SUPREME COURT OF NOVA SCOTIA

Citation: *National Bank Financial Ltd. v. Potter*, 2014 NSSC 264

Date: 2014-07-10

Docket: Hfx 174294 (Debt Action)
Hfx 206439 (Main Action)
Hfx 208293 (Barthe Action)
Hfx 246337 (National Bank/Weir Action)

Registry: Halifax

Between:

National Bank Financial Ltd.

Plaintiff/
Defendant by Counterclaim in Hfx. No. 174294

-and-

Daniel Frederick Potter, Gramm & Company Incorporated, Starr's Point Capital Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald D. Richter, Solutioninc Limited, John Francis Sullivan, Linda Fay Sullivan, Calvin W. Wadden, Craig Anthony Dunham. Douglas George Rudolph, Gerard B. McInnis, Janine M. McInnis, Lowell R. Weir, Blackwood Holdings Incorporated, and Staffing Strategists International Inc.

Defendants/
Plaintiffs by Counterclaim in Hfx. No. 174294

-and-

Daniel Potter, Starr's Point Capital Incorporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald Richter, Donald Snow, Meg Research.com Limited, 3027748 Nova Scotia Limited, Calvin Wadden, Raymond Courtney, Bernard Schelew, Blois Colpitts, Stewart McKelvey Stirling Scales, Bruce Clarke, 2317540 Nova Scotia Limited, Knowledge House Inc., The Estate of the Late Michael Barthe, represented by his Executrix Barbara Barthe, Lutz Ristow, Derek Banks and Plastics Maritime Ltd.

Third Parties in Hfx. No. 174294

Judge:	The Honourable Justice Gregory M. Warner
Heard by Written Submissions:	To February 12, 2014
Counsel:	Augustus M. Richardson, Q.C., counsel for Craig Anthony Dunham, Lowell R. Weir, Blackwood Holdings Incorporated, Carol MacLaughlin-Weir and the Estate of Michael Barthe David G. Coles, Q.C., James Hodgson and Robert Blair, counsel for National Bank Financial Limited and National Bank of Canada Calvin Wadden, unrepresented

By the Court:

Introduction

[1] This is the costs decision from the joint trial (2013 NSSC 248) of related litigation involving National Bank Financial Ltd ("NBFL") and National Bank of Canada ("NBC"), and in particular:

a) The successful counterclaims against NBFL by Craig Dunham ("Dunham"), Lowell Weir ("Weir") and Blackwood Holdings Inc. ("Blackwood Holdings") in the Debt Action;

b) The successful defence and counter-claim by Lowell Weir and Carol MacLaughlin-Weir ("MacLaughlin-Weir") in the National Bank/Weir Action;

c) The successful claim by the Estate of Michael Barthe ("Barthe estate") against NBFL in the Barthe Action;

d) The successful defence by the Barthe estate of NBFL's counterclaim in the Barthe Action and NBFL's third party indemnity claims in the related actions, including the Debt Action; and,

e) The unsuccessful defence and counterclaim by Calvin Wadden ("Wadden") against NBFL in the Debt Action, NBFL's successful claim in the Main Action and third-party indemnity claims in the Debt Action and Barthe Action.

[2] In this decision, the Court describes NBFL and NBC collectively as the "Defendant" or "NBFL", and Dunham, the Weir family and Barthe estate collectively as the "successful Plaintiffs". Calvin Wadden is described as the "unsuccessful Plaintiff" or simply "Wadden". These terms are used for convenience and are not intended to detract from the fact that:

a) NBFL was the Plaintiff in the Debt Action while Calvin Wadden, Craig Dunham, Lowell Weir, and Blackwood Holdings Inc. were defendants and plaintiffs by counterclaim in the Debt Action;

b) Calvin Wadden was the only remaining Defendant in the Main Action; and,

c) the Barthe estate was a plaintiff in the Barthe Action and defendant in NBFL's counterclaim, while NBFL claimed against Calvin Wadden as a third party defendant and the Barthe estate by counterclaim and as a third party defendant.

[3] Throughout this litigation the Court has referred to "groups of parties". Lowell Weir, Carol MacLaughlin-Weir and Blackwood Holdings were one "group of parties". When the Court refers to "the Weir group", it refers to Lowell Weir, Blackwood Holdings and Carol MacLaughlin-Weir collectively.

[4] W. Dale Dunlop ("Dunlop") was trial counsel for all the parties except NBFL. For this decision, costs counsel for the successful Plaintiffs is Augustus Richardson Q.C. ("Richardson"). Counsel for the successful Plaintiffs claims party and party, or lump sum costs of $750,000, against NBFL for Dunham and the Weir group and 1.5 million dollars for the Barthe Estate, plus $94,000 in respect of "days of trial" as well as $312,573.41 for disbursements.

[5] Wadden is not represented by counsel. Wadden advises that "he has nothing to add to the discussions on the matter of NBFL's costs".

[6] NBFL submits that the successful Plaintiffs should have party and party costs of $129,057.72 or, alternatively, lump sum costs of $300,000 plus disbursements of $12,810.67.

[7] With respect to NBFL's successful defence of Calvin Wadden's counterclaim and NBFL's partial success against Wadden in its Third Party Claim for indemnity against the successful Plaintiffs, NBFL seeks trial costs of $741,252.92 plus disbursements of $9,062.03.

[8] At trial, NBFL claimed margin debts owed by Dunham, Weir, Blackwood Holdings and Wadden. The fact that these margin debts had been incurred and the calculation of the amounts claimed by NBFL was not contested. Liability for these margin debts (and interest on them) was contested only as a matter of law by reason of Bruce Clarke's ("Clarke") fraudulent wrongdoing, NBFL's negligent and vicarious liability for Clarke's wrongdoing as well as NBFL's failure, since 2005, to admit its liability for the wrongdoing of Clarke. Similarly, Weir and MacLaughlin-Weir did not contest the fact that NBC advanced them $100,000 in the National Bank/Weir Action. These factual concessions are relevant to the costs analysis.

[9] The real contest, for which Dunham, Weir and Barthe (as well as Wadden) were required to present evidence at trial and in respect of the entire litigation, was the liability of NBFL for the alleged wrongdoing of Clarke as well as its own negligence, breach of contract and breach of fiduciary duty.

[10] The initial costs submissions made by the successful Plaintiffs in October 2013 were for solicitor and client costs. These submissions were replaced on December 20, 2013, by a claim for party and party costs based on the September 2004 "new tariff" and their calculation of the "amount involved" ("AI"), adjusted to a lump sum costs award to obtain a substantial contribution to reasonable legal costs.

[11] NBFL filed written submissions on February 6, 2014, seeking that costs be awarded against it as party and party costs, based on the "old" 1989 Tariff, and on a lower AI than claimed, further reduced on the basis that the successful Plaintiffs shared one counsel with several other parties and NBFL had made reasonable offers of settlement.

[12] The successful Plaintiffs filed a reply brief on February 12, 2014.

[13] In the end, all parties accepted that the principle of costs based on a substantial contribution to reasonable legal expenses applied to the analysis, but advanced vastly different methods of applying that principle.

The Successful Plaintiff's Claims

Submissions

Successful Plaintiffs' Submissions (Dunham, Weir/Blackwood, Barthe estate)

[14] At the time of the successful Plaintiffs' submissions, counsel did not have access to this Court's cost decision in *Wadden v BMO*, 2014 NSSC 11.

[15] Counsel relied on the October 28, 2013, affidavit of Dunlop filed with the original solicitor and client costs submission and a supplementary affidavit sworn January 9, 2014. NBFL elected not to cross-examine on these affidavits.

[16] The successful Plaintiffs seek lump sum costs as follows: for Dunham and Weir collectively, $725,000; for the Barthe estate, $1,500,000 and for trial dates, $94,000, for total fees of $2,319,000 plus disbursements of $312,573.41. Richardson claims this represents a substantial contribution towards, but not a complete indemnity of, these parties' costs.

[17] The successful Plaintiffs' submission is underscored by two important factors:

a) NBFL knew, or should have known, the basis of its liability to the successful Plaintiffs - Clarke's participation in the KHI stock manipulation scheme - shortly after March 2000 and, in any event, not later than August 3, 2000. Notwithstanding this knowledge, NBFL commenced actions against the successful Plaintiffs in the fall of 2001 and defended Dunham and Weir's allegation of wrongdoing by Clarke. In response to the Dunham and Weir's defences and counterclaims, NBFL conducted its own thorough investigation in March 2005, from which it determined (as it advised the Court in 2005) that it was never in doubt of the wrongdoing of Clarke and other insiders, and NBFL sued Clarke and these insiders. In June 2005, it made admissions of wrongdoing and a "secret" deal with the staff of the Nova Scotia Securities Commission to settle the Nova Scotia Security Commission's claims of wrongdoing by NBFL related to Clarke's wrongdoing. These 2005 admissions by NBFL to the Nova Scotia Securities Commission were part of the findings also made on the evidence at trial in these proceedings. Only after the successful Plaintiffs had put on their evidence at trial did NBFL, who had filed a long List of Witnesses for the trial, disclose that it was calling no evidence in support of its previously pleaded denials of wrongdoing of NBFL or Clarke.

b) Over eleven years, NBFL represented to the Court that it had good grounds for its pleadings or that it did not know anything that would suggest that its pleadings were either wrong or misleading. In fact, it knew otherwise and had admitted so to the Securities Commission, but had erected a "Potemkin villain" in this litigation to hide the truth – conduct

that imposed substantially greater costs on the successful Plaintiffs than should have been required.

[18] The successful Plaintiffs argue that the "new" September 24, 2004, tariff should apply. If not, the Court should exercise its discretion to use the new tariff as a guide for an assessment under the old tariff or consider a lump sum.

[19] Counsel acknowledges that the weight of precedent is that the tariff at the time an action is commenced applies, but argues that the unique circumstances of this case should be used as a guide in the exercise of discretion that exists under both the old and new tariff and the present *Rule 77*.

[20] NBFL knew before September 24, 2004, that it was at fault. Instead of proceeding differently, it fought "tooth and nail" with the intent to defeat the successful Plaintiffs, not on the merits but by grinding them down. Counsel notes the Court's discretion under the old tariff to depart from the old tariff or at least to be guided by a different approach.

[21] Counsel notes that discretion is exercised within the scope of a step-by-step analysis of enumerated factors, starting with a determination of the AI. The AI is not the same thing as the judgment amount. Where a party's claim is allowed, the AI is rather "an amount determined having regard to the amount allowed the complexity of the proceedings and the importance of the issues." Where a claim is successfully defended, the AI is not based upon the judgment amount but an amount determined having regard to the amount provisionally assessed (if assessed); the amount claimed; the complexity of the proceeding; and, the importance of the issues.

[22] Once the AI is determined, the Court must select the appropriate scale in Tariff A. Thereafter, the Court may add amount to or subtract an amount from tariff costs pursuant to *CPR 77.07*. Relevant factors for the *CPR* 77.07 exercise include *CPR 77.07(2)(e), (f), (g)* and *(h)*: the conduct of the party affecting the speed and expense of the proceedings; steps in the proceeding taken improperly or abusively; steps in the proceedings a party is required to take because the other party unreasonably withheld consent; and, a failure to admit something that should have been admitted.

[23] Finally, if the Court does not consider the award generated by the tariff (applying the above three steps) to generate a substantial contribution to a party's reasonable legal costs, the Court may order a lump sum.

[24] In its first brief, without benefit of the *Wadden v BMO* cost decision, Richardson submitted that the total judgment awarded to Dunham, exclusive of prejudgment interest ("PJI") was $922,250. This did not give credit for the portion of the margin account debt offset against the Court's finding of the damages caused to Dunham by NBFL's wrongdoing.

[25] With respect to NBFL's action against Weir and Blackwood Holdings as well as the dismissal of NBC's claim against Weir and MacLaughlin-Weir, counsel submits that the amount

awarded was $500,625 (exclusive of PJI). This sum does not give credit for the portion of the margin account debt that was owed by Weir and Blackwood Holdings to NBFL.

[26] With regards to the Barthe estate, counsel described the award (excluding PJI) as 1.7 million dollars less a negligible amount from the sale of KHI shares. Counsel advised that the counterclaim and third party claims of NBFL against the Barthe estate for Barthe's alleged wrongful failure to blow the whistle on KHI easily exceeded 20 million dollars. The Barthe estate acknowledges that some of the third party claims for which NBFL sought indemnity settled prior to trial and that the total amount claimed by NBFL in its counterclaim against the Barthe estate as well as in its third party claim was not before the Court at the commencement of the trial. It therefore estimates the value of NBFL's counterclaim and third party claims against Barthe, as of the trial, as 10 million dollars, or 50% of the potential exposure when the claim was commenced. For the purposes of the first step in the calculation of the AI, it submits that the AI was about $11,700,000.

[27] Counsel submits that the Court can and should increase the AI by the complexity of the proceeding, which, as of 2008, included more than 54 groups of parties in 11 actions, even though at the time of trial there were 6 groups of parties in 5 actions. This complexity warrants a higher AI.

[28] Finally, in determining the AI, counsel submits that the importance of the issues requires an increase in the AI. This litigation was not a simple debt claim as far as NBFL was concerned. At stake was its reputation as a trusted financial advisor as well as a careful and prudent guardian of its client's money. Its desire to protect that reputation at all costs led it to deny things that it ought to have admitted and to hide things that it should have to revealed as well as to the break a promise that it had made with Weir. The importance NBFL placed upon this litigation increased the legal costs to the successful Plaintiffs far beyond the ordinary.

[29] As a factor related to the importance of the issues, counsel argues the case was equally important to Weir, Dunham and the Barthe estate. For the Barthe estate, the importance was aggravated by the significant amount that NBFL claimed back from the Barthe estate in its counterclaim and third party claim founded on spurious allegations of conspiracy against the late Michael Barthe.

[30] Counsel argued that the AI ought to be doubled to reflect the added complexity and importance of the matters to all parties beyond the simple calculation of the amounts awarded to the successful Plaintiffs and the amount claimed from the Barthe estate. Counsel submits the AI should be fixed as follows: Dunham at $1,844,50; the Weir group at $1,001,250 and the Barthe estate at $23,000,400.

[31] The second step of the analysis involves selecting the appropriate scale for application of either the 1989 or the 2004 tariff. It argues that the scale should be Scale 3 if the 2004 tariff applies and Scale 5 if the 1989 tariff applies.

[32] The top scale can be used to reflect the significant increase in costs caused by the conduct of the unsuccessful party. Counsel cites: *Chaddock* (1993), 121 NSR (2d) 274; *Turner-Lienaux v AGNS* (1992), 115 NSR (2d) 200; *Landymore v Hardy* (1992), 112 NSR (2d) 410, and *Leddicotte v AGNS*, [2002] NSJ 289 (NSCA). The top scale may also be used when pretrial processes are extremely time consuming.

[33] Applying these first two considerations (AI plus top tariff scale) results in the following party and party costs:

a) to Dunham, under the new tariff, $149,865 and under the old tariff, $97,550;

b) to Weir, under the new tariff, $80,938 and under the old tariff, $55,325; and,

c) to the Barthe Estate, under the new tariff $1,901,250 and under the old tariff, $1,175,325. Counsel submits that the Barthe Estate party and party award should be fixed at 1.5 million dollars, half way between the old and new tariff calculation.

[34] Counsel submits that a lump sum award under *CPR 77.08* is appropriate in cases as complex as these proceedings and in light of the conduct of NBFL. These factors may make the straight party and party tariff approach inappropriate. Counsel cites many post-2004 decisions where lump sum awards were found more appropriate. They include: *Bevis v CTV*, 2004 NSSC 209; *Giffin v Soontien*, 2012 NSSC 354; *Creighton v AGNS*, 2011 NSSC 437 and *Wall v Horn Abbott*, 2008 NSSC 4. He argues that this case was at least as complex, hard-fought and bitter as *Wall v Horn Abbott*. He notes that in BMO's submissions to the Court regarding its cost claim against Wadden (which brief, but not the Court's decision, he received before his submissions), BMO claimed actual legal fees in excess of 1.2 million dollars and sought a lump sum award of $725,000, even though the top scale under the 1989 old tariff would have resulted in a party and party award of $494,000.

[35] Counsel submits that, based upon the overlapping of issues, proceedings, time and counsel, Dunham's and Weir's costs should be treated as one amount rather than two. He seeks a total award of $725,000.

[36] Counsel refers to the different fee arrangements between Dunlop and the various successful Plaintiffs described in Dunlop's affidavit and comments on how this should affect the Court's costs determination.

[37] The Weir group had no written or fixed fee agreement with Dunlop, as they expected their matter would settle quickly. I agree that it was a reasonable expectation, based on Weirs' evidence as to NBFL's representations to Weir early in the litigation. At the end of the case, the fee arrangement was equally vague. Dunlop does affirm that he was entitled to keep any costs awarded. Weir paid an advance of $57,500 on his undetermined account. It is not clear from the affidavits or submissions if Dunlop is entitled to keep taxed costs and the advance.

[38] Dunlop's original arrangement with Dunham had two elements: a 15% contingency fee plus an amount equal to one-half of Dunlop's hourly rate (one-half of $250 an hour). Dunlop's affidavit says that when it became apparent that Dunham could not afford to pay the hourly rate or the very extensive disbursements, they agreed to come to a reasonable arrangement, which included that Dunlop would keep any awarded costs. Apparently Dunham made advances on the undetermined legal account with Dunlop of $241,500. It is not clear from the affidavits or submissions if Dunlop is entitled to keep taxed costs and the advances.

[39] Dunlop's arrangement with Michael Barthe, apparently later affirmed by the Barthe estate, was that Dunlop would advance necessary disbursements and keep one-third of any damage award on a contingent fee basis.

[40] Dunlop's Affidavit does not disclose if any of these arrangements were in writing, or whether, respecting the contingent fee arrangement, they were compliant with *CPR 77.14*.

[41] Richardson submits that a cost award respecting the Barthe estate should not be limited to disbursements plus the contingent fee amount of $560,000.

[42] The successful Plaintiffs claim disbursements of about $312,566, including:

Drake Recording Services	$23,820
conference room rentals for discoveries	$7,248
the assistance provided by Dunham	$151,093
document copies at $0.20	$50,000
for interest on litigation loans to Weir	$80,405

Counsel explains the Dunham charge as relating to the hiring of Dunham to assemble and handle the vast volume of documents as well as to manage the documents, a task that would have been impossible in this litigation for Dunlop alone.

NBFL / NBC Brief of February 6, 2014

[43] Counsel for NBFL had the benefit of the Court's costs decision in *Wadden v BMO* before its brief was filed.

[44] NBFL argues for what it describes as an apportionment of a substantial contribution to the reasonable litigation expenses of the five successful parties (it treated the Weir group as three parties) with other Dunlop clients who settled before trial.

[45] Its basic submission was that the substantial contribution should be determined applying the 1989 tariff to a different AI than proposed by Richardson, taking into account the following factors:

i. Costs to the Barthe estate, based on Scale 5 of the old 1989 tariff, should be reduced because of its settlement offer to Barthe;

ii. Dunlop represented 17 other parties, whose claims have been settled or dismissed, the impact of whose proportionate legal costs should be deducted; and,

iii. Many of the claimed disbursements are not proper or properly attributed to the five successful Plaintiffs.

[46] NBFL affirms this Court's reference in *Wadden v BMO* to the underlying principle in party and party costs assessments of awarding a substantial contribution towards, but not complete indemnity, of a party's reasonable expenses as well as my reliance to the *Landymore* and *Williamson* decisions.

[47] NBFL claims that the successful Plaintiffs' submission seeks to recover more by a party and party analysis than is available to it on a solicitor and client analysis. NBFL's approach to the analysis follows the first three of the four steps identified and applied by Richardson in the successful Plaintiffs' brief.

[48] At step one, NBFL adopts as the AI the net amount of the award, including PJI (based on this Court's decision in *Wadden v BMO*). At step two, it submits that the new tariff only applies to actions commenced after September 24, 2004. It cites an earlier costs motion, 2008 NSSC 213 at para 29, in which I noted that: "No party disputes that the pre-September 24, 2004 (old tariff) applies."

[49] It submits that it is only at step two – the selection of the appropriate tariff scale, not at either step one or step three, that the Court looks at a party's conduct or whether the litigation costs were outside what would be expected, to modify party and party costs award. For this reason NBFL agrees that at step two the highest tariff scale is the appropriate scale, but only because step two is the only stage where recognition should be given for a party's misconduct or unusual litigation costs.

[50] NBFL acknowledges that *CPR 77.07* authorizes a third step or stage in the analysis, but makes no comment on the ability of the Court to increase or reduce tariff costs, other than to acknowledge that if the Court determines that the 2004 tariff applies, the highest scale (Scale 3) is appropriate.

[51] NBFL submits that the successful Plaintiffs' claim for costs of $2,319,000 is exaggerated and not based on the principle of substantial indemnity or on evidence of reasonable legal fees.

[52] It submits that the AI in the Dunham matrix was the net amount awarded to him of $885,314 (Dunham's loss of his KHI investment, plus punitive damages, plus PJI, less margin debt). Based on the 1989 tariff scale 5, party and party costs are $49,590 and on the 2004 tariff scale 3, $80,938.

[53] NBFL separates the claims for and against Weir and Blackwood Holdings in the Debt Action from the claim in the NBC promissory note Action. As in the Dunham matrix, NBFL submits that the AI is an amount net of the margin debt owed by Weir and Blackwood Holdings, which debt the Court did not forgive.

[54] It submits that the net amount owed to Weir in the Debt Action was $413,319, which supports a party and party costs award of $25,990 under scale 5 of the 1989 tariff, or $43,438 under scale 3 of the 2004 tariff.

[55] It submits that the successful defence of the NBC claim of $100,000 leads to a party and party costs award of $10,325 under scale 5 of the 1989 tariff or $15,313 under scale 3 of the 2004 tariff.

[56] NBFL challenges Richardson's calculation of the Barthe estate damages. It says the Barthe estate award was $1,675,000 plus PJI or $2,360,799. It disputes the Barthe estate's claim that it was exposed to NBFL's counterclaim and third party claims in the amount of 10 million dollars. In disputing this, it relies upon its pre-trial reply brief of January 30, 2012, 13 days before trial, where it stated (apparently for the first time) that it was confining its third party contribution and indemnity claim against the Barthe estate, if NBFL was found liable, to the claims of Wadden, Weir and Blackwood Holdings. In that brief NBFL stated that it was not seeking indemnity for a successful Dunham claim. In addition, many of the claims for which it sought third party indemnity against the Barthe estate were settled before trial. NBFL says that at trial it was clear that it was not seeking indemnity for those settled claims.

[57] NBFL notes that it sought leave to withdraw or dismiss its third party actions against Wadden, the Barthe estate and Ristow respecting its potential liability to the Keating estate, Derek Banks and Plastic Maritimes, when it settled those claims in 2011. In the motion heard at that time, Wadden, the Barthe estate and Ristow had argued that the withdrawal or dismissal of those third party claims should be allowed but only with the award of tariff costs to them based on the amount they were exposed to by NBFL's third party claims up to the time of settlement.

[58] NBFL included a transcript of the submissions and oral decision from that hearing with its costs submissions. Both sides filed extensive briefs at the time of the motion. At the hearing on August 12, 2011, Wadden, the Barthe estate and Ristow sought costs based on the fact that about $7,250,000 (half of what they believed their potential liability under NBFL's third party claims totaled) had been effectively withdrawn. NBFL argued at the time of that motion that the cost of responding to NBFL's third party claims had been negligible and that the parties still remained liable to indemnify NBFL with respect to any other losses incurred by NBFL or for which NBFL remained potentially liable to other parties still in the litigation.

[59] Based on the submissions made on that time, the Court determined that the potential liability of Wadden, the Barthe estate and Ristow to NBFL, by reason of the settlement of the Keating, Banks and Maritime Plastics actions, was reduced by about 7.25 million dollars or about half of their then estimate. The Court determined that the complexity of the litigation had not significantly changed and that the amount of effort and work by the parties was not reduced by the settlements. The Court asked what, in fairness, was it worth to have potential liability against those third party defendants reduced when the remaining outstanding claims against NBFL continued to place them, as third party defendants, at significant risk.

[60] In that oral decision, the Court noted that if it adjourned the award of costs decision until after trial, and NBFL was not successful against these parties, the costs award for their success would probably be significantly higher than the Court would give at the time of that decision (August 18, 2011).

[61] The Court did not apply the tariff to the extent that the AI was reduced, as requested by Dunlop, nor did it grant nominal or no costs, as requested by NBFL. Instead, the Court awarded $25,000, a compromise that recognized the points made by both parties – NBFL's point that no reduction in the work involved in the litigation or its complexity resulted from the settlements and Dunlop's point that there had been a significant and lengthy exposure to third party liability of 7.25 million dollars from the date NBFL's third party claims were made against them until the settlements.

[62] NBFL says that at trial the third party claims against the Barthe estate were limited to the claims of Weir, Blackwood Holdings and Wadden.

[63] NBFL cites a 1980 BCSC decision for the proposition that as a general rule courts only include, when considering costs respecting a counterclaim, the amount by which the costs of the proceeding were increased by the counterclaim. In this case, the third party claims were simply an extension of the Barthe estate's claim against NBFL. It did not bring the estate into a proceeding in which he was not already involved. It argues that there was very little work performed on behalf of the Barthe estate to defend NBFL's counterclaim and third party claims and there were no increased trial or pretrial legal costs. Furthermore, since Barthe and Ristow made a joint claim in a single action and were both subject to NBFL's counterclaim and third party claims, the work for the Barthe estate was shared with Ristow until the Ristow settlement. Costs to the Barthe estate should be limited to the extra work for the Barthe estate.

[64] In the alternative, NBFL argues that the amount involved should reflect only the reasonable exposure to the Barthe estate based on the award at trial. Because NBFL successfully defended Wadden's claim, Wadden's claim should not be included in any calculation. It submits that the AI for the Barthe estate should be $2,574,119.46, consisting of $213,319.76 of the Weir and Blackwood Holdings awards (excluding the punitive damage award), and the Barthe estate's successful claim of $2,360,799.70. The Barthe estate costs should be $134,030, applying Scale 5 of the 1989 Tariff or $209,147, applying Scale 3 of the 2004 Tariff.

[65] NBFL made a formal offer to settle to the Barthe estate on November 18, 2011, in the amount of $2,750,000 inclusive of costs and PJI. It was not accepted. NBFL says that *CPR 10* deals with the impact of this offer on costs. It claims to have obtained a favorable judgment, as defined in *CPR 10.09*: that is, a judgment providing the Barthe estate with a result no better than it would have received by accepting the offer. Pursuant to *CPR 10.09(3)*, a judge may award costs to a party who defends a proceeding, does not fully succeed but obtains a favorable judgment, at 60% of the tariff amount if the offer is made after the trial is set down and before the finish date.

[66] NBFL argues that the trial decision resulting in an award to Barthe of $1,675,000, plus PJI to the date of the offer (November 18, 2011) of $499,761, plus costs of no more than $209,147, for a total of $2,383,930.10. This is about $366,000 less than NBFL's offer.

[67] While there was no formal date assignment conference in this litigation (at which conference trial dates and finish dates are fixed), this Court already decided in the *Wadden v BMO* costs decision that the absence of a formal DAC should not disentitle a party to the benefit of *CPR 10*. Such was done in *Hayward v Young*, 2012 NSSC 56, upheld on appeal (2013 NSCA 65 at para 17).

[68] Counsel notes that this litigation was case managed. At a case management conference on September 18, 2010, the trial of the outstanding actions was set down to commence on October 31, 2011. At an organizational call on November 16, 2011, the trial was adjourned to commence on February 13, 2012. The last pretrial motion was set for December 19, 2011, but was withdrawn when the parties involved settled on November 17, 2011.

[69] During a December 19, 2011, organizational call, the date for exchanging witness lists was fixed as January 11, 2012 and, at that time, all parties acknowledged that no pretrial processes remained outstanding. NBFL submits that November 16, 2011, should be considered the trial readiness conference date and January 11, 2012, should be considered the finish date.

[70] NBFL seeks reduction of the Barthe's tariff fees by 60%. Based on Scale 5 of the 1989 Tariff, to $49,345 or based on Scale 3 of the 2004 Tariff, to $76,725.

[71] NBFL submits that there is no authority for doubling the AI, as submitted by Richardson in respect of all the successful Plaintiffs, to account for the complexity of the proceedings and the importance of the issues.

[72] It argues that this would create an artificial and fictitious AI as described by the Nova Scotia Court of Appeal in *Williamson*.

[73] With regards to the effect that NBFL's conduct may play in the assessment of complexity and importance, counsel notes that this Court did not award punitive damages to the Barthe estate, and, because the Court awarded punitive damages to Dunham and Weir, its conduct should not affect the calculation of the AI.

[74] NBFL disputes the suggestion that it was solely responsible for the delays, motions and appeals in this litigation. It further notes that the costs of motions were dealt with at the time of the motions.

[75] NBFL submits that the successful Plaintiffs' lump sum costs claims are not consistent with the principle of substantial indemnity for reasonable legal expenses.

[76] Respecting the Barthe's claim, NBFL notes that the successful Plaintiffs' first brief for solicitor and client costs sought 1.2 million dollars for the Barthe estate, $300,000 less than its December 2013 brief.

[77] Comparison of the Weir and Dunham claim for $725,000 with BMO's award for the same amount is a flawed approach because BMO did not share counsel and BMO was entirely successful while some of Dunlop's clients were not. Furthermore, BMO's actual costs are not relevant and Dunlop has not provided evidence of the actual costs to each of his many clients, nor timesheets, nor fee invoices, nor a breakdown of his work and how it was allocated. To deviate from party and party tariff costs requires evidence that is not before the Court.

[78] NBFL identifies seventeen other parties, beside the successful Plaintiffs, that Dunlop represented in this litigation. Fifteen of those settled; Helical's claim was thrown out for failure to post security for costs; and, Wadden was unsuccessful. Dunlop's work on this litigation overlapped several clients. Counsel cites a 1993 Ontario General Division Court decision for the proposition that where several parties are represented by one counsel "… it is acceptable that only one bill of costs can be submitted for assessment." Without evidence from Dunlop, the Court has no basis upon which to determine what a substantial contribution to reasonable legal fees is.

[79] NBFL submits that the lion's share of Dunlop's efforts, before and at trial, were with respect to Wadden's unsuccessful claim. Sixteen days of discovery were of Wadden witnesses; ten days of NBFL's witnesses (mostly related to the Wadden claim); and, only seven and one-half days of the successful Plaintiffs. At trial, the Wadden witnesses were on the stand for fourteen days and the successful Plaintiffs for less than five.

[80] The successful Plaintiff's claim for 47 days of trial time is inaccurate. There were actually 28 trial days, spread over 47 days, of which only 12 days related to the successful Plaintiff's case. At the billing rate for Dunlop and his associate ($450 per hour x 10 hours per day x 12 days), Dunlop's fees for the successful Plaintiffs was less than $54,000.

[81] It submits that the only evidence respecting Dunlop's fees until trial for all of his clients was the estimate in Richardson's brief of one million dollars, to which Richardson added $210,807 for trial. Since Dunlop represented 17 other clients until trial, a substantial portion of the one million dollars was unrelated to the successful Plaintiffs.

[82] NBFL argues that the Court should deduct from the one million dollar estimate the costs incurred respecting Wadden, those pretrial motions for which costs were awarded, and costs

associated with the other 16 clients. It submits that less than one-third of Dunlop's time until trial or $330,000 of the estimated one million dollars in pretrial solicitor costs related to the successful Plaintiffs.

[83] To this, NBFL argues that trial costs of $54,000 should be added for a total of $387,333 as actual legal costs of the successful Plaintiffs.

[84] *CPR 77.07* permits a judge to add to or subtract from the tariff costs based on a non-exclusive list of eight factors. The factors include: the conduct of a party affecting the expense of the proceeding; steps in a proceeding taken improperly or abusively; and, a failure to admit something that should have been admitted. NBFL submits no amount should be added or subtracted from the tariff amount.

[85] NBFL acknowledges this Court's criticism of NBFL's conduct in the trial decision but says that the Court could not have been aware of the attempts NBFL made to settle. It made offers to settle of $2,750,000, inclusive of interest and costs (all in), to the Barthe estate and $350,000, inclusive of costs and PJI and forgiveness of the margin debt, to Dunham, both offers made on November 18, 2011. On November 21, 2011, it offered to settle with the Weir group: $205,000 (and forgiveness of the margin debt) to Weir, dismissal of its claim on the Promissory Note against MacLaughlin-Weir and Weir, and $45,000 "all in" (and forgiveness of margin debt) to Blackwood Holdings.

[86] It submits that these offers were substantially what were claimed, more than the Barthe estate was awarded and not unreasonable in the context of what Dunham and the Weir group were awarded.

[87] NBFL disputes the claim for disbursements.

[88] With respect to the interest on the loans by Weir, it cites *Leblanc v Doucet*, 2012 NBCA 88, for the proposition that interest on a litigation loan is recoverable where, as a matter of fact, the loan was necessary to continue the litigation and the plaintiff did not have the means to pursue the action. It says Weir has provided no such evidence. It says there is no evidence of the causal connection between loans and the litigation expenses.

[89] With regards to Dunham's charges of $151,000 to assist in organizing and keeping track of the volumes of documents, it argues that he was not hired as an expert. If his work was beyond that of a normal litigant, there must be evidence to support it. Richardson's claim that Dunham had specialized IT knowledge required to sort, categorize and store the documents does not establish that the costs were reasonable for the work performed or comparable to similar services provided by independent third party providers.

[90] It disputes the Drake Recording disbursement claim of $23,825 on the basis that most of the discovery dates related to Wadden's claim. For the same reason, it disputes the $7,248 claim for conference room rentals for discoveries. It disputes the photocopy claim of $50,000 at the rate of $0.20 per page for two reasons. The charge implies that 250,000 pages were copied, yet

Dunlop's affidavits say that he only reviewed 40,000 pages. Secondly, in the *Wadden v BMO* costs decision, this Court only allowed a charge at the rate of $0.10 per page, absent proof that the actual cost per page was higher.

[91] It submits that Dunlop's $300,000 plus disbursements claim should be reduced to $12,810.

Successful Plaintiffs' Reply Brief of February 12, 2014

[92] The successful Plaintiffs take issue with eight points or inferences from NBFL's February 6th submissions.

[93] First, on the issue of whether the 1989 or 2004 tariff should apply, they refer to the Court's explanation as to why the 2004 tariff is the appropriate starting point for the analysis in *Wadden v BMO*. The 1989 tariff produces awards that are totally inadequate to meet the substantial indemnity principle.

[94] Second, based on this Court's decision in *Wadden v BMO* to include PJI in the calculation of the claims, the successful Plaintiffs recalculate what they submitted previously as the first step in the determination of the AI to include PJI at the rate of 2.614% for 11.5 years. They do not deduct the portion of the margin debt of Dunham, Weir and Blackwood Holdings that the Court did not forgive. Their revised calculation of the step 1 AI calculation is:

Dunham

Total Judgment	$722,250
PJI at 2.614% for 11.5 years	217,115
Punitive Damages	200,000
TOTAL:	**$1,139,365**

Weir / Blackwood

Weir personally	$165,625
Blackwood Holdings	35,000
PJI on combined amounts	60,310
Dismissal of claim against Mrs. Weir	100,000
TOTAL:	**$360,935**

Barthe Estate

Award (allowing for share sale proceeds)	$1,675,000.00
PJI on award	685,799.70
TOTAL:	**$2,360,799.70**

[95] Third, counsel takes issue with NBFL's submission that this Court should not take into account NBFL's third party claims against the Barthe estate that were dismissed before trial, or not advanced by NBFL at trial. In addition, NBFL's advancement of a claim for indemnity against the Barthe estate in respect of Dunham's claim until the eve of trial exposed the Barthe estate to liability in conducting its defence until the trial and should lead to its inclusion in the AI.

[96] The same argument is made with respect to the claims of other litigants with whom NBFL settled after many years of litigation and shortly before the trial. It refers the Court to para 86 in Justice Saunders' decision in *Leddicotte v Nova Scotia (Attorney General)*, 2002 NSCA 47, to the effect that a party expects that a claimant's demands for relief are intended to be taken seriously and that putting them forward invites consequences. "Linking the "amount involved" in an award of costs *to the claims put forward* may be a useful tool in reminding litigants of the financial risk intended upon suing and losing." [emphasis added]

[97] Counsel takes issues with NBFL's argument that its counterclaim and third party claims against the Barthe estate should have little impact upon the determination of the overall award. NBFL's reference to the British Columbia decision should be disregarded because the costs regimes in British Columbia and Ontario are not the same as Nova Scotia's costs regime.

[98] The principle of a substantial, but not complete, contribution to costs applies in most Canadian jurisdiction. However, the approach to calculating costs in other jurisdictions differs. In jurisdictions such as British Columbia and Ontario, the approach focuses on the steps taken during the course of the litigation (the "bill of costs" approach). In other jurisdictions, like Nova Scotia and New Brunswick, the approach focuses on the final result (the "tariff" approach).

[99] The approach used in Nova Scotia assesses the cost of the litigation (at least initially), not by reference to the various steps taken in the litigation, but rather by the ultimate result. Counsel submits that the value of claims that were dismissed either prior to trial, or withdrawn on the eve of trial, are still a proper consideration when determining the AI.

[100] With regards to the first step in the calculation of the AI, Richardson directs the Court to the transcript of this Court's decision of August 18, 2011, respecting the costs consequences of the removal of NBFL's third party claims for indemnity in the Keating, Banks and Plastics Maritime actions. Even with the reduction of the potential exposure in those claims of about

seven million dollars plus interest, there still remained exposure to liability to NBFL of at least seven million dollars plus interest. This exposure must be reflected in the AI.

[101] Fourth, while acknowledging that it is common practice for courts to use the amount awarded as indicative of the AI, Counsel submits that that practice does not mean that courts cannot consider the factors of importance and complexity. The tariff *expressly provides* that complexity and importance are to be considered in determining the AI. In most cases these two factors can easily be reflected in the amount allowed and require no special consideration.

[102] However, this case was in many ways unique. Counsel refers the Court to para 29 in the *Wadden v BMO* costs decision, and submits that it is in precisely a case like this that the factors of complexity and importance must be taken into account in addition to the amount allowed in calculating the AI.

[103] Fifth, counsel takes strenuous exception to NBFL's claim to a reduction in the lump sum claims by reason of the settlements or dismissals reached by other parties to the litigation who were represented by Dunlop at some point in the proceedings. NBFL's suggestion that those parties already received a contribution towards their costs and their submission that the costs of the remaining successful Plaintiffs overlap those of the settling parties. Counsel argues that the primary liability for costs, including disbursements, falls on the Defendant NBFL and it cannot avoid liability by saying that someone else *may have* paid or contributed to those costs. This is particularly so where NBFL makes this claim without disclosing the terms of the settlements or dismissals involving other parties to the litigation represented by the same counsel.

[104] The successful Plaintiffs submit that there is no evidence that some or all of the settlements represented a reasonable assessment of the value of the settling Plaintiffs' damages caused by the conduct of NBFL or Clarke. There is no evidence before the Court that they did not represent the capitulation of an innocent victim, exhausted, or fearful of the costs of continuing litigation. Without knowing the amount of the claims that had been advanced or the terms of the settlement, counsel argues that this Court cannot know what, if any, of the costs of other parties whose claims were settled, discontinued or dismissed may have contributed to the ultimate costs of the successful Plaintiffs.

[105] It would be wrong, absent any particulars of settlement terms, to determine that the offers were fair and just or part of a litigation strategy designed to force at least some of the plaintiffs to accept less than they were entitled to, notwithstanding the merits of their claims.

[106] Sixth, while acknowledging the particulars of the last minute offers of settlement NBFL made to the successful Plaintiffs, counsel does not concede that the offers satisfy the requirements of *CPR 10.05* or that NBFL obtained a "favourable judgment" under *CPR 10.09*.

[107] Counsel submits that *CPR 10.05(4)* is clear. Before an offer can be considered a formal offer to settle within the *Rule*, it must include a specific and express term with respect to costs. The offers made by NBFL were either *without* costs (in the case of a dismissal of counterclaims and third party claims) or *inclusive* of interest and costs in respect of claims. These offers do not

comply with *CPR 10.05* because they provide neither "an amount" nor "an amount to be determined by a judge" or an option to choose between the two.

[108] Counsel submits that the requirement for a separate term with respect to costs makes good sense. It encourages settlement by enabling a party to whom it is made to make rational calculations based on how much they can expect to receive with regards to quantum and how much with respect to costs. Settlement offers that are "all-in" do not satisfy the requirements of *CPR 10.05(4)* and are therefore not formal offers within *CPR 10.09*.

[109] Furthermore, if the offers can be considered formal offers, it is impossible to determine whether the offers were more favourable than the eventual judgments. The offers were essentially all made on a without costs basis. The successful Plaintiffs' claims were allowed at trial with costs. By making offers inclusive of interests and costs, NBFL deprived the successful Plaintiffs and the court of the ability to rationally analyse the offers. Counsel submits, as an example, the circumstance where, if the default interest rate of 5% had been used, the quantum portion would be significantly less than was fair or reasonable; in this case NBFL's first submission respecting PJI, submitting a rate much smaller than the default interest rate, was made in its post-trial brief.

[110] The successful Plaintiffs submit that NBFL's offers did not represent "reasonable efforts" to settle. The offers were not made after it learned in March 2000 of Clarke's stock manipulation scheme. They were not made in 2003 when NBFL commenced its Main Action claiming a solid basis for its action against Clarke. They were not made in June 2005, after it secretly admitted to the Nova Scotia Securities Commission its wrongdoing. It was not made after this Court's June 2008 decision to dismiss its attempts to remove pleaded allegations of wrongdoing that it had made against Clarke. Instead, the "all-in" offers were made on November 18, 2011, on the eve of the trial.

[111] Counsel argues that the costs consequences associated with offers to settle are intended to encourage parties to assess the merits of claims and defences, not to be a weapon to be used by a defendant who has no defence and who seeks to use the threat of cost consequences to force a party to give up a valid claim on the eve of trial. These offers, made at the time and in context (NBFL called no evidence when the Plaintiffs closed their case), should be considered as abusive rather than reasonable efforts to settle.

[112] Seventh, contrary to NBFL's submission that the Court should not consider NBFL's conduct in the costs assessment, simply because the successful Plaintiffs have disavowed a claim for solicitor – client costs, the successful Plaintiffs submit that one aspect of the law of costs is to control the costs of litigation by controlling the conduct of parties. Conduct that unreasonably increases the cost of litigation may justify a larger contribution to costs. NBFL's conduct falls squarely within the factors enumerated in *CPR 77.07 (2) (e)* to *(h).*

[113] Counsel cites para 32 in *Williamson v Williams* to the effect that one of the factors warranting an award of lump sum costs rather than party and party tariff costs was the existing of "a public interest in protecting investor confidence in financial institutions. … It is not to the

long term benefit of the securities industry if it is seen to be operating outside the law because significant legal expenses cannot be recovered and wronged individuals cannot afford to take erring brokers to court."

[114] Finally, NBFL submitted that no costs be awarded on the basis of time spent on interlocutory motions; those costs were already dealt with. The successful Plaintiffs submit that the trial judge, who has all the facts, may take note of the existence of these motions as part of the complexity of the proceedings in awarding lump sum costs, or an addition to tariff costs. This was endorsed in *Landymore v Hardy* and *Smith's Field Manor Development Ltd v Campbell* [2002] NSJ No.492, at para 23.

Analysis

Overview

[115] In *Wadden v BMO*, this Court dealt with costs as between two of the parties to this litigation. This decision, dealing with the costs claims amongst those remaining parties who went to trial, adopts and incorporates the analysis in *Wadden v BMO*, particularly paras 26 to 65, with adjustments, as necessary to meet some of the different matrices between the remaining litigants.

[116] At the risk of some redundancy, the relevant context for this decision includes the following:

i. This was no ordinary litigation, even in the context between an investor and a broker. It involved multiple groups of parties in multiple proceedings, many of whom were at the same time plaintiffs, defendants, counterclaimants (and defendants by counterclaim) and third party claimants (and defendants of third party claims) against one or more of each of the other litigants. There were many different causes of action.

ii. Over 11 years, many parties came and went.

iii. To fulfill the mandate of *CPR 1.01*, the proceedings respecting all parties, regardless of the simplicity or complexity of their respective claims, were by necessity, managed together. This forced parties, whether big or small, with simple or complex claims, to participate fully in the pretrial management processes.

iv. While the litigation commenced before 2004, the 1989 costs tariff is a wholly inadequate yardstick for the assessment of costs respecting complex litigation which spanned over 10 years, most of which involved steps that occurred after the "new" 2004 costs tariff came into effect.

v. Tariff costs are the starting point and most often an appropriate yardstick for the assessment of costs between parties in ordinary litigation. The most recent costs tariff was created to attempt to fulfill the overriding purpose of costs awards between litigants enumerated

in *Landymore v Hardy* and defined in *Williamson v Williams*; that is, to award the successful party substantial, but not complete, recovery of reasonable legal costs.

vi. The 2004 costs tariff is an appropriate starting point but, in this litigation, is not likely to 'do justice' between the parties.

vii. *CPR 77* respecting costs governs the assessment of party-and-party costs. Tariff A sets out the formula for determining tariff costs. The first step in the tariff analysis is to determine the AI. Where a monetary claim is allowed, AI is an amount determined "having regard to the amount allowed, the complexity of the proceeding and the importance of the issues." Where the monetary claim is dismissed, the AI is determined having regards to provisionally assess the damages, the amount claimed, the complexity of the proceeding and the importance of the issues.

viii. The second step in the tariff analysis involves fitting the AI into one of the scales in Tariff A.

ix. In addition, a judge may add to or subtract from the resulting tariff amount for many reasons, including the non-exhaustive list of factors in *CPR 77.07*.

x. A judge may make any order that "may do justice between the parties" (*CPR 77.02*). To do this, a judge may instead award lump sum costs (*CPR 77.08*). Ultimately costs awarded between litigants must reflect "justice between the parties". It is only if tariff costs cannot do that that a Court may deviate from tariff costs. The discretion to deviate from the tariff to do justice incorporates not only the express provisions of *CPR 77*, but the case law, which in Nova Scotia, incorporates the concept of substantial but not complete indemnity to a successful party of reasonable legal costs.

[117] As noted in *Wadden v BMO*, it is not necessary that the Court have before it evidence of the actual legal costs of the successful litigant, although such evidence is relevant and helpful in accessing what reasonable costs would be.

Specific Issues Respecting Successful Plaintiffs' Costs Claims

[118] The net amounts awarded to the successful Plaintiffs were: to Dunham - $885,314.91 (inclusive of PJI on some of the award at 2.614%); to Weir and Blackwood Holdings – $413,319.76 (inclusive of PJI on some of the award) and to the Barthe estate - $2,360,799.70 (inclusive of PJI). The claim against the Weirs on the Promissory Note ($100,000 plus interest) as well as the counterclaim and third party claims against the Barthe estate were dismissed. The counterclaim/third party claims are quantified later in this decision.

Complexity and Tariff A

[119] Consideration of tariff costs first requires the court to determine what tariff should apply. NBFL correctly states that *CPR 77* starts with the provision that the tariff when the proceeding began applied. Most of these proceedings commenced when the 1989 tariff was in place.

[120] The successful Plaintiffs argue that, in the calculation of the AI, *CPR 77* includes consideration of not just the amounts claimed, awarded or successfully defended, but also the complexity of the proceedings and importance of the issues. I agree that this litigation was very complex, and complexity can be taken into account in determining the AI, if the other steps in the analysis do not "do justice" between the parties. The successful Plaintiffs ask the Court to double the amount of the AI calculated on the amounts awarded and successfully defended, to take account for complexity and importance. I consider this submission later.

[121] At step two of the tariff analysis, the successful Plaintiffs seek application of the top scale; NBFL agrees. NBFL goes further and submits that this is the only step where the court can consider complexity and issue importance. In normal litigation, application of the AI to one of the three scales is sufficient to take into account complexity. Complexity is the primary factor in selecting the scale at step two; however, in my view, if the resultant tariff fee would not result in a just award, the Court may resort to a consideration of complexity in setting the AI at step one. *CPR 77* expressly provides for consideration of complexity and issue importance at step one. In this case, it is appropriate to do so.

[122] Application of steps one and two of the 2004 tariff, scale 3, to the net awards (without consideration of complexity and issue importance in setting the AI) would result in these awards: to Dunham - $80,938; to the Weir Group – $58,751 ($43,438 plus $15,313) and to the Barthe estate (excluding NBFL's failed counterclaim and third party claims) – $191,814.97.

[123] NBFL submitted that no amount should be added for the Barthe Estate's successful defence of NBFL's counterclaim and third party claims. In the alternative, it argues that the AI, in respect of these claims, should be limited to the successful claims of Weir and Blackwood of $213,319 (exclusive of the punitive damage awards). This would result in a costs award to the Barthe Estate of $209,147.20 on an AI of $2,574,119.46, at scale three.

[124] The successful Plaintiffs seek lump sum costs for Dunham and Weir jointly of $725,000 and for the Barthe estate of $1,500,000, together with trial days and disbursements. Their first submission would calculate tariff costs, scale 3, (doubling the AI for complexity/importance and including NBFL's counterclaim and third party claims) as follows: Dunham – 1989 tariff - $97,550, 2004 tariff - $149,865.63; the Weir Group – 1989 tariff - $55,325, 2004 tariff - $80,938; and, the Barthe estate – 1989 tariff - $1,175,325, 2004 tariff - $1,901,250.

[125] Based on the history of the litigation, with which this Court is familiar, it was easy in the *Wadden v BMO* decision to conclude that BMO's actual legal costs were likely in the range of the sum referred to in its brief. That sum appeared to be reasonable.

[126] As noted in that decision, the issues and evidence between Wadden and BMO was simpler and more streamlined than the issues and evidence between the successful Plaintiffs and NBFL. BMO's counsel did not attend many of the pretrial processes involving NBFL issues and only attended approximately one-half of the trial days.

[127] While technically *CPR 77* indicates the starting point of tariff costs is the tariff in effect on the start day of the litigation, this fact is secondary in importance to the requirement to do justice between the parties. The 1989 tariff is not reflective, by a long stride, of the reasonable costs of litigation in the 21st century. They are not a fair starting point for determination of party and party costs respecting this litigation. For the purposes of determining tariff costs, the starting point for this analysis is the 2004 tariff, not the 1989 tariff.

[128] I agree with the successful Plaintiffs' articulate and logical submission that the calculation of the AI (at the first step in the tariff analysis) is not restricted to "having regard to" the amount claimed, awarded, provisionally assessed or successfully defended. While restricting the analysis to the amount claimed or awarded may be the common application of the term AI in most civil litigation in this province, the definition in *CPR 77* expressly directs that in the determination of the AI, the Court shall have regard to AI (and in a successful defence, the damages claimed or provisionally assessed) together with the complexity of the proceeding and the importance of the issues.

[129] NBFL argued that the complexity of the proceeding and the importance of the issues are restricted to the picking of the appropriate scale at the second step in the tariff analysis; I disagree. The three scales in Tariff A are adequate to deal with complexity in most proceedings. The limited range for the adjustment of the AI (plus or minus 25%) in the second step may not result in "doing" justice between the parties in all cases, especially one as unusual as these proceedings. While complexity is a primary factor in the determination of the appropriate scale at step two, the range of options afforded by the three scales does not fully recognize the complexity to the successful plaintiffs in these proceedings.

[130] I agree with the successful Plaintiffs that exclusion of consideration of the complexity of these proceedings in calculating the AI would do an injustice to the successful Plaintiffs. This litigation involved many actions and causes of action between about 54 groups of parties. The equity in KHI, as measured by the public market share price, fell from over $100,000,000 at its peak to almost zero. The total claims far exceeded the lost market share price. The claims of Dunham, the Weir group and the Barthe estate were relatively miniscule in the big picture. The collective claims of Dunham, the Weir group and the Barthe estate totalled about five million dollars (less when the actions commenced). Their claims alone did not create the complexity. The necessary effort and expenses incurred by the successful Plaintiffs far exceeded what would normally be considered reasonable for claims of their magnitude.

[131] These proceedings were complex in many senses. The successful Plaintiffs were caught up in the litigation and forced to participate in the case management process involving NBFL, and the many parties that NBFL brought into the litigation by their commencement of the Main Action and their counterclaims and third party claims in several actions. The actions of NBFL to spread the liability added complexity for the successful Plaintiffs that greatly increased their time, expense and risk. The continuum of delay and complexity is evident from the mountain of reported (and unreported) pretrial motions and decisions that extended for more than a decade, the effect of which motions is noted at para 33 in 2008 NSCA 92 and paras 162 to168 in 2008 NSSC 135.

[132] Dunham and the Weir group were defendants in NBFL's and NBC's claim for margin debts and a promissory note. These issues, involving them as defendants, were legally and factually straight-forward and did not contribute to the complexity of the litigation. At no time did Dunham or the Weir group seriously contest the fact of, or accounting of, the margin debts and promissory note.

[133] NBFL strenuously contested the Dunham and the Weir group claims (and evidence) until Dunham and the Weirs closed their cases at trial. Only when NBFL failed to produce evidence, after Dunham's and the Weirs' cases closed, was it evident that NBFL had no factually-founded defence. The counterclaim of Dunham and the Weir Group as well as the Barthe estate claim against NBFL (for NBFL's and Clarke's wrongdoing) became complex by reason of the various basis of liability together with the more complex and time-consuming claims, third party claims and counterclaims advanced by NBFL against the Barthe estate and many of the other fifty groups of litigants.

[134] In the exercise of discretion, *CPR 77.07* authorizes a judge to add an amount to or subtract an amount from tariff costs, and *CPR 77.08* authorizes a judge to award a lump sum instead of tariff costs.

[135] Whether the Court increases the tariff amount pursuant to *CPR 77.07* by reason of the additional complexity of these proceedings, or considers the complexity by awarding lump sum costs pursuant to *CPR 77.08*, or increases the AI at step one of the tariff analysis, is irrelevant. The relevant fact is that the calculation of tariff costs pursuant to the 2004 tariff, based solely on the amounts awarded and successfully defended is so disproportionate to the complexity and effort required of the successful Plaintiffs that restricting costs to the 2004 tariff, scale 3, would be unconscionable. It would not to "do justice between the parties".

[136] NBFL makes several additional submissions respecting the successful Plaintiffs' costs claims.

Relevance of NBFL's counterclaim and third party claims on Barthe costs

[137] With respect to its submissions respecting its counterclaim/third party claims against Barthe, NBFL relies upon a 1980 British Columbia Supreme Court decision to advance the principle that one should only include the amount by which the costs of a proceeding were increased by a counterclaim in awarding costs and that in this case very little work was performed to defend the counterclaim and third party claim. Alternatively, it argues that any amount added to the AI should exclude: the third party claims of Wadden, because he was unsuccessful at trial; of Dunham, because in its pretrial brief on the eve of trial, NBFL abandoned that claim; and, with respect to Weir, be limited to the amount awarded by the Court to the Weir group (excluding the punitive damage portion).

[138] In advancing its submission that the Court should not include third party claims that were already settled, it provided the transcript of an oral decision made by this Court in respect of costs claimed by the Dunlop clients when NBFL settled with Keating, Banks and Plastic

Maritimes. Those settlements totalled about seven million dollars. In the transcript of the oral decision, it was estimated that the total remaining third party claims that were outstanding in 2011 amounted to at least seven million dollars. This oral decision did not address NBFL's counterclaim against the Barthe estate for its own losses. The counterclaim and most of NBFL's third party claims (except the Weir family claims and the substantial Wadden claims) were only abandoned in NBFL's pretrial brief on the eve of the trial.

[139] The value of NBFL's counterclaim and third party claims against the Barthe estate, advanced in its pleadings, are a proper consideration when determining the risk to which the estate was placed by NBFL throughout the litigation. Other than the costs award in the Court's oral decision of August 11, 2011, the Barthe estate has not been compensated for the exposure to liability by NBFL's counterclaim and third party claims. These were outstanding for several years - until the eve of trial for the counterclaim and most third party claims, and, in respect of the Weir claim and substantial Wadden claim, until this Court's decision after trial.

[140] As Mr. Richardson notes, the costs regime in British Columbia (and Ontario) differs in approach than that in Nova Scotia (and New Brunswick). The way in which costs awards are calculated differs. In essence, the British Columbia approach focuses on the steps taken during the course of the litigation (the "bill of costs approach") and the Nova Scotia approach focuses on the final result (the "tariff approach").

[141] In British Columbia and Ontario, the successful party generates a bill of costs that outlines the various steps taken. In British Columbia, each step is assigned a number of units by the Court. Each unit has a fixed dollar value, the amount of which depends on the complexity of the matter. Under this approach, the time associated with the counterclaim and third party claim may be subsumed within the overall calculation.

[142] In the Nova Scotia approach, the tariff approach, the assessment of the cost of litigation at the initial tariff stage is not by reference to the various steps taken in the litigation but rather by the claims, complexity and the potential and/or ultimate awards. The assumption is that, as a rule, the cost of the steps taken in litigation is and should be reflected in the amounts claimed and the final result.

[143] It is noteworthy and disturbing that NBFL claims costs, calculated using the Nova Scotia regime, against Wadden on the basis of its potential liability to the excessive Wadden claim first quantified at over seven million dollars in its pretrial brief.

[144] I reject the novel (to Nova Scotia) approach proposed by NBFL. I adopt the Nova Scotia approach articulated in Richardson's brief.

[145] With regards to the calculation of the quantum of risk to which the Barthe estate was exposed by NBFL, the Court notes that, in NBFL's original pleadings against Barthe, it counterclaimed for all of its losses and, in addition, third partied with regards to any liability it had in respect of any of those who claimed against it. In 2011, at the time of this Court's oral decision respecting the Keating, Banks, and Plastics Maritime settlement costs claim, it was

estimated that there remained outstanding the potential for more than seven million dollars in third party liability. That was before Wadden first quantified his surprising and very substantial claim against NBFL.

[146] For several years, the Barthe estate was exposed to an unquantified but clearly very substantial counterclaim in addition to NBFL's liability for any wrongdoing to many third parties. Barthe claims that this was clearly intended to intimidate Barthe into withdrawing or settling his own claim. With the benefit of hindsight, this claim seems to have merit. Only in August, 2011, was he granted a small amount of costs in respect of release from three of NBFL's third party indemnity claims.

[147] Even if I am wrong and should consider only Barthe's exposure at trial, there is no logic to limiting the amount to be included in the AI, the amount actually awarded to the Weir group, as opposed to the amounts claimed by the Weir group and Wadden at trial of about eight million dollars.

NBFL's settlement offers

[148] On November 18, 2011, NBFL submitted a formal offer to settle with Barthe for $2,750,000 inclusive of costs and prejudgment interest. It submits that this offer complied with *CPR 10.05* and that NBFL achieved "a favour judgment" pursuant to *CPR 10.09*. NBFL also refers to offers it made to Dunham and the Weir group on the eve of the trial, which it describes as close to the Court's decision.

[149] NBFL directs the Court's attention to *CPR 10.09(3)* where a Court may award costs to a party who defends the proceeding, does not fully succeed, and obtains a favourable judgment, of 60% of the tariff amount, if the offer was made after setting down and before the finish date. NBFL relies upon the Court's determination in *Wadden v BMO* as to when "setting down" and the finish date occurred. The Court held that, while there was no formal date assignment or finish date because of the case management process, November 16, 2011, the date of the last organizational call during which the final adjourned trial dates were fixed, was the equivalent of the "setting down" day and that January 11, 2012, the date upon which witness lists were to be exchanged was the equivalent of the "finish date". Effectively NBFL seeks a 60% reduction in the costs award to the Barthe estate based on *CPR 10.09(3)(c)* and consideration of the other offers when exercising its discretion.

[150] Again, I prefer the articulate submission by Richardson at paras 32 to 42 in his February 12, 2014 reply brief.

[151] *CPR 10.05(4)* reads:

> 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.

[152] The subsection is clear, before the offer can be considered a formal offer to settle, it must include a specific and express term with respect to costs. Three options are provided for in the *Rule*. The offers made by NBFL were either without costs (in the case of dismissal of the counterclaims and third party claims) or inclusive of interest and costs (in the case of claims). These offers do not comply with *CPR 10.05(1)* because they include neither "an amount", nor an amount to be determined by a judge, nor an option to choose between the two.

[153] The successful Plaintiffs argue that the requirement for a separate term with respect to costs makes common sense. It encourages settlement by enabling parties to make rational calculations based upon how much they can expect to receive with respect to quantum and how much with respect to costs. This knowledge enables the balancing of the risks and benefits of the settlement as opposed to trial. "All-in" offers do not satisfy the requirements of *CPR 10.05* and accordingly are not "formal offers" within *CPR 10.09*.

[154] I agree with the successful Plaintiffs. Because the offer was not an offer compliant with *CPR 10.05*, it was not a formal offer and *CPR 10.09* does not apply.

[155] The successful Plaintiffs made the alternative submission that if the offer can be considered a formal offer, it is impossible to determine whether the offer was more favourable than the eventual judgment. The offers were all essentially on a without costs basis. The claims were allowed at trial with costs. The successful Plaintiffs are clearly entitled to something with respect to the costs associated with the claims against them. When NBFL made the all-inclusive or "all-in" offer, there was no submission by it with regards to whether the default interest rate of 5% would apply. NBFL made no submission that the prejudgment interest rate should be less than the default rule of 5% until after trial (in its post-trial brief). I agree.

[156] Finally, the successful Plaintiffs submit that NBFL's offers to Dunham, the Weir group and the Barthe estate did not represent a reasonable effort to settle. They were not made after NBFL learned in March 2000 of Clarke's stock manipulation schemes. They were not made after it commenced the legal proceedings in 2001. They were not made after it secretly admitted to the Securities Commission in June 2005 that it had engaged in conduct contrary to the public interest and its position in these proceedings. They were made after the original start date for the trial and on the eve of the adjourned start date of the trial.

[157] The successful Plaintiffs' counsel submits that the costs consequences associated with offers to settle are not intended to be weapons to be used by a defendant who has no defence, who has acted against the public interest, and who seeks to use the threat of costs consequences

to force a party to give up a claim. Such offers do not further the ends of justice or the fair resolution of complex matters.

[158] Actions speak louder than words. The Court agrees with the successful Plaintiffs' suggestion that the last minute offers of settlement to the Barthe estate (as well as to Dunham and Weir) appear to have been based on its undisclosed intention to call no evidence at trial on the issue of its wrongdoing. The Court needs not decide if the circumstances of the offer constituted an abuse of the Court's process. It is enough to say that the offer did not comply with *CPR 10.05(4)* in the sense that it did not provide a term that would settle costs and permit the option for a determination of costs by a judge. It was therefore not a formal offer.

[159] As relevant is the fact that, based on the total amount of the judgment in favour to the Barthe estate with dismissal of the counterclaim and third party claims, the prejudgment interest (even at less than the default interest rate of 5%, a position NBFL only took issue after the trial), and, taxed costs, the offer is not "more favourable" to the Barthe estate.

Successful Plaintiffs' actual legal costs

[160] NBFL argues that the Court is not in a position to deviate from tariff costs or to order lump sum costs because there is no evidence before the Court upon which the Court can determine the reasonable legal costs of the successful Plaintiffs. This argument has two prongs.

[161] The first is that Dunlop's arrangements with the successful Plaintiffs with respect to fees appear to be nebulous, at best. No records were kept with respect to his time charges for each client. It appears that the fee arrangement changed as the litigation progressed, and none of it was documented in writing. Part of Mr. Dunlop's claim for fees appears to be a claim for a contingent fee, or alternatively, for keeping any additional costs awarded by the Court beyond advances already paid by his clients, even though there appears to be no written agreement with respect to whatever nebulous arrangement is, in the end, reached or determined by a taxing master.

[162] The second prong is that Dunlop represented several different litigants at various stages of the litigation. NBFL asked the Court to infer that Dunlop would or should have apportioned his legal fees and disbursements amongst all of his clients. In reply, Richardson makes the point that there is no evidence before the Court from which the Court can infer whether, and to what extent, Dunlop recovered any costs with respect of any of his other clients whose claims were dismissed, settled or discontinued before the trial. The trial itself only involved four clients.

[163] With respect to the first argument - the absence of good evidence of the actual legal expenses incurred by the successful Plaintiffs, I agree with NBFL's submissions that the evidence is nebulous as to the actual legal fees that the successful Plaintiffs owe Dunlop. Evidence of these parties' actual legal expenses is a relevant consideration in determining whether to award a lump sum. This Court's ruling in *Wadden v BMO* that actual legal invoices need not be proven for award of lump sum costs does not detract from the benefit of some basis

for determining what reasonable legal fees would be in the circumstances. The object is to award a substantial but not total indemnification of reasonable legal fees.

[164] In *Wadden v BMO*, counsel for BMO, without providing any particulars, advised that her legal fees for the litigation (which included actions other than the Wadden action) exceeded 1.2 million dollars. Based on the Court's experience in the management of this litigation, a foundation existed to measure the reasonableness of BMO's claim for legal fees in the amount of $725,000.

[165] NBFL's submission that the Court should take into consideration the "17 other parties" that Dunlop represented, including Wadden, whose portion of the trial, it submits, consumed most of the trial, has little resonance.

[166] Seventeen, on its face, appears to be many parties, but they represented fewer "groups of related parties". NBFL determined not to cross-examine Dunlop on his Affidavit, and therefore did not produce evidence as to what contribution, if any, that Dunlop received from his other clients with respect to actions that were discontinued, dismissed or settled before trial.

[167] To the Court's own knowledge (as the case manager), many of the "17 other parties" were not involved in the case management process, had little involvement in the litigation, or were not Dunlop's clients for much of the proceedings. For example, the Court at no time saw the pleadings of or opened a working management file with respect to John Gallinaugh, Kevin Pembroke, Mary Pembroke, John Groves, Norma Groves or Robert Radchuk. I believe that their names arose for only once, when court-assisted settlement conferences were been arranged. Staffing Strategist International Inc. and the "Romanowsky plaintiffs" were represented throughout almost all this litigation by another counsel. For the purpose of final settlement, Dunlop may have become their counsel of record. Kenneth MacLeod and his company (Futureed.com) ceased to be parties in these proceedings very shortly after they got underway in 2001. Derek Banks and his company (Plastics Maritime) hired another lawyer after NBFL scheduled a motion to have Dunlop removed as counsel by reason of a conflict of interest among his clients.

[168] This accounts for twelve of the "17 other clients". The Court has no information or knowledge of the basis upon which any of these parties left the litigation.

[169] Other than the parties who went to trial (Wadden and the successful Plaintiffs), only Ristow, who settled in 2011; Michael Mahoney (and his numbered company), who settled in 2010; and, Helical (a Weir company, whose action was dismissed when it was unable to post security for costs) were clients of Dunlop for a lengthy period.

[170] I agree that some of Dunlop's time and effort in this litigation related to other litigants, and as a matter of common sense would have been charged to other litigants. To the extent that the successful Plaintiffs advanced reasons why their costs award should be increased beyond tariff costs, this factor is also a relevant factor but minor mitigating factor. Other than in respect of Dunlop's services for Wadden, the quantum of any discount is not significant.

[171] I agree that NBFL's submission that part of the trial time was taking up with Wadden's unsuccessful claim against NBFL. I disagree, however, with NBFL's detailed but distorted allocation of the amount of time at trial and in various pretrial processes that, it submits or infers, were irrelevant to the successful Plaintiffs' claims and defences, and relevant only to the Wadden claim. The evidence of the Wadden witnesses and Clarke, were central to the Court's finding of liability against NBFL. While some or much of this evidence was tendered to advance Wadden's claims, this evidence was important to the successful Plaintiffs' success. NBFL's argument artificially attempts to separate the evidence at trial between that relevant to Wadden and the successful Plaintiffs.

Dunham Costs

[172] Dunham's claim for losses included the claim for the lost value of his KHI shares of $789,000; I awarded $810,000. In his pretrial brief, Dunham claimed about $809,000 in consequential losses, including blaming NBFL for the fact that he lost income for several years after he quit employment with KHI. The consequential loss claim was dismissed. Dunham claimed prejudgment interest at the default rate of 5%, provided for in our *Rules*. For the first time in its post-trial brief, NBFL presented information which convinced the Court not to apply the default rate, but rather the rate of 2.614%. Dunham claimed punitive damages; the Court awarded a conservative amount of $200,000.

[173] Dunham was successful at trial. I awarded $810,000 plus $200,000, less a set off for some of his margin debt (without interest), plus prejudgment interest on the $810,000. Without considering complexity or importance, the AI is $885,314.91. Applying Scale 3 of the 2004 tariff to this figure produces tariff costs of $80,938.

[174] If Dunham, who initiated his proceeding with a separate counsel (other than Dunlop), had continued with that other counsel or with any other counsel throughout the 11 years of litigation, and been compelled to participate in this complex litigation, it would have been ridiculous to suggest that Dunham's costs entitlement on a party and party basis for his success should be limited to about $81,000.

[175] The primary basis for NBFL's opposition to the award of tariff costs greater than $49,000, based on the 1989 tariff, or $81,000, based on the 2004 tariff, revolves around the fact that Dunham's counsel acted for other parties during part of the 11 years of litigation. Whatever actual legal fees are owed by Dunham to Dunlop, the determination of his "reasonable legal costs" for the purposes of determining a substantial contribution should involve recognition and apportionment of Dunham's counsel's efforts for his other clients.

[176] I agree with NBFL that there is a lack of reliable evidence, as to what Dunham's actual legal expenses are or will be. It appears from the Dunlop affidavit that it is a matter that is up in the air and is subject to varying verbal understandings, none of which have been solidified. Dunham has already paid Dunlop fees of $241,500. Dunham's counsel's entitlement could become the subject matter of taxation on a solicitor client basis.

[177] Secondary objections by NBFL to an assessment of more than tariff costs is that a consideration of NBFL's wrongdoing in the conduct of the litigation has already been dealt with by the award of punitive damages, and by the fact that NBLF made an offer to settle on the eve of the trial that it claims would have been more favorable than the amount awarded at trial.

[178] NBFL's conduct, which led to the punitive damages award, was punishment. The award of punitive damages does not detract from the entitlement of Dunham (and the Weir group) to costs based on the nature and complexity of the litigation as identified in *CPR 77* (especially *77.07*) and the case law.

Weir Costs

[179] NBFL claimed against Weir a margin debt of $67,177. Contrary to NBFL's submission the fact and quantum of the margin debt was not really in issue. The issue from Weir's point of view was that NBFL's conduct disentitled it to collect its margin debt. Weir counterclaimed for $183,750 for direct share losses, together with consequential losses and punitive damages. This Court awarded Weir damages of $165,625 for the loss to his KHI shares plus interest for about 10 years at the 2.614% annual rate (not the default 5% rate) based on NBFL's post-trial brief.

[180] Similarly, the Court upheld NBFL's claim for Blackwood Holdings' margin debt of $10,404 (without interest), not contested as to fact or amount by Weir, and awarded Blackwood Holdings damages for loss to its KHI shares of $35,000 with prejudgment interest, as opposed to the $42,000 it claimed.

[181] In addition, the Court awarded $200,000 punitive damages to Weir and Blackwood Holdings. The total net award (net of the undisputed quantum of the margin debts of about $71,500) was $413,319.76.

[182] Applying Scale 3 of the 2004 tariff, without consideration of complexity or importance of the issues, tariff costs would be $43,438. With respect to the successful defence of NBC's payment of a promissory note of $100,000, 2004 tariff costs on Scale 3 would amount to $15,313.

[183] The quantum of the Weir Group claims was small, relative to the total litigation in which they were forced to participate. To grant them 2004 tariff costs in the amount of $59,000 for the successful recovering of a net amount of about $600,000 in the context of the litigation that the Weirs were forced to participate in (in the factual context described in the Court's trial decision) would be unconscionable. NBFL had promised to settle with them, but reneged and fought them vigorously to the end.

Barthe Costs

[184] Mr. Barthe, and his estate after his death, pleaded losses from KHI share holdings in the amount of 3.315 million dollars. The Court awarded 1.7 million dollars. In addition, as a tactic, NBFL vigorously advanced a rather weak, but substantial in potential quantum, counterclaim and

third party indemnity claim against Barthe. Some of the third party claims disappeared when NBFL settled with the Keating estate, Derek Banks and Plastics Maritime, but there remained a significant outstanding liability through 11 years and some of it through the trial itself.

[185] As noted, NBFL provided the Court with a copy of a transcript of submissions and its oral decision of August 18, 2011, when Dunlop, on behalf of Wadden, Barthe and Ristow, sought costs based on the reduction in the third party indemnity claims that were put to bed by the 2011 settlement between NBFL, on one hand, and Keating, Banks and Plastics Maritimes on the other. Based on the evidence and counsels' submissions, this Court estimated that the potential liability of Wadden, Barthe and Ristow, as a result of the NBFL's settlement with Keating, Banks and Maritime Plastics, was cut in half and the remaining half was somewhere between seven and nine million dollars. In hindsight, this was too low an estimate. The two third party indemnity claims advanced by NBFL against Barthe at the time of trial was about eight million dollars; others, such as the Ristow claim, were resolved, and others, such as the unquantified counterclaim and Dunham third party indemnity claim ceased to be advanced by the time pretrial briefs were filed.

[186] The fact that on the eve of the trial, NBFL's submission suggested a lower potential liability to the Barthe estate does not remove the fact that for several years the estate was subjected to the potential liability to NBFL's counterclaim and third party claims (exclusive of Keating, Banks and Maritime Plastics) of a very substantial amount. The third party indemnity claims alone were likely over eighteen million dollars.

[187] I agree with the successful Plaintiffs that the amount of the potential liability of the Barthe Estate to NBFL was at least ten million dollars after August 18, 2011 decision, and this amount should be added to the AI for the calculation of NBFL's costs liability to the Barthe Estate.

[188] The actual award to the Barthe estate was $1,675,000 plus PJI. To that I add ten million dollars to the potential liability the Barthe estate faced throughout the litigation by NBFL's counterclaim for its losses and the third party indemnity claims.

Conclusion

Dunham

[189] Application of the 2004 Tariff A, Scale 3, without increasing the AI for complexity and importance, would result in an award to Dunham of tariff fees of $81,000. This proceeding was far more complex than the application of Scale 3 allows for. More important, *CPR 77.07* permits a judge to add to tariff costs to compensate a party for:

a) conduct of another party that affected the expense of the proceeding (*CPR 77.02(2)(e)*);

b) failure of another party to admit something it should have admitted (*CPR 77.07(2)(h)*); and,

c) a step in a proceeding taken by another party improperly, abusively or unnecessarily (*CPR 77.07(2)(f)*).

[190] The Court makes reference to the effect of the litigation on Dunham's financial circumstances, previously noted in the NBFL amendment motion decision of 2008. Those circumstances continue to show the significant financial costs of these proceedings to Dunham.

[191] The purpose of the punitive damage award against NBFL was to punish. The conduct of NBFL that merited punitive damages also invokes compensatory principles in respect of costs by reason of *CPR 77.07*.

[192] In this case, the Court awarded a very conservative amount for punitive damages to Dunham. That award does not preclude consideration of the factors enumerated in *CPR 77.07* in determining a costs award.

[193] The factors enumerated in *CPR 77.07(2)* are intended, both by addition and subtraction, to result in a just application of the tariff costs formula. In this case, the conduct of NBFL affected the expense of the proceedings in several ways. It joined several parties; it commenced several actions; all of which added to the expense of both the pretrial and trial proceedings. It failed to admit something it should have admitted and, in that regard, created unnecessary expense. These justify an addition to tariff costs.

[194] The Court declines to award a lump sum pursuant to *CPR 77.08*. *CPR 77.08* is, in my view, primarily aimed at fulfilling the underlying goal of awarding substantial indemnity for reasonable legal expenses. In this case, the absence of some evidence as to what actual solicitor-client costs are, is an impediment to an award under *CPR 77.08*. On the other hand, an award of simple tariff costs, without considering the complexity of the proceedings as well as the expense caused by NBFL would be unfair.

[195] In the result, I award Dunham tariff costs based on the 2004 Tariff A Scale 3 on an AI that is increased by 2 by reason of the complexity of the proceedings and further increased by reason of the factors enumerated in *CPR 77.07(2)(e), (f)* and *(h)*, and reduced by the fact that Dunham's counsel represented other litigants both before and at trial. The award recognizes that Dunham has already paid his counsel $241,500.

[196] Costs are awarded to Dunham in the sum of $300,000.

The Weir group

[197] Weir, Blackwood Holdings and MacLaughlin-Weir are in a similar position to Dunham. They were put through an extended period of litigation and considerable additional expenses by reason of NBFL's conduct, which, in my view, merits consideration of the factors enumerated

under *CPR 77.07(2)(e), (f)* and *(h)*. They are mitigated by the fact that Weirs' counsel represented other litigants.

[198] The punitive damage award in favour of the Weir group was to punish, not compensate. Costs awards are to compensate for conduct affecting the length and complexity of litigation. Just as these proceedings appear to have a significant adverse financial impact upon Dunham, they had a considerable negative impact upon the Weir family.

[199] Dunham had filed into bankruptcy. Weir, the principal of the Helical Group, was unable to pay the security for costs award of $15,000 that this Court ordered on NBFL's 2010 motion. At NBFL's subsequent motion to strike Helical's action because it failed to pay the security for costs amount, Weir represented that he was broke, and unable to advance the money for Helical, in order to have its claim adjudicated at trial. I accept this evidence as supporting the Weirs claim that they had to borrow money to finance the litigation in which they were ultimately successful. Weir has advanced $57,500 to his counsel towards solicitor-client costs.

[200] I decline to award a lump sum pursuant to *CPR 77.08* to reflect the principle of a substantial contribution to their reasonable legal expenses because there is inadequate evidence of what their legal expenses will or should be. I award jointly to Weir, MacLaughlin-Weir and Blackwood Holdings 2004 Tariff A Scale 3 costs, increasing the AI by reason of the extraordinary complexity of the proceeding, and increased by the factors enumerated in *CPR 77.07(2)(e), (f)* and *(h)*, and mitigated by the fact that they shared a counsel with other litigants, in the amount of $250,000.

The Barthe Estate

[201] My analysis of the Barthe estate costs award is slightly different. The estate was awarded damages of $2,360,799.70. It successful defended a counterclaim from NBFL and third party claims for which it was not completely compensated by an earlier costs decision. This outstanding exposure before the trial commenced was estimated by me at ten million dollars. Even during the trial, it was exposed to the third party claims by NBFL related to the Wadden claim and the Weir claim of about eight million dollars.

[202] The starting point for party and party costs is Tariff A. The 2004 Tariff A calculation of costs from the sum of $12,360,799.77, applying Scale 2 (the basic scale), is $64,750 plus 6.5% of the amount over one million dollars. Application of Scale 3 of the 2004 tariff to an AI of $12,360,799 (without considering complexity and importance) would generate tariff costs in the amount of $1,004,001.

[203] The Court previously noted that NBFL's offer to settle, which it claimed gave a more favourable result to Barthe than achieved at trial, was not a formal offer pursuant to *CPR 10* for two principal reasons. To the extent that the offer should be considered as a factor pursuant to CPR 77.07(2)(b), the offer was not more favourable than what Barthe could reasonable have expected at the time the offer was advanced.

[204] NBFL calculated, for the purpose of its brief, interest for 10.2 years at 2.614% to November 18, 2011, the date of the offer. On that basis, it calculated the interest was $499,782. NBFL did not argue for an interest rate less than the default rate of 5% provided for in the *Rules* until its post-trial brief. The appropriate rate of interest for consideration as of the time of NBFL's offer was the default 5% rate. If interest, as of November 18, 2011, was $499,782 calculated at 2.614%, I estimate that if it had been calculated at 5%, prejudgment interest would have amounted to about $900,000.

[205] Adding prejudgment interest plus 2004 Tariff A costs, based on the claim, counterclaim and third party claim, NBFL's offer was not close enough to the amount awarded to the Barthe estate to support a reduction in the costs award.

[206] Because Barthe commenced his application with Ristow, using the same counsel, and Ristow settled shortly before trial, I infer that they shared legal expenses. The additional expense of the litigation, caused by the complexity of the litigation, should, in my view, therefore reasonably be inferred as having been shared with Ristow. For that reason, I decline to increase the AI at step one of the tariff analysis for complexity and importance. Instead, I simply apply the 2004 Tariff A Scale 3, which is the starting point for party and party costs analysis. I therefore award 2004 Tariff A, Scale 3, costs to the Barthe Estate in the amount of $1,004,001.

Trial Days

[207] The trial consumed about 28 days over 47 days. The successful Plaintiffs seek $2,000 for 47 days. NBFL submits that only 12 days related to the successful Plaintiffs' case.

[208] In my view, the successful Plaintiffs' counsel was required to attend all court sitting days. The fact that he also represented Calvin Wadden leads me to conclude that the trial days should be apportioned between them. I apportion 20 days to the successful Plaintiffs and award them $40,000 for trial days.

Disbursements Claim

[209] Paragraph 42 of the decision itemizes the successful Plaintiffs' claim for disbursements at $312,566. Paragraphs 87 to 91 summarize NBFL's objections.

[210] Respecting the Drake Recording Services claim for $23,820 and the conference room rentals (for discovery) of $7,248.61, the Court agrees with the submissions of NBFL. The documents provided are too vague and not supportive of the claim made. The analysis by NBFL appears, on its face, to be more accurate. For the reason set out in their submission, the Court accepts as proper disbursements $6,126.47 respecting Drake Recording Services and $1,683.93 respecting conference room rentals.

[211] Respecting the photocopy claimed for $50,000 at the rate of $0.20 per copy, the Court interprets this as 250,000 copies.

[212] This Court has in many previous costs decisions stated that it is skeptical of claims that the actual cost to the lawyer for photocopying is greater than $0.10 per copy. The Court made this observation in *Wadden v BMO*. Absent evidence of a higher actual cost to the successful Plaintiffs' counsel for each photocopy, the Court does not accept or approve of a disbursement greater than $0.10 a page.

[213] NBFL submits that, in Dunlop's affidavit, he claims to have reviewed only 40,000 pages and suggests that this relevant to the number of pages photocopied. It submits that the photocopy claim therefore be reduced to $5,000, the amount this Court approved in the bill of costs of *Wadden v BMO*.

[214] The fact that Dunlop reviewed 40,000 pages is not relevant to the number of pages caused to be copied by him for this litigation on behalf of the successful Plaintiffs.

[215] The successful Plaintiffs' claim lacks detail but, based upon the Court's experience in this litigation, I accept that the volume of copies required to be produced for the successful Plaintiffs in their contest with NBFL likely exceeded by a significant amount the number of copies required to be produced by BMO in defence of Wadden's claim. I approve photocopy costs of $10,000.

[216] As a disbursement, Weir claims interest paid on litigation loans. The evidence in support of the loan interest is contained in Dunlop's affidavit, as well as Ex 3 to that affidavit. NFBL was provided the opportunity to cross-examine, initially indicated that it intended to cross-examine, but then declined to cross-examine Dunlop on his affidavit. Dunlop, in his affidavit, declares that Weir borrowed three sums: $25,000 at 2.4% monthly interest; $15,000 at 2.4% monthly interest; and, $49,000 at an unidentified rate of interest. The exhibit attached to his affidavit identifies total interest paid of $80,405.82.

[217] NBFL submits that the costs of a litigation loan are recoverable, but only where the loan is necessary to continue the litigation. It submits that there is no evidence before the Court that it was necessary for Weir to borrow in order to continue the litigation. I disagree.

[218] In November 2010, NBFL filed a motion against Helical Incorporation Limited, of which Weir was the president and a major shareholder, for security for costs in respect of Helical's action against NBFL. Helical was Weir's source of employment income. The motion was heard and decided on February 22, 2011. The Court granted NBFL's motion and ordered security for costs to be paid by Helical in the amount of $15,000 within three months. The security was not paid.

[219] On June 15, 2011, NBFL moved to dismiss Helical's claim for failure to post the security as ordered. At the hearing it was represented to the Court that neither Helical nor its principal officer and president Weir could afford to pay the security for costs. Helical stated that it could not pay security because it was put out of business by reason of the conduct of NBFL, the basis of its action. Weir effectively lost his source of income when Helical went out of business.

[220] It was clear to the Court, in the context of those hearings and the submissions made in respect of those hearings, that Helical's action was dismissed by reason of the impecuniosity of its principal officer Weir.

[221] I am satisfied, on a balance of probabilities, that it was necessary for Weir to take out loans at high rates of interest in order to continue the litigation. The Court approves the interest claim of $80,405.82.

[222] The final significant disbursement claimed was $151,093.75 for assistance and support provided Dunham of an IT nature to his counsel in respect of this litigation. The claim is itemized in Dunlop's affidavit.

[223] NBFL objects to the claim on the basis that Dunham is a party to the proceeding and, as such, is expected to assist his counsel in the prosecution of his claim. He was not hired as an expert and if his help was beyond that of a normal litigant, there must be evidence to support the assertion.

[224] While the Court has significant problems with the calculation of the quantum of the amount claimed, the Court is of the view that the nature of this litigation largely depended upon thousands of e-mails and other electronic information stored on computers. Dunham's speciality was in that field. This litigation mandated specialized technical assistance in sorting, categorizing and storing the electronic information. Dunlop could not have pursued this litigation on behalf of the successful Plaintiffs without the kind of technical assistance that it claims was provided by Dunham.

[225] Because it is not possible, absent cross-examination, to determine whether the costs claimed were reasonable and because I am not satisfied that sufficient detail has been provided in the affidavit, I am prepared only to acknowledge that such services were necessary. I infer that a claim of $25,000 would be a conservative estimate of what it would reasonably cost for services to keep up with the electronic evidence that could only be accessed, sorted, categorized and stored with the assistance of someone with Dunham's skills.

[226] In summary, the successful Plaintiffs' claim for disbursements is approved in the following amount:

Drake Recording Services	$6,126.47
conference room rentals for discoveries	1,683.93
the assistance provided by Dunham	25,000.00
document copies at $0.20	10,000.00
for interest on litigation loans to Weir	80,405.00
TOTAL:	**$123,215.40**

NBFL's Claim for Costs against Calvin Wadden

Submissions

[227] NBFL seeks costs against Wadden. At trial, NBFL claimed margin debt of $1,086,072 plus interest and third party indemnity respecting the claims of the Weir group and the Barthe estate. Previously, its counterclaim and third party indemnity claim against Wadden was more substantial. Wadden counterclaimed for an amount which was first quantified in his pretrial brief at $7,091,052 plus interest.

[228] NBFL was, for the most part, successful at trial. The Court held Wadden liable for his margin debt plus a reduced PJI and some of the third party claim as well as dismissing Wadden's counterclaim.

[229] To be consistent with its submissions respecting the successful Plaintiffs' costs claim, NBFL sought tariff costs on the old 1989 Tariff at the top scale (Scale 5).

[230] 1989 Tariff A costs were calculated by NBFL as follows:

	Basic Scale 3	Scale 5
Margin Debt	$29,582.16	$49,303.60
Wadden's Counterclaim	212,731.56	354,552.60
NBFL's third party claims	51,187.48	90,312.45
Total:	**$293,501.20**	**$494,168.65**

[231] NBFL provided the Court with a copy of a formal offer to settle, which it claims was a formal offer pursuant to *CPR 10*. The offer was made on November 18, 2011, on the eve of the trial. The offer had three parts:

1. NBFL would dismiss its claims and third party claims against Wadden on a without costs basis.

2. Wadden's claims and counterclaims would be dismissed on a without costs basis.

3. NBFL would forgive Wadden's margin debt.

[232] It seeks to have its cost award increased by 50% on the basis that their offer was more favorable to Wadden than the trial result and was made between the date assignment conference date and the finish date, pursuant to *CPR 10.09(c)*. It acknowledges that there was no formal date assignment conference date and finish date but refers the Court, as was discussed earlier in this decision, to the fact that the Court's organizational call on November 16 finalized the opening of the trial, previously scheduled to start in October 2011, to commence February 13,

2012, and on a second organizational call, held December 19, 2011, fixed the date for the filing of the witness lists as January 11, 2012. Normally trial dates are set at a date assignment conference and the finish date is the date which witness lists, at present, are required to be filed.

[233] NBFL submits that the appropriate principle to apply in its claim for costs against Wadden is the principle of rewarding the successful party and penalizing the unsuccessful party, with the goal of providing a substantial contribution to a party's litigation expenses. It cites *Landymore v Handy*, 1992 NSJ No. 79.

[234] Disbursements include discovery costs for attendance and transcripts for 13 days of discovery of Wadden, 2 days of discovery of Andrea Wadden and one day of discovery of Hal Greenwood, totalling $6,955; a share, from one-half to one-seventh, of the discoveries of Clarke, Eric Hicks and Richard Rousseau (varying with the number of parties who attended those discoveries) in the amount of $1,780 and one-sixth of five trial exhibit books. The total disbursements claimed are $9,062.

[235] Wadden makes no submissions respecting costs.

Analysis

[236] NBFL did not do a calculation of its costs claims based on the 2004 Tariff A Scale 3. The 2004 Tariff A is the basis of this Court's decision in favor of the successful Plaintiffs. The calculation of Tariff A costs based on Scale 3 of the 2004 tariff in respect of the total claim would be as follows:

Margin Debt	$1,086.072.00
Wadden's Counterclaim	7,091,052.00
NBFL's third party claims	1,806,249.00
Total:	**$9,983,393.00**

Application of Scale 2 (basic) or Scale 3 of the 2004 Tariff A would amount to costs of $648,670 and $810,838 respectively.

[237] Two submissions by NBFL in its claim of costs against Wadden are directly contrary to the submissions it subsequently made in responding to the successful Plaintiffs' cost claim.

[238] First, it subsequently submitted that the Court should disregard (or at best, add minimal costs) to the Barthe's costs claim in responding to NBFL's unsuccessful counterclaim and third party claims. Its argument was based on its submission that Barthe's defence of its counterclaim and third party claims added little, if anything, to Barthe's legal costs.

[239] Over 70% of NBFL's costs claim against Wadden reflects Wadden's unsuccessful counterclaim against it. Wadden's unsuccessful counterclaim was quantified first in Wadden's

pretrial brief. But for Wadden's counterclaim, NBFL's tariff costs would have been about one-third the amount now claimed.

[240] Secondly, NBFL does not seek an adjustment in its cost claim against Wadden on the basis that, throughout the 11 years of litigation, NBFL's counsel were prosecuting and/or defending claims, counterclaims and third party claims against, by my estimate, more than thirty other groups of parties.

[241] NBFL also seeks a 50% increase in its costs award by reason of its formal settlement offer.

[242] This Court conducted an analysis of NBFL's settlement offers in respect of the Barthe claim. The Court has the benefit of the submissions made by Richardson on behalf of the successful Plaintiffs.

[243] Applying the submission made by Richardson with respect to NBFL's offers to Barthe, Dunham and Weir, adopted by the Court, leads me to conclude that this offer was not a formal offer pursuant to and compliant with *CPR 10*, because it did not set out a specific amount or method for the calculation for costs to the date of the settlement offer. I incorporate this Court's analysis in this decision dealing with the effect of the settlement offers on the successful Plaintiffs' costs claim to the analysis in respect of NBFL's settlement offer submission against Wadden.

[244] In my view, for the same reasons as expressed earlier in this decision, NBFL's offer to Wadden is not a formal compliant *CPR 10* offer.

[245] Having said that, it is open to the Court to consider an offer, whether or not made formally pursuant to *CPR 10*, when determining whether to add to or subtract from costs between two parties (*CPR 77.07(2)(b)*).

[246] NBFL was the reason this litigation was so complex and so lengthy. It commenced the Main Action. It commenced most of the third party proceedings. This Court found in its trial decision that NBFL knew or should have known before it commenced the litigation and, at least, since 2005 that its broker Clarke had acted wrongfully in respect of these parties and that it had been, at the least, negligent in its supervision of Clarke. NBFL should not benefit from the top scale of costs when it was the primary reason that the litigation was complex.

[247] Costs are to be determined in the context of the litigation. It would not do justice between the parties to award NBFL substantial costs for litigation that it was primarily responsible for making so lengthy and complex, especially in light of what it knew, or should have known from the beginning, and what its counsel represented to the court in justifying commencement of the Main Action (2005 NSSC 8, and 2005 NSCA 139), and its officers advised Weir early in the litigation.

[248] NBFL is entitled to costs against Wadden by reason of its success against him. Its written submission was for costs on the 1989 Tariff, Scale 5, with a 50% increase for its settlement offer. NBFL are awarded tariff costs on the 1989 Tariff A, basic Scale, based on its success in respect of the margin debt claim, its successful defence of the counterclaim, and its partial success in the third party claim. The Court makes not adjustment for the late, non-compliant settlement offer. Application of the 1989 tariff is intended to adjust for the fact that the involvement of NBFL's counsel in this litigation was with respect of several other litigants, and it was primarily responsible for the length and complexity of the litigation. NBFL is awarded costs of $ 293,501.20.

[249] NBFL claimed limited disbursements totalling $9,062.03, under three headings:

a) attendance at and obtaining transcripts of about 13 days of discovery of Calvin Wadden; 2 days of discovery of Andrea Wadden; 1 day of discovery of Al Greenwood	6,955.14
b) for a share of the discovery examinations of Bruce Clarke, Eric Hicks and Richard Rousseau	1,819.00
c) as a portion of the five trial exhibit books of 2,236 pages each copied at a cost of $0.25 per page.	287.75

[250] The Court's practice is to award costs for photocopies at $0.10 a page, especially where large volumes are involved, absent actual proof of the cost per photocopy of more than $0.10. I therefore adjust the exhibit book claim as follows: 2,236 pages x 5 copies = 11,180 at $0.10 is $1,118. One-fifth of that cost is $223.60. I award NBFL costs of $223.60 against Wadden for that expense.

[251] In the context of these proceedings and the fact that the discovery of Clarke, Eric Hicks and Richard Rousseau were not solely or even primarily by reason of the involvement of Wadden in the litigation but would have been required no matter whether Wadden was involved or not, I do not allow the disbursement for the attendance at the discovery or transcripts related to the discovery of these three persons.

[252] Disbursements are approved in the amount of $7,178.74.

Summary

[253] In summary,

1. Dunham is awarded enhanced 2004 tariff costs of $300,000 against NBFL;

2. the Weir group is awarded enhanced 2004 tariff costs of $250,000 against NBFL and NBC;

3. the Barthe estate is awarded 2004 tariff costs of $1,004,001 against NBFL;

4. the successful Plaintiffs are awarded trial day costs of $40,000 against NBFL;

5. the successful Plaintiffs' disbursements are approved in the amount of $123,215.40 against NBFL;

6. NBFL is awarded reduced 1989 tariff costs of $293,501.20 against Calvin Wadden; and

7. NBFL's disbursements are approved in the amount of $7,178.74.

Warner, J.