IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Higgins v. Bourgeois Higgins, 2015 NSSC 293

Date: 20151013
Docket: 1201-066915
Registry: Halifax

Between:

James Andrew Higgins

Petitioner

and

Sylvie Marie Rose Bourgeois Higgins

Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Written Submissions: Written Submissions on costs were received

Counsel: Janice E. Beaton, Q.C., Counsel for the Petitioner
Patrick J. Eagan, Counsel for the Respondent

By the Court:

Introduction (Costs Decision)

[1] This is a ruling on costs after a hearing and an oral decision on December 9, 2014. Subsequent involvement of the Court was necessary to accomplish compliance with the Court's decision. The hearing related primarily to determining the quantum of child and spousal support payable by Mr. Higgins and disposition of the parties' former matrimonial home. Three days of court time were required to

conclude the hearing. This followed a hearing to enforce partial settlement agreements.

[2] Mr. Higgins made two settlement offers. One dated August 23, 2013 and a second dated June 25, 2014. Both were unacceptable to Ms. Bourgeois Higgins. The later offer was revoked several weeks before the trial on November 10, 2014.

General Principles Governing Costs

[3] The governing Civil Procedure Rule on costs is now 77. This Rule incorporates the tariffs mandated by the *Costs and Fees Act*, R.S.N.S. 1989, c.104 when applying an amount involved assessment to determine costs payable by a party. The Rule provides *inter alia*:

> **Scope of Rule 77**
>
> 77.01 (1) The court deals with each of the following kinds of costs:
>
> > (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
> >
> > (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
> >
> > (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.
>
> **General discretion (party and party costs)**
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> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.
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> **Liability for costs**

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

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

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

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

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

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

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

(d) any other way the judge sees fit.

(5) A judge may order that costs awarded to a party represented by counsel with Nova Scotia Legal Aid or Dalhousie Legal Aid be paid directly to the Nova Scotia Legal Aid Commission or Dalhousie Legal Aid Service.

. . . . .

Assessment of costs under tariff at end of proceeding

77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the Costs and Fees Act, a copy of which is reproduced at the end of this Rule 77.

. . . . .

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

(a) the amount claimed in relation to the amount recovered;

(b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

(c) an offer of contribution;

(d) a payment into court;

(e) conduct of a party affecting the speed or expense of the proceeding;

(f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

(g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

. . . . .

Disbursements included in award

77.10 (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

(2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.

[4] Justice B. MacDonald of this court summarized the applicable principles when assessing costs in *L. (N.D.) v. L. (M.S.)*, 2010 NSSC 159 and more recently in

Gagnon v. Gagnon, 2012 NSSC 137. She stated the following at paragraph 3 in *L. (N.D.)*:

> 3 Several principles emerge from the Rules and the case law.
>
> 1. Costs are in the discretion of the Court.
>
> 2. A successful party is generally entitled to a cost award.
>
> 3. A decision not to award costs must be for a "very good reason" and be based on principle.
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> 4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to a otherwise successful party or to reduce a cost award.
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> 5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".
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> 6. The ability of a party to pay a cost award is a factor that can be considered; but as noted by Judge Dyer in M.C.Q. v. P.L.T. 2005 NSFC 27: "Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See Muir v. Lipon, 2004 BCSC 65]."
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> 7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
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> 8. In the first analysis the "amount involved", required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".
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> 9. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of $20,000 in order to determine the "amount involved".
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> 10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.
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> 11. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.
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> 12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties position at trial and the ultimate decision of the court.

[5] Arriving at a costs assessment in matrimonial matters is difficult given the often mixed outcome and the need to consider the impact of an onerous costs award on the families; and the children in particular. The need for the court to exercise its discretion and to move away from a strict application of the tariffs is often present.

[6] As stated at paragraph 13 in *Grant v. Grant,* 2002 N.S.J. 14, Justice Williams observes that divorce and family law proceeding "often involve a multitude of separate and inter-related problems". The result is that a determination of success is also more complex.

[7] It should be noted that Rule 77.07 provides that tariff costs may be increased or decreased after considering enumerated factors.

[8] Rule 77.08 provides for a lump sum of costs in cases where a tariff amount is not appropriate.

[9] In *O'Neil v. O'Neil*, 2013 NSSC 64 Justice Beaton ordered the parties to bear their own costs. The parties had exchanged offers to settle that were very close to the Court's ruling on the quantum of spousal support ultimately ordered. Both parties were partially successful and no costs were ordered.

[10] In *Robar v. Arseneau*, 2010 NSSC 175, I ordered costs of $5,138 inclusive of HST and disbursements to be paid at a rate of $150 per month. In that case, the Applicant's case to set aside the parties' separation agreement was dismissed and Ms. Robar was found to have been unreasonable. She was also found to have rejected offers to settle. The matter required court time on two days. I applied scale 1 of Tariff "A". The amount involved was within the $40,001-$65,000 range. Ms. Robar was subject to significant financial hardship at the time. This was a factor weighing against a higher costs award.

[11] The case of *Provost v. Marsden*, 2009 NSSC 365 involved an assessment of child support obligations. I applied Tariff "A", there being a decision following a half day hearing. The amount involved was in the $40,001-$65,000 range. Success on the issues was mixed but Mr. Marsden was found to have been the more successful party. This case also involved an offer to settle. Costs totalling $3,000 inclusive of HST and disbursements were ordered (2010 NSSC 423 (cost decision)).

[12] The case of *R. (A.) v. R.(G.)*, 2010 NSSC 377 resulted in a costs award of $3,000 inclusive of HST and disbursements. The hearing concerned the parenting arrangement for the parties' two children. The conduct of the Applicant was found to have been aggravating. The amount involved was $20,000, this representing the amount involved when a full day of court time is consumed (2010 NSSC 424 (cost decision)).

[13] In *Godin v. Godin*, 2014 NSSC 46, I ordered costs of more than $28,000 following a five day hearing and after having increased the scale by 50% to reflect Ms. Godin's *mal fides* in the conduct of the proceeding.

[14] In *Myer v. Lyle*, 2014 NSSC 355 I ordered costs payable by Mr. Lyle in the amount of $2,500 payable at the rate of $50 per month. At paragraph 24-26 of that decision I observed:

> [24] Each party played a significant role in forcing this matter to a hearing. Mr. Lyle communicated with Ms. Myer and her counsel in February 2014 (tab J of his costs submission) and sought agreement on the parenting issue and child support. He was agreeable to the child remaining with Ms. Myer in Nova Scotia and agreeable to paying the table amount of child support. Mr. Lyle's position was reasonable. These were major issues at trial. There was an opportunity to resolve these issues pre trial, had Ms. Myer responded to Mr. Lyle's suggestions in a meaningful way.
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> [25] I exercise my discretion to order costs of $2,500 payable by Mr. Lyle. These shall be payable at the rate of $50 per month, commencing November 1, 2014 until paid in full.
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> [26] The hearing was not complex, although it did consume a day and a half of Court time. The Court is persuaded that a cost award of a lesser amount than sought on behalf of Ms. Myer more appropriately reflects the needs of this family and the parties' conduct throughout.

[15] Justice Jollimore in *Moore v. Moore*, 2013 NSSC 281 at paragraph 14 addressed the applicability of Tariff "C" to applications in the Family Division:

> [14] Initial guidance in determining costs is the tariff of costs and fees. The proceeding before me was a variation application. Formally, Tariff C applies to applications. As I said in MacLean v. Boylan, 2011 NSSC 406 at paragraph 30, applications in the Family Division are, in practice, trials. Rule 77's Tariffs have not changed from the Tariffs of Rule 63 of the Nova Scotia Civil Procedure Rules (1972). Despite the distinction between an action and application created in our

current Rules, the Tariffs have not been revised. My view has not changed since I decided MacLean v. Boylan, 2011 NSSC 406: I don't intend to give effect to the current Rules and their incorporation of the pre-existing Tariffs where this routinely results in lesser awards of costs for the majority of proceedings in the Family Division, such as corollary relief applications, variation applications and applications under the Maintenance and Custody Act or the Matrimonial Property Act. In these situations I intend to apply Tariff A as has been done by others in the Family Division: Justice Gass' decision in Hopkie, 2010 NSSC 345 and Justice MacDonald in Kozma, 2013 NSSC 20.

[16] Our Court of Appeal recently reviewed the law governing awards of costs in family proceedings in *Armoyan v. Armoyan*, 2013 NSCA 136. It is helpful to incorporate the court's discussion of the basis upon which costs are ordered and the meaning and effect of Rule 77. Fichaud, J. on behalf of the Court summarized how costs should be quantified beginning at paragraph 9:

> [9] Justice Campbell did not quantify costs for Ms. Armoyan. So there is no issue of appellate deference to the trial judge's exercise of discretion on quantification. The Court of Appeal is calculating costs at first instance for both the forum conveniens proceeding in the Family Division and the two appeals in this Court.
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> [10] The Court's overall mandate, under Rule 77.02(1), is to "do justice between the parties".
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> [11] Solicitor and client costs are engaged in "rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation". Williamson v. Williams, 1998 NSCA 195, [1998] N.S.J. 498, per Freeman, J.A.. This Court rejected most of Mr. Armoyan's submissions on the merits. But there has been no litigation misconduct in the Nova Scotia proceedings that would support an award of solicitor and client costs. So these are party and party costs.
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> [12] Rule 77.06 says that, unless ordered otherwise, party and party costs are quantified according to the tariffs, reproduced in Rule 77. These are costs of a trial or an application in court under Tariff A, a motion or application in chambers under Tariff C (see also Rule 77.05), and an appeal under Tariff B. Tariff B prescribes appeal costs of 40% trial costs "unless a different amount is set by the Nova Scotia Court of Appeal".
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> [13] By Rule 77.07(1), the court has discretion to raise or lower the tariff costs, applying factors such as those listed in Rule 77.07(2). These factors include an unaccepted written settlement offer, whether or not the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding.

[14] Rule 77.08 permits the court to award lump sum costs. The Rule does specify the circumstances when the Court should depart from tariff costs for a lump sum.

Tariff or Lump Sum?

[15] The tariffs are the norm, and there must be a reason to consider a lump sum.

[16] The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses. In Williamson, while discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from Landymore v. Hardy (1992), 112 N.S.R. (2d) 410:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
>
> > "... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity."

Justice Freeman continued:

> In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[17] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.

[18] But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no

"amount involved", other important issues being at stake. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity – e.g. to define an artificial "amount involved" as Justice Freeman noted in Williamson – that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law. [emphasis added]

[19] In my view, this is such a case for a lump sum award. I say this for the following reasons.

[20] Justices of the Family Division have stated that trial-like hearings in matrimonial matters are more appropriate for Tariff A than Tariff C: Hopkie v. Hopkie, 2010 NSSC 345, para 7, per Gass, J.; MacLean v. Boylan, 2011 NSSC 406, paras 29-30, per Jollimore, J.; Kozma v. Kozma, 2013 NSSC 20, para 2, per MacDonald, J.; Robinson v. Robinson, 2009 NSSC 409, para 10, per Campbell, J..

[21] The forum conveniens proceeding was brought by Ms. Armoyan's "Notice of Motion" that, as Mr. Armoyan's counsel points out, literally would engage Tariff C. But the proceeding ripened with the features of a complex trial that spanned ten days of hearing over eleven months. It was not remotely equivalent to a conventional chambers motion, and its natural home would be Tariff A.

[22] But this proceeding had no "amount involved" within Tariff A. The issue was whether the Courts of Nova Scotia or Florida would take jurisdiction. That matter involved broad consideration of comparative comity, fairness and efficiency in the administration of justice. The "amounts" are for the separate matrimonial proceedings in Florida and this province. In Williamson Justice Freeman noted that the artificiality of a notional "amount involved" supported the use of a lump sum award:

> Any attempt to adjust the amount involved to factor in the special circumstances of the present appeal to arrive at a more just result would require the arbitrary determination of a fictitious "amount involved" bearing no real relationship to the matters in issue.

> [23] Rule 77.07(2)(e) permits an adjustment based on "conduct of a party affecting the speed or expense of the proceeding". The supervening criterion is that the costs award "do justice between the parties" under Rule 77.02(1).

[17] Commenting on the impact offers to settle can have on an award, Justice Fichaud stated the following at paragraph 27:

> [27] Rule 77.07(2)(b) permits the adjustment of a costs award based on an unaccepted written settlement offer, whether made formally under Rule 10 "or otherwise". Rule 59.39(7) excludes Rules 10.05 to 10.10 (formal offers to settle in the Supreme Court - General Division) from family proceedings. But Rule 77.07(2)(b) is not excluded, and unaccepted offers of settlement may impact costs in family proceedings: e.g. Fermin v. Yang, 2009 NSSC 222, para 3, # 12, per MacDonald, J.. I agree with Justice Campbell's sentiments in Kennedy-Dowell v. Dowell (2002), 209 N.S.R. (2d) 392 (S.C.), under the former Rules:
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>> [12] In my opinion, the reasonableness of both the trial position and the bargaining position (including the timing of concessions made) is a very important factor in deciding whether an order for costs should be made. This is especially true in family law matters because the parties are often of limited resources and can often face legal fees after a trial which make the process uneconomical and devastating to the family including children. Family law disputes are capable of out of court resolution in many cases and the policy of the court regarding costs should promote compromise and reasonableness in the negotiating process. For that reason, the court should measure each party's bargaining position against the court's adjudication to measure the reasonableness of each position. ...
>
> To similar effect - Justice Campbell's comments in Robinson, paras 13-15.

[18] Ultimately, Justice Fichaud found a lump sum award of costs as the most appropriate mechanism for determining costs. He awarded costs of $306,000 including disbursements.

Conclusion

[19] I am satisfied that Mr. Higgins was the more successful party. An immediate sale of the former matrimonial home was ordered and spousal support was set at a level that reflected his actual income.

[20] Ms. Bourgeois Higgins' argument that she should be permitted to remain in the home without the risk of it being sold was not accepted. She was also unsuccessful in her claim that she was unable to be employed.

[21] Ms. Bourgeois Higgins forced this matter to a hearing. Mr. Higgins' position was reasonable throughout. There was an opportunity to resolve these issues pre trial, had Ms. Bourgeois Higgins responded to Mr. Higgins' proposals in a meaningful and realistic way.

[22] Ms. Bourgeois Higgins failed to honour settlements reached before another Judge - a refusal that delayed the start of the hearing before me and required that other Judge to revisit the circumstances of the settlement. Ms. Bourgeois Higgins was not justified in her refusal. In addition to placing unreasonable demands on the Court, she increased Mr. Higgins' legal and related costs in his effort to conclude matters.

[23] Her demands of Mr. Higgins were unreasonable during the trial and she was uncooperative when called upon to implement the Court's decision.

[24] Mr. Higgins legal costs were in excess of $50,000. Mr. Higgins seeks costs of $30,000.

[25] Ms. Bourgeois Higgins argued that costs for a four day trial would typically be in the $20,000 range but in the circumstances, seeks a $10,000 lump sum award payable by Mr. Higgins from the proceeds of the sale of the former matrimonial home.

[26] I exercise my discretion to order costs of $15,000 payable by Ms. Bourgeois Higgins. These shall be payable at the rate of $250 per month, commencing November 1, 2015 until paid in full.

[27] In my view, this is a substantial contribution to the costs incurred by Mr. Higgins recognizing the length of the hearing, the amount involved and the conduct of the parties.

[28] The hearing was not complex, although it did consume three and a half days of Court time. The Court is persuaded that a cost award of a lesser amount than

sought on behalf of Mr. Higgins more appropriately reflects the needs of this family and the parties’ conduct throughout.

ACJ