

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Todd v. Todd*, 2025 NSCA 30

**Date:** 20250507

**Docket:** CA 536903

**Registry:** Halifax

**Between:**

Colin Andrew Todd

Appellant

v.

Linda Marie Todd

Respondent

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**Judges:** Bourgeois, Scanlan and Van den Eynden, JJ.A.

**Appeal Heard:** March 31, 2025, in Halifax, Nova Scotia

**Facts:** The case involves a divorce proceeding between the parties, who were married for 16 years and separated in November 2020. The Respondent filed for divorce in December 2021, and the Appellant contested the claims, particularly regarding the division of a Canadian Armed Forces Reserve pension and spousal support. The trial focused on these financial issues, including the valuation and division of the Reserve pension and the entitlement to spousal support (paras [1-11](#)).

**Procedural History:** Trial court: The trial judge found the Respondent to be the more successful party and awarded her costs of \$29,750.00 (paras [6-7](#)).

**Parties' Submissions:** Appellant: Argued that the trial judge's findings in the costs endorsement did not reflect the trial outcome, asserting that he was successful on most issues and that the costs award was unjust (paras [7](#), [25](#)).

Respondent: Maintained that she was the more successful party, particularly on the issue of spousal support, and that the costs award was appropriate (paras [32-34](#)).

**Legal Issues:**

Should leave to appeal the award of costs be granted?

Does the trial judge's costs award demonstrate legal error or is it manifestly unjust?

If appellate intervention is appropriate, what quantum of trial costs is appropriate in the circumstances?

**Disposition:**

Leave to appeal granted.

Appeal allowed.

Trial judge's award of costs set aside.

Trial costs awarded in favour of the Appellant.

Costs of the appeal awarded to the Appellant (headnotes, para [71](#)).

**Reasons:**

Per Bourgeois J.A. (Scanlan and Van den Eynden JJ.A. concurring):

The trial judge's costs award was found to be manifestly unjust due to significant errors in assessing the success of the parties. The trial judge misapprehended the nature of the relief awarded to the Respondent, particularly regarding spousal support, which was not indefinite as claimed. The trial judge also failed to properly assess the Appellant's success in excluding a significant portion of his Reserve pension and RRSPs from the matrimonial division. Additionally, the trial judge erroneously concluded that the Appellant delayed disclosure and opposed obtaining an actuarial report, which was not supported by the record. These errors warranted setting aside the costs award and granting costs in favour of the Appellant (paras [30-70](#)).

<p><i>This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 72 paragraphs.</i></p>
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**Judges:** Bourgeois, Scanlan and Van den Eynden, JJ.A.

**Appeal Heard:** March 31, 2025, in Halifax, Nova Scotia

**Held:** Leave to appeal granted, appeal allowed with costs, per reasons for judgment of Bourgeois, J.A.; Scanlan and Van den Eynden, JJ.A. concurring

**Counsel:** Allison Kouzovnikov, for the appellant  
Bradford G. Yuill, for the respondent

## **Reasons for judgment:**

[1] This is an appeal of a costs award in a Divorce proceeding. The parties were married for 16 years. They separated on November 13, 2020. In December 2021, the respondent, Linda Marie Todd, filed a Petition for Divorce. The appellant, Colin Andrew Todd, filed an Answer. The parties participated in three pre-trial conferences with the trial judge, Justice Robert M. Gregan.

[2] The matter proceeded to trial on November 9, 2022. Ms. Todd gave evidence and was cross-examined. Her common-law partner, Peter Swan, had been subpoenaed by Mr. Todd and gave evidence. The final witness was Mr. Todd.

[3] In the midst of Mr. Todd's cross-examination, counsel for Ms. Todd advised that in preparing for the hearing he realized there was a "hole" in the evidence relating to Mr. Todd's Canadian Armed Forces Reserve pension ("Reserve pension").

[4] The hearing continued. At the conclusion, the trial judge queried the parties on whether an actuarial report ought to be obtained to show the value of the Reserve pension accrued both before and during the marriage. A report was obtained and filed with the court. The parties were given the opportunity to file additional affidavits and submissions.

[5] On April 18, 2023, the trial judge rendered an oral decision with a Corollary Relief Order being issued on November 7, 2023. Neither party has challenged the trial judge's conclusions arising from the issues at trial.

[6] The parties each sought costs following the trial. Each alleged they were the "successful party" and deserving of an award of costs. On June 26, 2024 the trial judge issued an Endorsement in which he found Ms. Todd to have been the more successful party and ordered costs payable to her in the amount of \$29,750.00. A Corollary Relief Order (Costs) was subsequently issued on September 10, 2024.

[7] Mr. Todd now appeals. He says the trial judge's findings in the costs endorsement bear little to no resemblance to the trial outcome. I agree. For the reasons to follow, I would grant leave, allow the appeal and set aside the trial judge's award of costs to Ms. Todd. I would further award trial costs in favour of Mr. Todd, along with the costs of the appeal.

## Background

[8] Prior to their marriage, Mr. Todd had a full-time position as a teacher. He was also a member of the Canadian Armed Forces Reserves. Both jobs provided him with the benefit of a pension. He continued in both jobs after his marriage to Ms. Todd. There was no dispute at trial how Mr. Todd's teachers' pension would be divided. The parties were, however, at odds with respect to the division of the Reserve pension. At the time of trial, Mr. Todd's income was in the range of \$130,000.00.

[9] Ms. Todd brought two children into the relationship. She also worked outside the home in various positions during the marriage. At the time of trial, her annual income was \$49,000.00.

[10] When the parties separated, Ms. Todd left the matrimonial home and obtained her own apartment. Mr. Todd remained in the matrimonial home. Upon separation, Mr. Todd paid Ms. Todd spousal support in the amount of \$800.00 per month in addition to paying her car insurance and maintaining her on his health and dental plan. On November 1, 2022, Ms. Todd re-partnered and began residing with Mr. Swan.

[11] From the record before the Court I note:

- In her Petition for Divorce, Ms. Todd sought "indefinite spousal support" and retroactive spousal support. She further sought an equal division of the matrimonial assets;
- In his Answer, Mr. Todd noted he had been voluntarily paying spousal support in the amount of \$800.00 per month since the date of separation. He contested Ms. Todd's claim to prospective and retroactive spousal support. He further made a claim to exclusive possession of the matrimonial home and sought "*an exclusion of certain assets acquired both before and during the marriage*" from the matrimonial asset division;
- The parties filed Statements of Property and Statements of Expenses. In her Statement of Expenses sworn December 17, 2021, Ms. Todd noted:

The following are the names, occupations or sources of income of all persons with whom I currently reside or with whom I share living expenses or from

whom I receive an economic benefit as a result of living with the person ...  
**Peter Swan.**

- The parties had the first of three Pre-Trial Conferences with the trial judge on March 1, 2022. In her Pre-Conference summary, Ms. Todd advised she was seeking indefinite spousal support and an equal division of assets. In his Pre-Conference summary, Mr. Todd advised he “*seeks the exclusion of some pre-marital assets, specifically a portion of his military pension, and some of his RRSPs*” from the matrimonial property division. With respect to spousal support, Mr. Todd advised he required further disclosure from Ms. Todd before finalizing his position. He sought a statement of income and a statement of expenses of Peter Swan;
- The parties participated in a second Pre-Trial Conference with the trial judge on July 19, 2022. Mr. Todd filed a Pre-Conference summary in which he indicated he was challenging Ms. Todd’s entitlement to spousal support. He confirmed he was seeking to exclude a portion of his military pension and some of his RRSPs from the matrimonial property division. Ms. Todd did not file a Pre-Trial Summary of her position. During the conference Mr. Todd advised the trial judge he had not received disclosure of Mr. Swan’s financial information as previously requested. Ms. Todd’s counsel advised his client had no ability to produce her partner’s financial information and suggested Mr. Todd should subpoena Mr. Swan to give evidence in that regard at trial; and
- The parties participated in a third and final Pre-Trial Conference with the trial judge on October 4, 2022. Mr. Todd repeated his positions regarding spousal support and the assets he sought to exclude from the division of assets. Ms. Todd did not file a Pre-Trial summary. During the conference, Ms. Todd’s counsel reiterated that his client had no ability to provide Mr. Swan’s financial information and he should be subpoenaed.

[12] In advance of the hearing, Mr. Todd’s counsel subpoenaed Mr. Swan to attend at the trial. Further, each party filed written submissions in which they set out their respective positions. Ms. Todd, as the Petitioner, filed her written submissions first. In her submissions filed November 1, 2022, she set out the following requests:

1. An equal division of matrimonial assets. She sought an equalization payment from Mr. Todd in the amount of \$121,099.68;
2. Prospective spousal support in the amount of \$2,014.00 per month, payable on an indefinite basis;
3. Retroactive spousal support calculated at \$18,303.00; and
4. Occupation rent of \$19,200.00<sup>1</sup>.

[13] In his pre-trial submissions filed November 8, 2022, Mr. Todd responded as follows:

1. Adjustments were suggested to the property division proposed by Ms. Todd, resulting in an equalization payment to her in the amount of \$59,993.00 plus a RRSP roll-over;
2. There should be no ongoing spousal support. Mr. Todd submitted the spousal support he had paid since the date of separation fulfilled any entitlement Ms. Todd should be found to have, and it should terminate effective November 30, 2023;
3. There should be no retroactive spousal support awarded; and
4. There should be no occupation rent awarded.

[14] In addition to his pre-hearing brief, Mr. Todd also filed on November 4, 2022, a motion seeking to introduce an affidavit of his counsel, Ms. Kouzovnikov into evidence at the hearing. The purpose of the affidavit was to respond to alleged factual inaccuracies in the pre-hearing written submissions filed by Ms. Todd's counsel, Mr. Yuill.

[15] At the outset of the trial on November 9, 2022, the motion to file the affidavit of counsel was heard and dismissed. The trial continued. As stated above, the issue regarding the valuation of Mr. Todd's Reserve pension arose during trial and an actuarial report was obtained.

[16] The report was prepared by McKeating Actuarial Services, Inc. and confirmed:

- The pension was not divisible at source;

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<sup>1</sup> The appellant had remained in the matrimonial home.

- Mr. Todd would be entitled to retire with an unreduced pension at age 55;
- 59% of the Reserve pension had accrued prior to the marriage, and 41% during the marriage; and
- The value of the pension based upon retirement ages of 51.4 (Mr. Todd's age at separation), 55, 60 and 65.

[17] Neither party challenged the contents of the report, but rather, differed in how the trial judge ought to apply the information contained therein.

[18] As had been permitted by the trial judge, the parties filed post-hearing affidavits and submissions. In addition, there were two further court appearances to address the actuary's report and the timing of the additional evidence and submissions arising therefrom.

[19] Post-hearing, Ms. Todd sought:

- For the entire value of the Reserve pension to be subject to division. She submitted the court should adopt the valuation suggested for a retirement age of 60, and suggested one half of the value be paid to her immediately as part of the property division equalization payment. Based on her calculations, this would require Mr. Todd to pay her an immediate equalization payment of \$237,788.72;
- The parties' timeshare, which had been overlooked in previous submissions, should be split between the parties, each having the opportunity to use it; and
- The claims for indefinite spousal support, retroactive spousal support and occupation rent remained as claimed in the pre-hearing submissions.

[20] In his post-hearing submissions, Mr. Todd asked:

- For the pre-marriage portion of his Reserve pension to be excluded from the marital property division, as well as that portion of his RRSPs which had been purchased with funds obtained from the sale of a business asset (an apartment building).

Ms. Todd's share of the Reserve pension (half of the 41%) accrued during the marriage would be paid to her on a periodic basis upon his retirement from the military. Specifically, he proposed to transfer to Ms. Todd her share of the pension payment on a monthly basis, not as part of an upfront equalization payment;

- For his proposed property equalization payment of \$59,993.00 to be implemented;
- For the time share to be sold and the proceeds divided equally after adjusting for carrying costs he had incurred; and
- For the prospective spousal support, retroactive spousal support and the occupation rent claims to be resolved as earlier submitted.

### *The trial decision*

[21] The trial judge rendered an oral decision on April 18, 2023. It has not been reported. He determined:

- Ms. Todd was entitled to periodic spousal support based on the “*low-end*” of the *Spousal Support Guidelines* in the amount of \$1,726.00 per month;
- Ms. Todd's entitlement to spousal support would “*terminate absolutely*” when Mr. Todd retired from the Canadian Armed Forces Reserve Force;
- Ms. Todd's claim for retroactive support was dismissed;
- As sought by Mr. Todd, the Reserve pension would be divided unequally, with him retaining 59% of the value accrued. Ms. Todd was entitled to receive her half of the remaining 41% of the pension when “*Mr. Todd reaches the age of 55*”, and not as part of an upfront equalization payment. Because the pension was not divisible at source, Mr. Todd would transfer to Ms. Todd a monthly amount equal to her share of the pension from his pension payment;
- Mr. Todd was ordered to secure life insurance to pay to Ms. Todd the value of her share of the Reserve pension in the event of his death, the premium being deductible first from the spousal

support payable and thereafter, from her share of the monthly pension;

- Mr. Todd's RRSPs were divided unequally, with him retaining 59% of the value, and half of the remaining 41% to be rolled-over to Ms. Todd;
- Ms. Todd's claim for occupation rent was dismissed;
- The timeshare property was to be sold and the sale proceeds divided equally between the parties as suggested by Mr. Todd; and
- The remaining matrimonial assets were divided equally with the trial judge adopting the equalization payment of \$59,993 subject to adjustments, as requested by Mr. Todd.

[22] As established earlier, neither party sought to challenge the trial judge's findings.

#### *The costs decision*

[23] In his Endorsement dated June 26, 2024 the trial judge, in determining an appropriate award of costs, made the following findings:

1. The results were somewhat mixed, however while Mr. Todd was successful on a number of minor issues (contents of the home, division of timeshare), the Petitioner Ms. Todd was successful on the larger issues.
2. While it is true that the court rejected the arguments by Ms. Todd that the home should be provided to her in lieu of the pension as part of the pension division<sup>2</sup>, the court determined that the pension equity issue could be addressed in the division of property and ordered accordingly pursuant to the decision.
3. Ms. Todd was entirely successful on the issues of spousal support and spousal support was ordered payable in the amount of \$1,710.68 a month (inclusive of life insurance).
4. The court also agrees that the following issues should be considered on awarding costs. The lack of timely disclosure by Mr. Todd with respect to pension benefits. While ultimately an actuary's report was prepared

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[2] Although it does not impact on the resolution of the appeal, for the sake of accuracy I will note that having reviewed the entirety of the record, including her evidence and submissions, Ms. Todd never sought to have the matrimonial home transferred to her in lieu of a pension division. Neither was that position advanced by Mr. Todd.

explaining the nature and complexity of the reserved pension for Mr. Todd, it was much delayed, and, initially opposed by Mr. Todd.

5. I also accept that Mr. Todd initially failed to advance a position on the division of equity and ultimately on the eve of the hearing conceded the proposed equity (chart) proposed by Ms. Todd's counsel.
6. I also accept that the requirement of the Petitioner to file the evidence of Mr. Swan and the allegations of contributions by common-law partners which were ultimately dismissed contributed to the legal fees of Ms. Todd.
7. The motion dealing with counsel's submissions and seeking to strike those which were without merit, also resulted in additional costs to the Petitioner.
8. I therefore, accept that costs are appropriate. In terms of the amount to be used in Tariffs under Civil Procedure Rule 77 I will use the amount argued by the Petitioner as it relates to the spousal support award. I accept that the payment of \$1,710.68 a month is the equivalent of \$20,528.16 a year.
9. I also accept that because spousal support was awarded indefinitely using a figure of 10 years would be appropriate which would result in a total award and for a table amount for costs purposes of \$205,000.00.
10. Under the Tariff and the Scales fees for the range between \$200,000.00 and \$300,000.00 produce a range of costs.
11. I decline to use Scale 3 which was suggested by Mr. Yuill on behalf of Ms. Todd and will use Scale 2 which produces costs of \$22,750.00.
12. I also award additional costs as it relates to the issues of having subpoenaed Mr. Swan to produce the evidence of his income, costs in the amount of \$1,500.00.
13. I also award an additional \$1,500.00 cost to deal with the motion that was filed by Ms. Kouzovnikov on behalf of Mr. Todd. Costs in the amount of \$1,500.00 are appropriate for that motion.
14. I decline to order costs using Civil Procedure Rule 77.12 as raised by Mr. Yuill because here I find that although the argument was deemed to be without merit, it was not done in a vexatious manner, and not caused by the failure of counsel to do certain acts as contemplated in the case authorities.
15. The court also finds that two days of Hearing are appropriate which would result in an additional \$2000.00 cost per day.
16. Therefore, total costs are awarded to the Petitioner as follows, \$22,750.00 per the amount of \$200,000.00 and \$300,000.00 found in Scale 2. Plus \$1,500.00 costs for failure to disclose evidence relating to Mr. Swan's subpoena and financial information required and an additional \$1,500.00 for the motion on submissions, plus \$2,000.00 per day x2 equalling \$29,750.00.

[24] The Corollary Relief Order (Costs) incorporating the above was issued on September 10, 2024.

## **Issues**

[25] In his Notice of Application for Leave to Appeal and Notice of Appeal Mr. Todd set out grounds of appeal alleging:

- The trial judge erred in his Endorsement on costs by making a series of significant factual errors, misunderstandings, misapprehensions, legal errors, and errors of principle in his analysis which, on the whole, resulted in an injustice to him; and
- The trial judge erred in his Endorsement on costs by failing to i) consider the actual outcome of the divorce hearing, specifically that he was successful on 12 out of 13 issues raised before the court; ii) address the two court appearances which occurred after the hearing to provide additional evidence and legal submissions respecting the exclusion of the pre-marital portion of his Reserve pension and some RRSPs, issues wholly resolved in his favour, and iii) consider any of the arguments put forward in his supplementary submission on costs, and practically none of the arguments put forward in his initial submissions on costs.

[26] After having considered the written and oral submissions of the parties, I would restate the issues to be resolved on appeal as follows:

1. Should leave to appeal the award of costs be granted?
2. Does the trial judge's costs award demonstrate legal error or is it manifestly unjust?
3. If appellate intervention is appropriate, what quantum of trial costs is appropriate in the circumstances?

## **Standard of Review**

[27] The standard of review governing this Court's review of a judge's costs determination is well-established. In *Wolfson v. Wolfson*, 2023 NSCA 57, Justice Van den Eynden noted:

[41] Costs awards are within a judge's discretion. This Court defers to that discretion, absent an error in law or where the award results in an injustice. (See *Ward v. Murphy*, 2022 NSCA 20 at para. 28 and *Donner v. Donner*, 2021 NSCA 30 at para. 60.)

## Analysis

*Issue 1: Should leave to appeal the award of costs be granted?*

[28] Leave of the Court is required to challenge a costs award on appeal. To obtain leave an appellant must demonstrate an arguable issue—that is, an issue that arises on the record which could result in the appeal being allowed. See *Link v. Link*, 2022 NSCA 14 at para. 69 and *Ward v. Murphy*, 2022 NSCA 20 at para. 90.

[29] Given the reasons to follow, it is evident Mr. Todd has raised arguable issues and that leave ought to be granted.

*Issue 2: Does the trial judge's costs award demonstrate legal error or is it manifestly unjust?*

[30] The trial judge's costs Endorsement contains significant errors which resulted in the award of costs against Mr. Todd being manifestly unjust.

[31] Firstly, in assessing who was the more successful party, the trial judge misapprehended the nature of the relief he had awarded to Ms. Todd at the trial. His determination in the costs Endorsement that Ms. Todd had been “entirely successful” in her claim for spousal support is incorrect. The record and his trial reasons demonstrate she was not.

[32] More significantly, however, is the trial judge's erroneous belief he had granted Ms. Todd indefinite spousal support. This error directly impacted his assessment of the value of her award for costs purposes. He used a duration of 10 years and assessed the value of Ms. Todd's “win” as being \$205,000.00. In fairness to the trial judge, it appears he may have been led astray by Ms. Todd's costs submissions in which her counsel Mr. Yuill incorrectly asserted:

As I alluded to earlier, the spousal maintenance claim was the most time consuming and contentious issue.

The Petitioner was **completely successful** on this issue. Not only that “the amount involved” dwarfs any of the other claims.

The award was net spousal support of \$1,710.68 per month this is equivalent to \$20,528.16 per year.

It is reasonable to anticipate that **this indefinite maintenance** would last for ten years. In other words, \$205,000.00.

(Emphasis added)

[33] Notably, in submissions before this Court, Ms. Todd’s counsel maintains the trial judge made no error in concluding she was entirely successful in relation to her claim for spousal support, that she had been awarded indefinite spousal support, and it was reasonable to assess the value of that support by anticipating she would be in receipt for 10 years.

[34] Specifically, on appeal Ms. Todd submits the trial judge made no error in using 10 years as a basis for assessing the value of the spousal support awarded and asserted there was no evidence Mr. Todd had in fact retired from the military at 55. She suggested that he was still working. In her factum she argues:

41. **If** Mr. Todd was retired now (as he is presently over 55), fresh evidence could have been adduced on that point with leave, but was not. Even submissions from his counsel, confirming he had retired, may have been expected. **He is likely still working and may be until 65 or longer**, but there is still no evidence on this point, only aspirational statements.

(Emphasis added)

[35] The above statement is highly problematic. It asks this Court to accept a state of affairs which Ms. Todd and her counsel knew to be false. In response to questions from the bench, Mr. Yuill acknowledged Mr. Todd had in fact retired from the military at 55, spousal support had ceased, and his client was now in receipt of her share of the Reserve pension. Although Ms. Todd was free to argue the trial judge could have, at the time he rendered his costs decision, determined Mr. Todd may continue his Reserve work beyond 55 and potentially for another 10 years, it is another thing to represent to this Court that he was “likely still working and may be until 65 or longer”, when she knew it to be untrue.

[36] Contrary to what Ms. Todd and her counsel represented to the trial judge and again asserted on appeal, a review of the trial decision demonstrates she was only

partially successful in her claim for spousal support. Instead of the indefinite support she sought, she was awarded time-limited support and at a monthly amount significantly less than what she had asked for. Further, her claim for retroactive support was dismissed.

[37] The trial judge misapprehended Ms. Todd's degree of success. Further, his assessment of the value of her success was marred by his failure to recall he had made a terminal order for spousal support (ceasing when Mr. Todd retired from the military), not an indefinite one. Indeed, Mr. Todd had testified that given his health difficulties<sup>3</sup>, he intended to retire from the military when he turned 55 and subsequently reiterated this in his post-trial submissions.

[38] The trial judge gave his oral trial decision on April 18, 2023. It is clear from those reasons the trial judge accepted Mr. Todd was "*close to retirement age*". Further, he ordered spousal support would only continue until Mr. Todd was in receipt of the Reserve pension at which time he would begin paying Ms. Todd her portion. The trial judge noted "*the military pension will be deferred until Mr. Todd reaches the age of 55*", a clear indicator he had accepted Mr. Todd would likely be retiring at that age, automatically bringing an end to the spousal support. Retirement at age 55 resulted in just 14 months of spousal support payable to Ms. Todd – a value of \$23,949.52, a sum far less than the \$205,000.00 "win" the trial judge attributed to her in his costs assessment.

[39] The trial judge's failure to consider the import of the evidence and his own finding of Mr. Todd's likely retirement at 55, combined with his mistaken belief Ms. Todd had been awarded indefinite support, led to an overvaluation of Ms. Todd's "win" for costs assessment purposes.

[40] Secondly, the trial judge's assessment of Mr. Todd's degree of success was flawed. He did not consider at all that Mr. Todd had been successful in seeking an unequal division of his Reserve pension and RRSP holdings. The trial judge's assertion Mr. Todd was successful on only "minor issues" simply does not reflect what he had ordered, or the live issues at trial<sup>4</sup>.

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<sup>3</sup> At trial Mr. Todd testified he was on sick leave from the Reserves.

<sup>4</sup> The trial judge said one of the "minor issues" in which the appellant was successful was "the contents of the home". The record demonstrates the parties had agreed to the division of the household contents. It was not a subject discussed at trial, nor was the trial judge required to make any determination in that regard. His trial reasons do not mention household contents. It is not clear why this issue was considered by the trial judge in assessing costs.

[41] As outlined earlier, Mr. Todd was successful in keeping 59% of the value of his Reserve pension out of the matrimonial division. Based on the actuarial report, this was a significant financial “win” the excluded pre-marital portion being valued at \$306,337 if Mr. Todd retired at 55 and \$247,562 for a retirement of 60. Further, a portion of the RRSPs excluded from the property division was valued at \$12,369.89. This was in addition to the retroactive support claim of \$18,303.00 and occupational rent claim of \$19,200.00 Mr. Todd had successfully fended off. These items were not mentioned, or seemingly considered, by the trial judge in determining who was the most successful party at trial. His failure to do so was an error in principle and renders his costs assessment manifestly unjust.

[42] Finally, I am satisfied the trial judge made two errors which impugned Mr. Todd’s litigation conduct, placing it in a negative light for the purposes of the costs assessment: 1) the record does not support the disclosure in relation to the Reserve pension was delayed, nor contested by Mr. Todd, and 2) neither does the record support the trial judge’s conclusion Mr. Todd had failed to advance a timely position on the “*division of equity*”. I will address each of these in turn.

*Assertion of delayed disclosure and opposition to actuarial report*

[43] In her costs submissions to the trial judge, Ms. Todd asserted Mr. Todd had failed, despite being requested, to make pre-trial disclosure in relation to his Reserve pension. Mr. Yuill wrote:

As to the military pension, the information was clearly requested and **not delivered** to the Petitioner. This was the Respondent’s pension. It was his obligation to provide the information. He did not.

This unnecessarily protracted the trial, unnecessarily incurred further costs and otherwise represent costs thrown away by virtue of the fact that the Respondent **did not disclose the nature of the pension, or its value, or indeed, his position until post-trial.**

This, again, undermined any chance the Petitioner had to fairly address this issue pre-trial for reasons of nondisclosure.

(Emphasis added)

And further:

The post-trial proceedings could have been avoided had the Respondent met his disclosure/valuation obligation **as requested a year before the trial.**

(Emphasis added)

[44] In support of the above assertion, Ms. Todd relied solely on correspondence sent from her counsel to Mr. Todd's counsel dated November 17, 2021 and specifically, the following passage relating to outstanding disclosure:

There are two items outstanding. The first is the retro pay. This was earned during the marriage and would be a matrimonial asset divisible equally.

**The second is the present-day value of the military pension.**

**As I understand it, the reserve pension may not be divisible at source.**

Accordingly, my client would be entitled to one-half of the present-day value.

(Emphasis added)

[45] In his costs submissions to the trial judge, Mr. Todd denied he had failed to provide pre-trial disclosure relating to the Reserve pension. With respect to the timing of the actuary report, Mr. Todd's counsel submitted:

5. Colin Todd says the reality is that both parties missed the fact that a valuation for his military reserve force pension would be necessary until the day of trial. Each appears to have been operating under different assumptions. Once it became apparent on the day of trial that the valuation would be necessary, the parties quickly agreed on a go-forward approach. Colin Todd obtained and provided the valuation in a timely manner.
6. Colin Todd first flagged that his military reserve force pension could not be divided in his Statement of Property filed 8 months before the trial in February 2022.

[46] Ultimately, the trial judge accepted Ms. Todd's assertion of problematic litigation conduct on Mr. Todd's part. Although set out earlier, the trial judge found:

4. The court also agrees that the following issues should be considered on awarding costs. The lack of timely disclosure by Mr. Todd with respect to pension benefits. While ultimately an actuary's report was prepared explaining the nature and complexity of the reserved pension for Mr. Todd, it was much delayed, and, initially opposed by Mr. Todd.

[47] Based on the record, I have no hesitation in concluding the assertions penned by Ms. Todd's counsel in her costs submissions were factually incorrect and misleading. Specifically, I reject the assertion Mr. Todd failed to disclose the requested pension information in a timely fashion, and further reject that the nature of the pension, its value, and his position regarding how it ought to be treated, were only disclosed after the trial.

[48] As the review of the record below demonstrates, Ms. Todd received the information she had requested regarding the Reserve pension months before the trial. Further, there is nothing in the record to support that in the months leading up to the trial, Ms. Todd had ever flagged the need for an actuarial valuation. There is no evidence to support the trial judge's conclusion that Mr. Todd had ever been opposed to obtaining one, or had delayed in anyway.

[49] In concluding the trial judge misapprehended the evidence before him in determining Mr. Todd had failed to make timely disclosure, I note the following from the record:

- Mr. Yuill's letter of November 17, 2021 requesting disclosure was sent prior to his client filing her Petition for Divorce, Statement of Property and Notice to Disclose on December 21, 2021;
- On February 11, 2022 Mr. Todd filed a Statement of Property in which he stated he had "*a pension with DND that cannot be divided*". There is no dispute this Statement and attachments were provided to Ms. Todd. Mr. Todd attached a print-out from the Government of Canada website describing the nature of his Reserve pension as follows:

**Is my former spouse or former common-law partner eligible for part of my pension?**

No. Currently, there are no provisions in the Reserve Force Pension Plan Regulations (RFPPR), Part I.1 of the Canadian Forces Superannuation Act (CFSA), that allow for the division of pension benefits. Accordingly, it is not possible to enforce such a division against a Part I.1 pension benefit at this time. If Part I.1 of the CFSA is amended in the future, updated information will be provided on this web site.

- Mr. Todd's Statement of Property further attached two Pension Benefit Estimates issued by Public Works and Government Services Canada showing the present value of his pensionable earnings as of

the date of separation (\$1,127,346.65) and as of October 25, 2021 (\$1,194,717.65) along with estimates of the monthly values of a deferred annuity and annual allowance depending on retirement age;

- In his affidavit filed with the court on February 17, 2022, Mr. Todd provided the following evidence pertaining to his Reserve pension:
  22. I am a member of the Reserve Force Pension Plan with the Canadian Armed Forces (“Plan”).
  23. I became a member of this Plan in 2007.
  24. Prior to my marriage, I did two years of full-time service as I did two tours in Bosnia: 6 months work up training and 6+ months overseas.
  25. My Total Pensionable Days Served in the Army prior to marriage is 3,263.5. I will file supporting documentation for this and similar figures quoted in this affidavit separately as its more than 50 pages.
  26. All of my service after I was married was part-time, with full-time pieces only for the summer. My Total Pensionable Days Served in the Army while married and up to the date of separation is 2,022.
  27. Time-wise, 38% of my days with the military were worked during the time Linda and I were together. This is calculated using the following information:
    - a. Total Pensionable Days Served in the Army up to my separation: 5,285.5
    - b.  $2,022/5,285.5 = 38\%$
  28. When I became a member of the Plan in 2007, I was offered the ability to buyback earlier years of service. I purchased 11 years of full-time service.
  29. The lump sum payment for the 11 years was approximately \$41,000 and was paid in part with money I had after selling my apartment building, a pre-marital asset, and part with the remainder of my gratuity. There would have been about \$3,000 that would have come from my income during the marriage, but I don’t have official documentation to confirm this.
  30. Prior to 2007, there was no pension for Reserve soldiers. Instead, there was Severance Pay which was based on the number of years served.
  31. I had the option to collect the Severance in 2013, which I took. The money went straight into RRSPs. Before I got married, I had worked 3,263.5 days in the army and my statement of service for my Severance was 4,042 days. The Severance I received was \$19,271; and

- In the same affidavit, Mr. Todd stated he sought an “[u]nequal division of property to exclude pre-marital portion of my military pension and RRSPs”.

[50] The trial judge was privy to all the above information when making his costs assessment. It contradicts his finding Mr. Todd had delayed providing disclosure regarding the Reserve pension. Unfortunately, the trial judge may have accepted at face value Ms. Todd’s factually incorrect submission.

[51] The record further discloses that if Ms. Todd was of the view the disclosure received was inadequate or an actuarial report was required, her counsel did not raise it in his pre-trial communications with the court or opposing counsel:

- In his Pre-Conference summary submitted in advance of the March 1, 2022 conference with the trial judge, Mr. Todd’s counsel wrote: *“Mr. Todd confirms that all disclosure requested by Ms. Todd has been provided”*. The transcript of the conference shows that in response to the trial judge’s query regarding the status of disclosure, Mr. Yuill indicated: *“But I don’t think there’s much, if there’s things outstanding, there’s not much left”*. Ms. Todd’s counsel did not challenge the assertion Mr. Todd had provided all requested disclosure, nor did her counsel raise any concerns regarding the adequacy of the Reserve pension disclosure. There was no mention of the need for an actuarial report;
- During the July 19, 2022 pre-trial conference, the trial judge again asked about the status of disclosure. Mr. Yuill stated:

. . . My friend and I had canvassed a lot of these issues over the first part of the year, so I think we’re ready to go. There is a home that there’s an appraisal on. Likely have to update it before hearing. Updated financial statements as well. I think it is down to one witness each although there was some discourse over the status of Peter Swan who is the common-law of my client. And he did not wish to disclose his financial information. So that’s in play as well. **But, other than that, I think we’re ready** ... looking for a date to conclude.

(Emphasis added)

- During the conference there was no indication given that Mr. Todd had failed to make appropriate disclosure in relation to his Reserve

pension. There was no mention of an actuarial report being required;

**Subject: Todd – Disclosure**

Dear Allison:

Just checking on the final aspects of disclosure.

I see that RSP was your clients (sic). If you have the supporting documents perhaps you could relay it to me.

I have looked back on the file in 2022 and I do not have a record of seeing your client's 2021 tax information. I would ask that you forward it.

**Short of that, I think we are good on disclosure.**

I see no reason why we cannot report that to the court on October 4th and confirm the filing dates to conclude the trial.

Let me know.

Thanks,

Brad

(Emphasis added)

- During the final pre-trial on October 4, 2022 the trial judge again raised the status of disclosure. He noted Mr. Todd was seeking outstanding information from Ms. Todd and discussion ensued. There was no mention made during this appearance of any outstanding disclosure being requested by Ms. Todd. Nor was there any reference to an actuarial report being needed or requested. Indeed, Mr. Yuill advised his client was ready for trial; and
- Ms. Todd filed her pre-trial brief on November 1, 2022. There was no mention of there being a lack of disclosure in relation to the Reserve pension. There was no suggestion an actuarial report had been requested, had been opposed or was needed. Curiously, however, despite being aware from the disclosure that the Reserve pension was not divisible at source, Ms. Todd put forward the following position with respect to Mr. Todd's pensions:
  49. As to pensions, the Petitioner acknowledges that the Federal and Provincial Legislation for Department of National Defence and the Teacher's Union limits division to the term of the marriage only.

50. It is further noted that a separate order will be required to **divide these pensions at source**.

(Emphasis added)

[52] The above clearly demonstrates that prior to the trial, Ms. Todd had never raised an issue about the sufficiency of information in relation to the Reserve pension, nor had she indicated an actuarial report would be required. There was no evidentiary basis for the trial judge to have concluded that, at least in advance of the trial, Mr. Todd had been lacking in his disclosure obligations or there had ever been a refusal on his part to obtain an actuarial report.

[53] Based on my review of the record, and as indicated earlier, the issue of an actuarial report only arose in the course of Mr. Todd's cross-examination at the hearing. From the transcript I observe that:

- Mr. Yuill suggested to Mr. Todd that nowhere in either of his statements of property had he provided "the value of your DND pension". Mr. Todd testified: "I thought I provided it". Ms. Kouzovnikov pointed out that there had been pension benefits estimate statements attached to the first Statement of Property prepared in February 2022;
- Mr. Yuill confirmed that an actuarial valuation of pension earned during the marriage was not provided. Mr. Todd testified that unlike the regular forces pension, the Reserve pension administration did not provide an actuarial service;
- The trial judge interjected to confirm his understanding of the evidence that there "*is no actuarial calculation of what is pre and post marriage and what would be ... and your client would be entitled to because that service is not provided*". Mr. Yuill replied, "*Yeah, and yeah in fairness to, to Mr. Todd and everyone this, we were under the impression that we had the information, and we don't have the information*". Later, Mr. Yuill acknowledged that "*there was a hole which just really came to my attention to have to ... just preparing*"; and
- At the conclusion of the evidence, the trial judge suggested to the parties that obtaining an actuarial report in relation to the valuation of the Reserve pension accrued prior to and during the marriage might be helpful. He invited the parties to take a recess to discuss

their views on obtaining a report. After a short break, the parties returned to the hearing and advised the trial judge there was an agreement to obtain an actuarial report with the cost being shared equally.

[54] There is nothing in the transcript or the rest of the record to support the trial judge's conclusion Mr. Todd had ever opposed obtaining an actuarial report.

*Alleged failure of the appellant to put forward a timely position on property division*

[55] In his costs Endorsement, the trial judge found fault with Mr. Todd as follows:

5. I also accept that Mr. Todd initially failed to advance a position on the division of equity and ultimately on the eve of the hearing conceded the proposed equity (chart) proposed by Ms. Todd's counsel.

[56] There is no support in the record for the trial judge's conclusion. Again, it appears as if the trial judge may have been led astray by the submissions of Ms. Todd's counsel. In the post-hearing brief submitted by Mr. Yuill and later repeated in Ms. Todd's costs submissions, it was alleged Mr. Todd had changed his position on the division of property on the eve of trial by consenting to the property division proposed by Ms. Todd, subject to minor adjustments. He wrote:

This is a completely new position of the Respondent. As late as the Pretrial Conference held on October 4, 2022, and throughout this litigation he has taken the position that there should be an unequal division. In fact, his counsel states in her last Pre-Conference Summary dated September 29, 2022, the following:

Property Division – Mr. Todd seeks the exclusion of some pre-martial [sic] assets, specifically a portion of his military pensions, and some of his RRSPs. Ms. Todd seeks an equal division of property.

**Most of the Petitioner's submissions on matrimonial property were to address this purported entitlement to an unequal division. Then it is simply dropped at the eleventh hour.** Obviously, this will be addressed in the eventual submissions on costs.

...

**As a whole, the Respondent's position as to whether or not he is seeking an unequal division seems to vacillate and is otherwise unintelligible.**

(Emphasis added)

[57] Similarly, in his arguments before this Court on appeal, Ms. Todd's counsel repeats that during the lead up to the trial, it was unclear what Mr. Todd was requesting in terms of relief and Mr. Todd had given no indication of what his requested unequal division would entail. Further, counsel for Ms. Todd repeated that Mr. Todd simply dropped his claim for an unequal division of matrimonial assets on the eve of trial.

[58] This assertion, seemingly accepted by the trial judge, does not reflect the reality demonstrated in the record. From the outset, Mr. Todd made clear he was seeking an unequal division of matrimonial assets specifically in relation to two things—the pre-marital portion of his Reserve pension and his RRSPs. His affidavit evidence explained why he took that position in relation to those two assets and set out his proposed division. His position did not vacillate, nor did it change on the eve of trial.

[59] As discussed earlier, Mr. Todd was ultimately successful in obtaining the unequal division he sought<sup>5</sup>. Mr. Todd never suggested he was seeking an unequal division of any of the other matrimonial assets. Given the presumption of equal division contained in the *Matrimonial Property Act*<sup>6</sup>, it should have been evident Mr. Todd's claim for unequal division was confined to the two assets he particularized. If Ms. Todd or her counsel were uncertain as to the nature of Mr. Todd's claim for an unequal division, they could have sought clarification. Nothing in the record suggests they did so.

[60] Further, the criticism that Mr. Todd accepted the chart prepared by Ms. Todd “on the eve of trial” is unwarranted. Firstly, that chart was presented by Ms. Todd in her pre-trial brief on November 1, 2022. Mr. Todd responded on November 8, 2022, the date assigned for the filing of his brief. His response was not last minute, rather it was made in accordance with the filing dates given by the court. Secondly, the division proposed by Ms. Todd included an equal division of the RRSPs, resulting in Mr. Todd's adjusted chart removing that asset from the division. Otherwise, Mr. Todd was agreeable to the remaining matrimonial assets

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<sup>5</sup> In his affidavit Mr. Todd had proposed only 38% of the pension had accrued during the marriage. The actuarial report placed it at 41%. Mr. Todd accepted the opinion contained in the report.

<sup>6</sup> R.S.N.S. 1989, c. 275, as amended, s. 12.

being divided equally. This is entirely consistent with the position he had put forward from the commencement of the proceedings.

[61] In light of the above errors, I am satisfied the trial judge's award of costs to Ms. Todd is not entitled to deference. I would set it aside. Any portion of the costs award, paid by Mr. Todd shall be repaid to him forthwith.

*Issue 3: If appellate intervention is appropriate, what quantum of trial costs is appropriate in the circumstances?*

[62] Having concluded the trial judge's costs award should be set aside, I turn now to a fresh assessment of trial costs. In doing so, I find:

- Mr. Todd was overwhelmingly the more successful party both in terms of the number of issues litigated and their value, with Ms. Todd finding success primarily in relation to a time-limited claim for spousal support;
- The "amount involved" for the purpose of applying Tariff A of Civil Procedure Rule 77 is "\$200,001 to \$300,000"; and
- The proceeding was complicated due to the Reserve pension not being divisible at source. This resulted in an actuarial report, further affidavits and submissions being filed post-hearing. In their costs submissions, both parties had suggested that Scale 3 was appropriate in the circumstances. I agree.

[63] Applying the above to Tariff A, creates base costs of \$28,438.00. To this I would add 2 days of trial time (\$2,000.00 x 2) for a total of \$32,438.00. Given the modest success of Ms. Todd in relation to the spousal support claim, I would reduce the above to \$28,000.00 payable to Mr. Todd.

[64] I will also briefly deal with two issues advanced by Ms. Todd in the court below. She requested costs be awarded against Mr. Todd for having subpoenaed her common-law partner to attend trial. She also requested that Ms. Kouzovnikov be ordered to personally pay costs in the amount of \$10,000.00 in relation to Mr. Todd's motion to have her affidavit introduced at trial. I would decline to award costs in relation to either of those matters.

[65] Ms. Todd had acknowledged she had re-partnered and was living with Mr. Swan. Mr. Todd had asked for her to disclose, prior to trial, Mr. Swan's financial information. She did not. In the two later Pre-Trial Conferences, both the trial judge and Ms. Todd's counsel suggested that if Mr. Todd wanted to compel Mr. Swan to provide his financial information, he should be subpoenaed to attend trial. Mr. Todd followed that direction.

[66] I would not award costs, as sought by Ms. Todd for compelling her partner to provide his financial information. She was making a claim for indefinite spousal support. Mr. Swan's financial information was potentially relevant to assessing Ms. Todd's claim. Mr. Todd should not be penalized for seeking that information.

[67] Finally, Ms. Todd sought costs due to Mr. Todd's motion, filed only days before the hearing, to have Ms. Kouzovnikov's affidavit submitted into evidence. Ms. Todd opposed the motion, but filed nothing in response. The motion was dismissed at the outset of trial without Ms. Todd's counsel being called upon to speak.

[68] The costs sought by Ms. Todd, \$10,000.00 against Ms. Kouzovnikov personally, was related to the allegedly vexatious, scandalous and improper allegations contained in her written submissions in support of the motion. In short, Ms. Kouzovnikov asserted the affidavit was necessary because Ms. Todd's counsel had made a number of representations in his written submissions to the court that were false and misleading. She wanted to correct them, and not risk the court being influenced by inaccuracies. Indeed, Ms. Kouzovnikov's written submissions pulled no punches and raised serious questions about Mr. Yuill's professionalism. The tone was strident.

[69] If there was no merit to Ms. Kouzovnikov's concerns, I would strongly consider rebuking her questioning the professionalism of opposing counsel with an award of costs. Lawyers should tread very carefully in making allegations of unethical and unprofessional conduct against opposing counsel, especially in the midst of litigation. I would not want to be seen as condoning such behaviour.

[70] However, as demonstrated above, I am satisfied Ms. Todd's counsel did, notably in his costs submissions to the trial judge, make representations which were not accurate. Although counsel should be free to make strong submissions on behalf of their clients, this cannot go as far as making statements which do not

align with the record. In the circumstances, I would decline to make an award of costs in favour of Ms. Todd in relation to the motion to introduce Ms. Kouzovnikov's affidavit into evidence at trial.

### **Disposition**

[71] For the reasons above, I would grant leave and allow the appeal. The costs award ordered by the trial judge should be set aside and any costs paid by Mr. Todd in relation thereto, be repaid by Ms. Todd. I would further order that trial costs be assessed at \$28,000.00, inclusive of disbursements, payable by Ms. Todd to Mr. Todd.

[72] With respect to costs on the appeal, Mr. Todd requested \$7,500.00 if successful. I would order Ms. Todd pay costs on the appeal to Mr. Todd in the amount of \$7,500.00, inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Scanlan, J.A.

Van den Eynden, J.A.