for the land swap proposal, and the nature of the right of way to the Rim Property for the benefit of each party. The bridge construction was not in dispute at this time. The Plaintiffs provided a further offer of settlement on September 24, 2020, increasing the land acreage they would swap from the previous 55 acres to 70 acres.

[28] It is noteworthy that by letter of September 19, 2018, the Defendant had proposed a settlement based on a land swap of the entire Freeman Rim Property (100 acres) for the Ponhook Rim Property (35 acres), along with other terms. Prior to this, Laurie Wamboldt had exchanged some correspondence with the Department of Environment who had looked at some preliminary plans for a bridge crossing and commented as follows:

> …judging by the picture there may not be enough room to do that without altering one or both bodies of water. We would not likely approve it as proposed. Do you have any alternatives?

[29] The September 19, 2018 offer by the Defendant following this exchange did not raise any concerns about the bridge crossing, and, as noted above by November 21, 2018, the issue of the bridge was no longer in dispute, as between the parties. I conclude that the November 2018 settlement proposal was more favourable than the trial decision and should be considered in assessing the costs award. Substantial costs were incurred after this 2018 timeframe which could have been avoided. This is a significant factor for consideration.

[30] The March 1, 2022 settlement proposal advanced by the Plaintiffs provided that the owner of the Freeman Property would grant Ponhook Lodge a 50 foot right-of-way in the area of the "adjusted" right-of-way, and Ponhook Lodge would agree to relinquish the right-of-way in the original path that ran between Charlie Freeman's garage and house (i.e. the right-of-way that was at issue at trial); the Plaintiffs would make adjustments to the first corner at the southern entrance to the right-of-way to make the entrance more gradual; and the purchase of PIDs 70270947 and 70270954 from the Defendant. This offer was made on March 1 and the trial began on March 7, 2022.

[31] The Defendant says the March 1, 2022 settlement offer should not be considered as it contained an unworkable term and was therefore incapable of acceptance. It says Queens County would not allow subdivision of the Defendant’s land on a less than 66 foot right-of-way and the offer was for a 50 foot wide right-of-way. It says in the alternative that if the March 1, 2022 letter is found to be an offer capable of acceptance, it was reasonable for the Defendant to not accept it as there was insufficient time before trial to engage with Queens County to determine whether it would vary its prior position on a 66 foot right-of-way.

[32] I find that the offer of March 1, 2022 was capable of acceptance as the by-law states that the minimum proposed street shown on a plan of subdivision shall be 20

meters or such lesser width, not less than 15 meters (50 feet). The evidence is not clear that Queens County had closed the door to a right-of-way of less than 66 feet.

[33] The Defendant points to Rule 10.09 which says a formal offer is to be delivered at least one week before a trial. It says the offer was not delivered one week prior to trial, however, the Rule does not contain the same requirements as for an informal offer. This was not a formal offer and does not have the same cost implications. For example, Rule 10.09 (2), which deals with formal offers, provides that where a party obtains a favourable judgment, a judge may award an amount based on the tariffs and increased by 50% if the offer is made after setting down and before the finish date, and 25% if the offer is made after the finish date. Given the significant cost implications for formal offers to settle, strict timelines are necessary.

[34] Simply because an informal offer is made on the eve of trial (here three clear days before trial) does not mean that it should be completely disregarded in considering costs. The offer was made on March 1, 2022, and if the Defendant had concerns over approval of a 50 foot right-of-way, there were three additional business days before the trial started to contact the County about this proposal, either individually or jointly. While such a late offer will not have the same impact on costs as ones presented much earlier in the process, it is still a factor for consideration.

[35] I am of the view that the Plaintiffs' two settlement proposals were more favourable than the court's decision and are therefore relevant factors when considering costs.

Are the claimed fees reasonable?

[36] The Defendant takes issue with the reasonableness of the fees charged by Plaintiffs' counsel. It says the fees are too high, the law firm utilized too many different lawyers and paralegals, and that when compared to the fees the Defendant incurred, the amount is clearly unreasonable.

[37] Parties are entitled to retain counsel of their choice. I recognize that there may be circumstances where a comparison between the parties of their incurred legal fees and hours spent may result in a determination that the claimed fees are unreasonable. However, the mere fact that one party incurred higher fees than the other does not equate to unreasonableness, absent other factors at play. There are many possible reasons for differing legal fees between the parties. Lawyers have different hourly rates, as was the case here. Some lawyers have higher rates due to their experience and years at the bar. Some charge higher rates due to higher overhead costs than

those of other counsel. Plaintiff and defendant's counsel may employ very different strategies based on instructions from their clients. Issues may be more important to one party than another and result in higher legal fees being incurred by that party. Parties may have different budgets and ability to pay and some may work out a schedule of fees with their lawyers. Some lawyers may be better timekeepers than others. The plaintiff or applicant may have a greater burden from an evidentiary perspective, requiring extensive exhibits and *viva voce* evidence to support their case. The same is true for a defendant or respondent in certain cases. One party may have significantly more cross-examinations to prepare for, or cross-examinations that are document intensive, requiring more hours of preparation time. One party may expend significantly more time preparing exhibits in a document intensive case. One party may retain expert witnesses while the other does not. One party may be advancing a new or novel legal argument requiring extensive research and legal submissions. In short, there are a whole host of reasons, singularly or in combination, as to why one party may incur much higher legal fees than another party. This, in and of itself, is not a reason to discount a successful party's otherwise reasonable fees.

[38] Some lawyers utilize the assistance of associates and paralegals, while others do not, or not to the same degree. Some lawyers take the view that it is not always cost effective for the highest rate lawyer to be doing the bulk of the research, or for lawyers to prepare exhibit books when paralegals can do this work at a lower cost to the client. However, some lawyers may disagree, or may not have access to associates or paralegals and, therefore, they do the work themselves. Just because several associates work on a file does not mean that the fees charged are unreasonable, without other evidence. I am not prepared to assume, as the Defendant suggests, that simply because 16 people worked on the matter, including seven associates and five paralegals, the fees charged must necessarily be unreasonable. In addition, it was perfectly reasonable for Plaintiffs' counsel to have an associate lawyer assisting him at trial.

[39] The detailed accounts provided in the affidavit of Ms. Walsh clearly set out the particulars of the work done by each person involved with the matter, the time spent, and rate charged. I have carefully reviewed the accounts and see nothing unreasonable about the time entries in the circumstances of this matter. I do note that there was one time entry of September 3, 2018 that appears, at least in part, to relate to another matter. I have taken this minor oversight into account.

[40] I note that Rule 77.13(2) provides some guidance for assessing the reasonableness of counsel's fees. I have considered this guidance and note for example, that counsel for the Plaintiffs worked to achieve a resolution of this matter well in advance of trial. The affidavit evidence indicates several overtures, including in 2017, 2018 and 2022. The issue was of significant importance to the parties and no delay was argued, nor did I find any. For the Plaintiffs, the issue was a matter of their ability to enjoy their property without being subjected to campground users and employees traveling over a right-of-way that ran between their residence and garage. For the Defendant, the important issue was one of their livelihood, which depended on whether they could continue with their planned campground expansion that required use of the right-of-way. I am of the view that Mr. R. Rogers, the lawyer who represented the Plaintiffs, provided both effective and efficient legal representation. There were seven days of trial, discovery of 10 witnesses, extensive land title investigation, numerous attempts to reach a settlement, a counterclaim advanced in 2021 (well into the litigation), and extensive exhibit books containing title reviews, title histories and title abstracts that were largely compiled by the property paralegal working with Plaintiffs' counsel. I find that the legal fees charged were reasonable in the circumstances.

[41] The total legal fees charged and paid by the Plaintiffs was $252,382.69, plus HST of $37,857.40. As noted above, the Plaintiffs claim 85% of this total amount or $246,704, which they have rounded down to $245,000.

[42] Taking into account the settlement offers and the other factors I have noted above, I am of the view that the appropriate percentage is 78% of the Plaintiffs' actual legal fees incurred, or $196,858.50. In this case, I prefer a global percentage that takes into account the settlement offers and their timing, rather than setting separate pre and post settlement offer percentages. I now turn to address whether HST should be added to the fees before applying the 78%. The Rules do not address the question of whether HST should be included in a costs award.

[43] In *R. (G.B.) v. Hollett*, 1996 NSCA 121, the Nova Scotia Court of Appeal clearly stated that tax is not payable on an award of costs:

> 198 I agree with the comments of Goodfellow J. in *Day v. Day* (1994), 129 N.S.R. (2d) 186 at p. 193:
>
> > While the theory of costs is that it is a partial reimbursement by way of indemnification to the successful party, costs are the property of the party,

> and no GST is incurred or is payable on an award of costs. Costs do not represent goods and services, and being owned by the party should not be related to a client's liability for whatever GST is required by law on a solicitor/client bill for legal fees.

[44] I note that the Court of Appeal has affirmed cost awards inclusive of HST without specific comment on the HST issue (*Laamanen, supra* and *L.K.S. v. D.M.C.T.*, 2008 NSCA 61). In addition, the Court of Appeal added HST to an award of costs in relation to proceedings in the court below, but did not explicitly address the issue *(Moore v. Darlington*, 2012 NSCA 68, at para. 64). After review of these cases, I am of the view that the Court of Appeal has not revisited and explicitly overturned its earlier decision in *R.(G.B.), supra*. It remains the law in Nova Scotia and I decline to add HST to the costs award.

[45] Therefore, the costs award will not include HST. However, the Court of Appeal in *R. (G.B.), supra* stated that reimbursement for disbursements does include the HST paid. In this regard, I refer also to the decision of *Mader v. Lahey and Mailman* (1997), 176 N.S.R. (2d) 143, 538 A.P.R. 143 (S.C.), where Justice Edwards reviewed the law and stated:

> [43] HST is not to be calculated on an award of costs other than in respect of disbursements to the extent the disbursements have been allowed and HST actually has been paid.
>
> [44] Reference is made to the Court of Appeal decision in *Roose v. Hollett et al* (1996), 154 N.S.R. (2d) 161, 452 A.P.R. 161 (C.A.). In that case the Court stated clearly, following a number of decisions by Goodfellow, J. that GST was not to be added to taxable party and party solicitor's costs. That reasoning was followed and applied by Saunders, J. in two cases in which he held that HST was not claimable other than HST paid on disbursements — *MacDonell v. M & M Developments Ltd. et al*., [1977] N.S.J. No. 342; 164 N.S.R. (2d) 81; 491 A.P.R. 81 (S.C.) and *Campbell v. Lienaux et al*., [1977] N.S.J. No. 343; 165 N.S.R. (2d) 356; 495 A.P.R. 56 (S.C.)
>
> [45] As such, no award for HST on costs can be made other than as noted in respect of disbursements.
>
> [Emphasis Added]

Conclusion

[46] The Plaintiffs will have judgment against the Defendant for a costs award in the total amount of $196,858.50, plus agreed upon disbursements in the amount of $9,268.22 (disbursements are inclusive of HST). I ask that counsel for the Plaintiffs prepare the order.

Jamieson, J.