SUPREME COURT OF NOVA SCOTIA
Citation: *Forman v. Stanley*, 2015 NSSC 311

Date: 2015-11-05
Docket: No. 1204-005030
Registry: Kentville

Between:

Sonya Lynne Forman

Applicant

v.

Clifford Read Stanley

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	June 19 and July 3, 2015, in Kentville, Nova Scotia
Final Written Submissions on Costs:	October 16, 2015
Counsel:	Lynn Connors Q.C., for the applicant Tim Peacock, for the defendant

By the Court:

[1] This is a costs decision arising from an application in chambers.

Background

[2] The parties separated in 2007. Their informal agreement was incorporated in a consent Corollary Relief Order, entered on February 27, 2012, and issued October 11, 2012.

[3] Paragraph 18 of the order read:

> Upon the sale of the home, the parties shall address the matter of the appropriate quantum of prospective spousal support. In the event the parties cannot agree on the quantum, after the sale of the matrimonial home … either party shall be entitled to bring the matter of prospective quantum of spousal support before the Supreme Court of Nova Scotia. It shall not be necessary for that party to initiate a new proceeding in order to do so, and the parties agree that the Court shall maintain jurisdiction over this matter, for the purpose of resolution of this issue.

[4] On May 1, 2015, the applicant filed an application for prospective spousal support, effective November 2014, the date of sale of the matrimonial home. The applicant's income is approximately $66,000; the respondent's income is approximately $111,000. The applicant sought spousal support of $1,500 per month for an indefinite duration. The respondent claimed that the applicant had exhausted her entitlement to spousal support by reason of debts and other payments he had made before May 1, 2015.

[5] Each party filed an affidavit (the respondent filed a rebuttal affidavit), a statement of income, a statement of expenses, and a statement of property, with the usual attached financial records. No prehearing processes occurred. The hearing process lasted one full day, spread over two partial days.

[6] After cross-examination of the parties, and submissions by counsel, the court gave an oral decision awarding spousal support of $1,100 per month for a fixed term of 36 months.

Submissions

[7] The applicant seeks costs in accordance with Tariff A (costs on a decision or order in a proceeding) at Scale 2, calculated on the basis of a gross award of $39,600. This would result in a costs award of $6,250 plus $2,000 for a one day hearing, or $8,250. She submits that an award of costs based on Tariff C (costs payable on an application in chambers) is not appropriate. She cites *MacLean v Boylan*, 2011 NSSC 406 ("*MacLean*"), a parenting variation application heard in the Family Division, as deciding that Tariff C should not apply in Family Division proceedings.

[8] The applicant states that her actual solicitor costs exceed $8,000.

[9] The respondent submits that the *MacLean* decision does not stand for the blanket proposition that Tariff C should not apply in family proceedings. Costs are in the discretion of the court. Tariff A may be a preferable reference point in those family cases where preparation for the hearing are as extensive as for a trial.

[10] He further distinguished the facts of this case from the facts in *MacLean*. *MacLean* involved two hearings and a pretrial conference. Unlike *MacLean*, this matter involved completion of unfinished business contemplated in the Corollary Relief Order, based on the parties' affidavits and their cross-examination.

[11] The respondent notes that the starting point for Tariff C is an award of $2,000 for each full day hearing, but Tariff C also provides for the exercise of discretion by the court to award costs that are "just and appropriate in the circumstances".

[12] Finally, the respondent submits that he was more successful than the applicant in the hearing. The applicant's starting position was $1,500 per month indefinitely, which, practically speaking, meant until he reached the retirement age of 65 (8 years). The court's decision was much closer to his position than to the applicant's. The respondent claims he should be awarded costs.

Analysis

Tariff C versus Tariff A

[13] Tariff A is not the appropriate tool for the assessment of costs in respect of applications in chambers in family proceedings.

[14] A few family proceedings may take on the procedure and appearance of a trial in respect of which Tariff A is the appropriate tariff. This application, as most family proceedings, is very similar in procedure to "special time" or "complex" chambers applications regularly heard in the General Division of the Supreme Court and for which Tariff C provides the analytical tool for the assessment of costs.

[15] Applications in the General Division, to which Tariff C applies, include summary judgment applications, judicial reviews, statutory appeals and a host of other civil disputes. In these proceedings, the direct evidence consisting of affidavits with some cross-examination of affiants. It is not unusual for applications in chambers in the General Division to be very complex, to involve extensive affidavits, both in their length and in their number, and to involve extensive cross-examination. Applications in chambers in the General Division may be as short as part of a day or as lengthy as several days.

[16] Tariff C, which expressly applies to an Application in Chambers, provides as fulsome a range of options for the assessment of costs for applications in family proceedings, as in special times or complex chambers in the General Division.

[17] Tariff C is not a rule providing for a cost award based only on the length of the hearing of the application. While the starting point for the Tariff C costs analysis is an award based on the length of the hearing of the application ($750 to $1,000 for more than one hour but less than one day; $1,000 to $2,000 for more than one half day, but less than one day; and, $2,000 per full day, for one day or more than one day), these are only a starting point which reflect the court's experience respecting the usual extent of pretrial preparation for an application in relation to the length of the hearing of that application.

[18] Tariff C includes the following additional important express and often applied considerations:

> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
>
> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>
> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.

[19] To the extent that the pretrial endeavors of parties for an application exceed the normal experience for an Application in Chambers, *Rule 3* provides discretion to adjust a costs award. Innumerable examples are contained in written published decisions.

[20] To the extent that the application is determinative of the issue of the matter in dispute (as it was in this case), the factors of complexity, importance of the matters to the parties, and the amount of effort involved in preparing for and conducting the application, are weighed into determining whether to apply a multiplier to the standard hearing-time based award.

[21] Family proceedings, commenced by application, differ significantly from most trials, both in respect of the extent of pre-hearing processes and the length of the hearing (by reason of both direct and cross occurring in the courtroom). Tariff C, not Tariff A, is the appropriate frame work for assessing costs in respect of applications in chambers, whether in the family context or in the non-family civil and administrative law context. There are few circumstances in which Tariff C is not the appropriate tool for the assessment of costs in respect of applications in family proceedings.

Application of Tariff C to this case

[22] I conclude that Tariff C is the appropriate tool for the assessment of the award of costs in this case.

[23] As stated, the application involved the determination of prospective spousal support from the date of the sale of the matrimonial home in November 2014. This determination was expressly reserved, and contemplated, in the Corollary Relief Order issued in 2012. The application involved a two-page notice of application; standard sworn statements of income, expenses and property; an affidavit from the applicant, consisting of 21 paragraphs and 2 attachments with a rebuttal affidavit consisting of 7 paragraphs and 1 attachment; and an affidavit from the respondent consisting of 38 paragraphs and 3 attachments. There were no other pre-hearing processes.

[24] As noted, the hearing consumed one full day, inclusive of cross-examinations, submissions and decision.

[25] Tariff C applies. The application was determinative of spousal support. Tariff C (4) therefore directs the court to consider the factors of complexity of the matter, importance of the matter to the parties, together with the amount of effort involved in preparing for and conducting the application. This is used to determine whether to apply a multiplier to the base scale of $2,000 per full day, and, if so, what multiplier to apply.

[26] In this case, the matter was not unusually complex. It was, however, of importance to both parties. In my view, the preparation of the notice and the relatively short affidavits, with the standard financial disclosure documents, did not involve more extensive preparation than in the normal application in chambers in the non-family civil context. Because this matter was a final determination of the prospective spousal support issue, it is appropriate to apply a multiplier to the standard costs for a full-day hearing of $2,000.

[27] The amount of the multiplier in this case should take into consideration the following facts:

1. As noted, the matter is not complex and the preparation does not appear inordinate in comparison with other applications in chambers.

2. The success was divided. Neither party was entirely successful, but the respondent opposed any further spousal support.

3. While the applicant claims that the quantum ($1,100 per month for 36 months) was equal to an award of $39,600, that is not entirely accurate. The "amount involved" is less than $39,600 by reason that the payments are over time and by the respective tax consequences to each party from the support award.

4. The applicant's legal costs to obtain spousal support, the only issue in this application, are clearly deductible from her taxable income, as noted and explained in *Income Tax and Family Law Handbook* by Morton Rashkis, Mary Lou Benotto, Patricia Harris and Andrew Chris (Toronto: LexisNexis, loose leaf to release 76-9/2015), para.§38. Adding the amount of spousal support to her existing income suggests that her total income is close to or about $80,000 and her marginal tax rate is about 38%. On this basis her net (after tax) legal costs are about $5,000.

[28] The applicant's Tariff A analysis, based on $39,600 and a full day in court, would result in a costs award of $8,250 - as much as, or more than, her actual legal costs, before consideration of the tax deductibility of legal costs.

[29] The law, as it has existed since the decision of the Supreme Court of Canada in *Young v Young* [1993], 4 SCR 3, is that solicitor – client costs are reserved for those rare and exceptional cases where a party has behaved in a way that is reprehensible, high-handed or arbitrary. This case does not fit that matrix.

[30] Even if the court were to apply Tariff A, it was never intended by Tariff A to award costs equal to the full amount of a parties' actual legal costs. See *Landymore v Hardy*, 1992 NSSC 70.

[31] I award costs to the applicant in the amount of $3,000.

[32] This constitutes about 60% of the applicant's actual net (after tax) legal costs. This award falls within the range of substantial but not complete reimbursement of reasonable solicitor – client costs endorsed by courts in Nova Scotia on many occasions since *Williamson v. Williams*, 1998 NSCA 195. It involves a 50% increase over the basic Tariff C award for one full day of hearing, with the normal pre-hearing preparation.

Warner, J.