

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Niles v. Munro, 2011 NSSC 57

Date: 20110214

Docket: 1201-56024

Registry: Halifax

Between:

Michele Debra Niles

Petitioner

and

David Alexander Munro

Respondent

Judge: Justice Lawrence I. O'Neil

Written

Submissions: Written Submissions on costs were received in November and December 2010

Counsel: Michele D. Niles, Self Represented
Shawn M. O'Hara, for the Respondent

By the Court:

Introduction,

[1] This is a ruling on costs after the Court's decision on a pre-hearing application heard on August 19, 2009, which decision is reported at 2009 NSSC 318 and following a hearing on December 9, 2009. The pre hearing application resulted in a finding that the parties' older child was not a child of the marriage at the time of the application to vary the parties' Corollary Relief Judgment. Consequently, I declined jurisdiction to hear that part of the application pertaining to the older child.

[2] On December 9, 2009 the court heard arguments on child support and special expenses pertaining to the younger child. A written decision was released in June 2010 (2010 NSSC 221).

[3] In July, 2010 Ms. Niles advised the court that she was seeking counsel to assist her in making submissions on the issue of costs Mr. Munro wished to claim.

[4] Written submissions on costs were received in November and December 2010.

Position of the Parties

General Principles Governing Costs

[5] The new Rule on costs is 77. It contains the tariffs when applying an amount involved assessment to determine costs payable by a party. Justice Dellapinna in *Tamlyn v. Wilcox*, 2010 NSSC 363 reviewed the transition from the 1972 Rules to the new Rules. His commentary is a helpful guide in tracing the changes.

[6] Rule 92.02(2) of the New Rules of Court provides that the 1972 Nova Scotia Civil Procedure Rules continued to apply to the Family Division of the Supreme Court until June 30, 2010.

[7] Rule 92.08(1) permits the court to continue to use the old Rules in a proceeding started before June 30, 2010. I will apply the 1972 Rules.

[8] Rule 70.03(4) of the 1972 Rules provides:

.....

70.03(4) Where any matter of practice or procedure is not governed by Statute or by this Rule, the other rules and forms relating to civil proceedings shall apply with any necessary modification.

[9] An award of costs following or during a proceeding is provided for in the 1972 Rules of Court. Rule 57.27, Rule 63.02 and Rule 63.04(1) and (2) provide as follows:

Party and party costs fixed by court

57.27(1) Where the proceeding is for a divorce or matrimonial cause, the court may from time to time make such order as it thinks fit against a party for payment or security for the costs of the other of such parties.

(2) The costs of a matrimonial cause shall be recovered in the same way as in an ordinary proceeding.

.....

63.02(1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

- (a) award a gross sum in lieu of, or in addition to any taxed costs;
- (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
- (c) direct whether or not any costs are to be set off;

(2) The court in exercising its discretion as to costs may take into account,

- (a) any payment into court and the amount of the payment;
- (b) any offer of contribution;

(3) The court may deal with costs at any stage of a proceeding.

.....

63.04(1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the “amount involved” shall be determined, for the purpose of the Tariffs, by the court.

(2) In fixing costs, the court may also consider

- (a) the amount claimed;
- (b) the apportionment of liability;
- (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (d) the manner in which the proceeding was conducted;
- (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;

- (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
- (g) the neglect or refusal of any party to make an admission which should have been made;
- (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;
- (i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and
- (j) any other matter relevant to the question of costs.

[10] The Tariffs are regulatory, adopted pursuant to Rule 63.01(b) and the *Costs and Fees Act*, R.S.N.S. 1989 c.104. The subject proceeding is one that would most appropriately fall within Tariff A, if the Tariff structure was to be strictly applied.

[11] Justice B. MacDonald of this court summarized the applicable principles in *L. (N.D.) v. L. (M.S.)*, 2010 NSSC 159. She stated the following at paragraph 3:

- 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.
 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.
 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".
 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]."
 7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

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".

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".

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.

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.

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.

[12] Arriving at a costs assessment in matrimonial matters is difficult given the often mixed outcome and the need to consider the impact on 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.

[13] The court considered the decision of Justice Legere-Sers in *Shurson, 2007 NSSC 101*, and the decision of Justice MacDonald in *Conrad v. Bremner, 2006 NSSC 99*. The court has also considered the decisions of Justice Goodfellow in *Gardiner v. Gardiner, 2007 NSSC 282* and Justice Williams in *Grant v. Grant [2002] N.S.J. No. 14*.

[14] It is settled that costs can be granted in matrimonial matters. Justice Williams in *Grant* at paragraph 3 reviews the Rules and the considerations for the court when considering an award of costs. In particular, he references the factors outlined in Rule 63.04(1) and (2).

[15] In *Grant*, Justice Williams was considering costs flowing from a proceeding that included numerous applications and interlocutory notices over four years. There was also a trial and a pre-trial. He found that the conduct of the wife had unnecessarily lengthened the matter and that the proceedings contained many

unproven allegations and untrue assertions. These were significant factors Justice Williams considered when he awarded costs of \$12,000 and \$2,250 for disbursements. I agree with Justice Williams in *Grant*, who stated at paragraph 42 that an “amount involved” analysis has limited applicability in complex, multi-issue matrimonial proceedings.

[16] As stated at paragraph 13 in *Grant*, Justice Williams observes that divorce and family law proceeding “often involve a multitude of separate and inter-related problems”. The result is that determination of success is also more complex.

[17] In *Shurson*, Justice Legere-Sers was considering costs in the context of an offer to settle. The case report does not detail the particulars of the outcome. She ordered \$10,000 in costs.

[18] In *Conrad*, Justice MacDonald was dealing with costs following a trial and once again the case involved an offer to settle as provided by Rule 41.09(a). The case also involved discoveries, pre-trial court appearances and a two day hearing. Justice MacDonald awarded party and party costs of \$5,000.00.

[19] Justice Goodfellow in *Gardiner*, declined to order costs. Justice Goodfellow conducted an interim hearing that lasted one half day, other proceedings occurred over the following year. Citing Mr. Gardiner’s financial difficulties as a partial reason for the delay in having matters concluded and the mixed success of the parties, he directed that each party bear their own costs.

[20] Justice Gass in *Pelrine v. Pelrine*, 2007 NSSC 123, a decision of this court dated April 18, 2007, considered the issue of costs claimed by both parties, following a divorce proceeding which was heard over four days. Post trial submissions were filed. The Petitioner sought approximately \$11,000 in costs including HST and disbursements and the Respondent sought approximately \$9,000 plus disbursements of approximately \$3,600. Justice Gass reviewed Rule 63.04; the decision of Justice Campbell in *Kennedy-Dowell* 209 N.S.R. (2d) 392 and the decision of Justice Goodfellow in *MacLean* 200 N.S.R. (2d) 34.

[21] Of particular interest is that Justice Gass found a failure to timely disclose on the part of the Petitioner. She also assessed the relative “success” of the parties and the presence or absence of offers to settle. Justice Gass ordered costs to the Respondent in the amount of \$3,031.00 plus \$2,000 towards disbursements.

[22] In *Hanakowski v. Hanakowski* [2002] N.S.J. No. 272 Justice Dellapinna awarded costs of \$2, 500 to the husband where the wife's failure to provide full financial disclosure added to the husband's legal costs and hampered the settlement process.

[23] In *Guillena v. Guillena* [2003] N.S.J. No. 76 Justice Dellapinna ordered costs of \$4,000 in a case where the matrimonial assets were divided equally. The Respondent had failed to comply with disclosure obligations. The Respondent failed to comply with orders to disclose dated March 15, 2001; May 14, 2001; April 4, 2002; September 4, 2007 and December 10, 2002. The Respondent husband did not attend trial in *Guillena*, nor did he consent to any of the corollary relief.

[24] Justice Coady in *Ghosn* [2006] N.S.J. No. 272 assessed costs against the husband after finding that his non-disclosure and obstruction increased the wife's legal costs. He found that the tariffs were not drafted with family law in mind. He awarded a lump sum of \$10,000 plus 75% of the wife's disbursements. Ms. Ghosn's conduct was found to be aimed at frustrating Mr. Ghosn's application to vary. He was found to have mislead both Ms. Ghosn and the Court. Ms. Ghosn was found to have pursued 15 avenues to obtain financial information Mr. Ghosn refused to provide. In addition, Ms. Ghosn made two offers to settle.

[25] I have recently ordered costs in a number of cases.

[26] 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.

[27] The case of *Provost v. Marsden*, 2009 NSSC 365 also 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)).

[28] 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)).

Conclusion

[29] This proceeding most appropriately falls within Tariff "A". There were two decisions, an oral decision on October 2, 2009 following a one half day hearing on August 2, 2009. A second decision reported as *Niles v. Munro*, 2010 NSSC 221 followed further argument for one half day on December 9, 2009.

[30] An adjournment of the initial hearing was made necessary by a failure on the part of the Petitioner to file in a timely manner.

[31] Mr. Munro also made offers to settle that were more favourable to Ms. Niles than the outcome of the hearing. These are set forth in Mr. Munro's brief on costs at Tab 1.

[32] Mr. Munro's legal fees totalled \$29,513.57. The amount involved was less than \$65,000 and scale 2 (basic) should be applied. This suggests costs of \$7,250. To this is added costs of \$1,000 inclusive of disbursements and HST flowing from the adjourned hearing scheduled for May 20, 2009. I am not ordering a separate amount as a contribution to the HST and disbursements. I order costs totalling \$8,250. This shall be payable on the first of the month at a rate of \$250 per month, commencing March 1, 2011 until paid.

J.