

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Baird v. Barkhouse, 2014 NSSC 74

**Date:** 20140224

**Docket:** Syd. No. 334436

**Registry:** Sydney

**Between:**

Jeffrey Warren Baird

Plaintiff / Respondent

v.

Brian Vincent Barkhouse

Defendant / Applicant

**Decision on Costs**

**Judge:** The Honourable Justice Robin C. Gogan

**Heard:** November 12, 2013, in Sydney, Nova Scotia

**Final Written Submissions:** January 30, 2014

**Counsel:** Hugh R. McLeod, for the Plaintiff/Respondent  
Guy LaFosse, Q.C., for the Defendant/Applicant

**By the Court:**

**Introduction**

[1] Jeffrey Warren Baird filed a Notice of Action against Brian Vincent Barkhouse on August 18, 2010 seeking damages resulting from a motor vehicle collision. The accident occurred on July 26, 2009. A Defence was filed on September 15, 2010. Discoveries were held in December of 2012.

[2] On June 18, 2013, Mr. Barkhouse brought a motion seeking production of documents from Mr. Baird pursuant to Rule 18. The motion was heard on November 12, 2013. The Applicant was entirely successful for the reasons set out in *Baird v. Barkhouse*, 2013 NSSC 425. The issue of costs remains outstanding. Written submissions were received from the Applicant on January 21, 2014 and from the Respondent on January 30<sup>th</sup>, 2014.

**Issue**

1. What is the appropriate cost award in the circumstances?

## **Analysis**

### *Position of the Parties*

[3] Mr. Barkhouse was the successful party on his motion. He seeks costs in the amount of \$3,000 plus disbursements, in any event of the cause, payable forthwith. Mr. Barkhouse relies upon Rule 77 and Tariff C and submits that this is an appropriate case for an accelerated cost award. He points to the history of the proceeding, the amount of time and effort involved in the hearing of the motion, as well as Mr. Baird's cavalier approach to his discovery and disclosure obligations under the Rules.

[4] Mr. Baird submits that the amount of \$500 is appropriate and that the award should be payable at the conclusion of the proceeding.

### *The Law*

[5] The authority for the Court to award costs to a party is found in Rule 77. It is well established that costs are in the discretion of the Court. Generally speaking, the Court will award costs to a successful and well behaved litigant.

[6] Rule 77.02 provides a general discretion with respect to cost orders:

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

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

[7] Rule 77.03 gives direction as to liability for costs:

**77.03** (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.

(2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.

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

(4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:

(a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;

(b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;

(c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;

(d) any other way the judge sees fit.

[8] Rule 77.05(1) provides that the provisions of Tariff C apply to a motion, unless the judge hearing the motion determines otherwise.

[9] Tariff C provides, in part, as follows:

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:

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added or subtracted from the costs calculated under Tariff A.

(3) In the exercise of the 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) ...

[10] Tariff C further provides a range of costs applicable to a motion in accordance with the length of the motion hearing. Rule 77.07(1) allows an increase to or decrease from tariff costs. Examples of factors to consider in departing from tariff costs are found in Rule 77.07(2). The factors include, “conduct of a party affecting the speed or expense of a proceeding”.

*Ruling*

*(a) The Quantum of Costs*

[11] Mr. Barkhouse was completely successful on the motion and is entitled to his costs. The motion, on its face, was simple. Mr. Barkhouse sought production of information requested at the discovery examination of Mr. Baird in December of 2011. Mr. Baird did not object to the production of the information at discovery. Nevertheless, on the hearing of the production motion almost one year post discovery, an extensive list of documentation remained outstanding.

[12] Mr. Baird contested the motion. He swore an affidavit detailing his position and was cross-examined. His evidence on the motion was inconsistent with his answers when discovered. This raised issues of compliance with Rule 18.19 and complicated the motion. Mr. Baird also took the position that some of the requested medical disclosure was unreasonable, unfair, onerous and premature. I disagreed and ordered the requested medical documentation to be produced.

[13] The motion required 2 appearances which took more than a half day but less than 1 day in total. Accordingly, the Tariff costs on the motion are between \$1000 and \$2,000. Given that the time required for the motion only slightly exceeded one

half day, the starting point of my assessment would be on the lower end of the range.

[14] I have been asked by Mr. Barkhouse to depart from the tariff costs and award a higher amount of costs. This submission invites me to “accelerate” the cost award “because of the procedural history in this action, the amount of time and effort involved in the hearing of the motion, and the Plaintiff’s approach toward his obligations under the Civil Procedure Rules”. In my view, the amount of time and effort involved in this matter is recognised by the tariff costs. Accordingly, I would not depart from the tariff on this basis.

[15] Rule 77 does provide discretion to adjust the tariff in accordance with Rule 77.07(1) and in accordance with Rule 77.02(1) that “will do justice between the parties”. In this respect, I have also reviewed and adopt the reasons of Goodfellow J. in *Armour Group Ltd v. Halifax (Regional Municipality)*, 2008 NSSC 123.

[16] In exercising my discretion to award costs, I find it appropriate to increase the cost award above the tariff costs. I do so considering the conduct of Mr. Baird and in particular:

1. Mr. Baird’s overall conduct respecting disclosure fell below the required standard;

2. Mr. Baird's approach to disclosure and discovery was cavalier;
3. Mr. Baird's efforts to provide consensual disclosure lacked the diligence required in the circumstances;
4. Mr. Baird's approach to disclosure and discovery delayed the proceeding;
5. Mr. Baird's failure to correct discovery errors necessitated the motion, in part, and made it more complicated; and
6. Mr. Baird advanced a disclosure strategy with respect to medical records that was unreasonable and inconsistent with the Rules.

[17] Mr. Baird's overall approach to disclosure and discovery delayed the proceeding and unnecessarily increased costs to Mr. Barkhouse. Mr. Barkhouse was required to bring a motion to rectify the misconduct of Mr. Baird. In the circumstances, I order Mr. Barkhouse to pay costs of \$1,750.00 to Mr. Baird. These costs are to be payable in any event of the cause.

*(b) The Payment of Costs*

[18] The remaining question is whether this cost award should be payable forthwith as requested by Mr. Barkhouse.



[19] I have reviewed the parties' submissions and considered the relevant case law on the issue.

[20] Rule 77.03(4)(c) provides authority to the Court to order costs payable immediately. It is well settled that there no longer exists any general proposition that costs on all interlocutory matters are to be costs in the cause (see *Salvage Association v. North American Trust Company*, 1998 NSCA 210).

[21] The decision of Wright J. in *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2011 NSSC 3 dealt with the narrow issue of the timing of a cost award. Justice Wright reviewed the authorities on the issue and concluded:

[22] The court recognizes that the most common basis in the case law for an award of costs to be payable forthwith is the situation where the court thereby reflects its disapproval of some conduct on the part of the unsuccessful party. However, in light of the wide discretion that the court has when it comes to costs, it is my view that that is not the sole situation in which an award of costs payable forthwith can be justified. The *Salvage Association* case, in my view, does not stand for such a broad proposition.

[22] In *Salvage Association*, the Nova Scotia Court of Appeal upheld a decision of Davison J. awarding costs payable forthwith against a party resisting discovery. On appeal, it was argued that costs should have been ordered in the cause. Bateman J.A., writing for the Court of Appeal, disagreed:

49 His award of costs to the successful party on the application accords with the common law and the provisions of Rule 63.03. It is reasonable to conclude, as

well, the Justice Davison, in ordering costs payable forthwith, was expressing his disapproval of the appellant's resistance to discovery, which has necessitated the respondent's application to the Court.

[23] In the present case, Mr. Baird was non-compliant with the Rules of disclosure and discovery. His conduct resulted in a motion for production. Explicitly, Mr. Baird's conduct delayed the disclosure required to move the proceeding forward in a timely fashion. Implicitly, the conduct delayed the entire proceeding and resulted in unnecessarily increased costs for Mr. Barkhouse.

[24] In the circumstances, it would not be fair or just for the cost award to be payable at the conclusion of the proceeding. Costs shall therefore be payable on or before March 31<sup>st</sup>, 2014.

### **Conclusion**

[25] Mr. Baird shall pay costs to Mr. Barkhouse in the amount of \$1,750.00, in any event of the cause, payable no later than March 31<sup>st</sup>, 2014.

J.