

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Peraud v. Peraud, 2011 NSSC 80

Date: 20110224
Docket: 1201-064299
Registry: Halifax

Between:

Shelly Anne Peraud

Petitioner

v.

Pascal Michel Peraud

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Submissions:

February 3, 2011 by Angela A. Walker for Shelly Peraud
February 11, 2011 by Judith A. Schoen for Pascal Peraud

Counsel:

Angela A. Walker on behalf of Shelly Peraud
Judith A. Schoen on behalf of Pascal Peraud

By the Court:

Introduction:

[1] On January 6, 2011, I released my decision resolving Shelly Peraud's application for spousal support. My decision in that application is reported as *Peraud v. Peraud*, 2011 NSSC 1. Ms. Peraud was successful in her application. She now seeks costs.

Costs, generally

[2] A claim for costs is governed by *Civil Procedure Rule 77*. Costs are to be fixed in accord with the tariffs of costs and fees determined under the *Costs and Fees Act*, R.S.N.S. 1989, c. 104. Costs follow the event, according to *Rule 77.03(3)* unless I order otherwise or a *Rule* provides otherwise.

[3] Ms. Peraud seeks costs in the range of \$8,000.00 to \$10,000.00, inclusive of disbursements and HST.

[4] Mr. Peraud opposes the request for costs on three bases: he says he was put to needless expense (and he lost income) as a result of an interim support application which Ms. Peraud did not perfect; he claims he is in a precarious financial position; and he describes Ms. Peraud's application as a "novelty".

Needless expense

[5] Ms. Peraud made an interim application for spousal support. Only when her application was being heard did Mr. Peraud and his counsel learn that Ms. Peraud had filed a reply affidavit. They hadn't had an opportunity to review this affidavit and the application was adjourned. The parties and their counsel co-operated in scheduling a final hearing, rather than re-scheduling the interim application. Mr. Peraud says this was done to minimize expenses. It appears that costs weren't addressed when the interim application was adjourned.

[6] The Statement of Income and Statement of Expenses filed by Ms. Peraud in support of her interim application were used in the final hearing. The affidavit evidence relied on at trial did not deviate significantly from the affidavits filed for the application.

[7] I accept that Mr. Peraud would have incurred some legal expense needlessly because this interim application didn't proceed. However, much of the preparation for the interim application would remain relevant less than four months later, when the trial was held.

[8] *Rule 77.07* allows me to add or subtract an amount to tariff costs and *Rule 77.07(2)* lists factors that may be relevant to a request to increase or decrease tariff costs. *Rule 77.07(2)(f)* offers the example of "a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily". Mr. Peraud doesn't suggest that the

adjournment was improper, abusive, unnecessary, caused by neglect or the result of excessive caution. It seems inadvertence kept Mr. Peraud and his counsel from receiving the reply affidavit which, in turn, compelled his counsel's request for an adjournment. I don't interpret *Rule 77.07(2)* to disentitle a successful party from receiving costs. Rather, I believe the *Rule* identifies factors relevant to varying the tariff cost.

Mr. Peraud's precarious financial position

[9] Ms. Peraud gave notice of her claim for costs in her Petition. *Rule 77.04(1)* allows relief for a party who cannot afford to pay costs. A motion may be made for an order that the party is to pay no costs in the proceeding in which the claim is made. Mr. Peraud made no motion for this relief.

[10] Mr. Peraud's submissions assert that he has no access to credit given his "relatively recent bankruptcy declaration". From his documentary evidence, I know that Mr. Peraud declared bankruptcy on June 15, 2009 and that, as a first time bankrupt, he would be given an automatic discharge on March 16, 2010 unless the Superintendent of Bankruptcy, Mr. Peraud's trustee or one of his creditors gave notice of intended opposition prior to that date. In fact, his trustee required surplus payments of \$1,118.14 to be made before June 16, 2010 prior to a discharge being granted. Mr. Peraud did not address the status of his bankruptcy at the trial. His Statement of Expenses, sworn to on August 6, 2010 did not disclose any lingering payments to his trustee in bankruptcy. With regard to his access to credit, his Statement of Expenses shows that he is to reimburse S. Collette and Alice Czuchro for their payment of bankruptcy and legal expenses, respectively. The legal expenses were incurred in the year following Mr. Peraud's bankruptcy.

[11] Mr. Peraud also asserts in his submissions that he owes over \$90,000.00 in child support arrears. This information is not before me as evidence. It comes only as a submission of his counsel. It was not the subject of testimony, though he did testify that he owes child support arrears. I also heard Ms. Peraud's evidence that she contributed to the payment of Mr. Peraud's child support during their marriage, either directly or by paying other expenses so Mr. Peraud could meet his obligation.

[12] At paragraphs 45 to 51 of the decision relating to Ms. Peraud's application (*Peraud v. Peraud*, 2011 NSSC 11), I reviewed Mr. Peraud's financial situation. Mr. Peraud earns an annual income of \$54,950.00. After paying spousal support, he has a modest monthly deficit of less than \$130.00, based on his budgeted expenses, which included repayment of his child support arrears.

[13] Mr. Peraud says that he did not challenge the terms of the parties' separation agreement that related to the division of property. Mr. Peraud did not advance this claim so it's difficult for me to determine its relevance: his bankruptcy relieved him of some of the debts he was to assume following the marriage breakdown. I do not have evidence about the extent of the

liabilities which remain: the "debt" portion of his Statement of Property simply states "Filed for bankruptcy in June, 2009".

[14] I am not persuaded that Mr. Peraud's financial position is precarious. His bankruptcy addressed debts of approximately \$282,000.00 and I have no evidence of the extent of his remaining debt. His income and expenses are fairly balanced.

The novelty of Ms. Peraud's application

[15] I do not accept that Ms. Peraud's application was novel. Ms. Peraud applied for spousal support in the face of a separation agreement in which her right to receive support was terminated. The Supreme Court of Canada addressed this sort of application in *Miglin*, 2003 SCC 24 and this decision has been considered in more than three dozen reported decisions in Nova Scotia in the past seven years. Ms. Peraud's application was not novel.

[16] I conclude there is no reason to deny Ms. Peraud's request for costs.

Determining the costs award

[17] Ms. Peraud seeks costs in the range of \$6,000.00 to \$8,250.00, with an additional amount to be awarded for her disbursements.

[18] I've been provided with an affidavit which details the fees, disbursements and HST billed to Ms. Peraud. She has been billed for fees of \$7,405.69, disbursements of \$789.46 and HST (on disbursements and fees) of \$1,176.73. In total, this proceeding has cost her \$9,371.88.

[19] The amount of fees, disbursements and taxes billed to a party are not necessarily the same as the amount the party pays when the expenses are incurred in matters relating to support. The *Income Tax Act*, R.S.C. 1985 (5th Supp), c. 1, s. 18, allows that legal and accounting fees may be deducted from total income to determine taxable income. Canada Revenue Agency's Income Tax Technical News Release Number 24 of October 10, 2002 changed the terms of the Agency's *Interpretation Bulletin IT-99R5: Legal and Accounting Fees*, making it possible for a party to deduct expenses incurred to obtain spousal support under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 and other similar provincial legislation across Canada. If a litigant is able to deduct legal expenses from total income, the resulting reduction in total income serves to diminish the litigant's tax bill.

[20] In Ms. Peraud's circumstances, this analysis is brief. In 2010, Ms. Peraud paid her lawyer's firm \$4,600.00. In 2010 she had no taxable income against which to claim this expense as a deduction so as to reduce her income taxes. So, the expense of \$4,600.00 was her actual expense.

[21] As a result of my decision, in 2011 Ms. Peraud will have income of at least \$13,200.00. If her employment in 2011 is the same as it was in 2010, she will have less than \$1,000.00 in

earnings. Paying the remainder of her legal expenses (\$4,771.88) in 2011 will sufficiently reduce Ms. Peraud's income that she should pay no income taxes. If she did not have this deduction, I estimate her income taxes would be in the range of \$400.00. So, when I consider the extent to which a costs award compensates Ms. Peraud, I know that her actual legal expense is approximately \$9,000.00.

[22] Ms. Peraud seeks costs in the range of \$6,000.00 to \$8,250.00, with an additional amount to be awarded for her disbursements.

[23] The \$6,000.00 amount results from using the rule of thumb that each day of trial should be treated as the equivalent of an "amount involved" of \$20,000.00 which generates a \$4,000.00 award and adding \$2,000.00 for the day of trial. Ms. Peraud seeks an additional amount for her disbursements (which total \$1,966.19) for a total award of \$7,966.19.

[24] The \$8,250.00 amount results from equating the "amount involved" to be two years of spousal support payments (post-tax), and applying Tariff A, but relying on Scale 2, and adding \$2,000.00 for the day of trial. Additionally, she asks for her disbursements which would bring the total award to approximately \$10,216.00. As I rejected Mr. Peraud's argument that this was a novel application, I reject Ms. Peraud's argument that this was a complex case. The Supreme Court of Canada has clearly identified the analysis for this sort of application in *Miglin*, 2003 SCC 24.

Conclusion

[25] Inclusive of disbursements, Ms. Peraud is seeking costs in the range of \$8,000.00 to \$10,000.00. This would be almost complete indemnification or more than complete indemnification for her legal expenses. According to *Rule 77.01(1)*, party and party costs are to compensate "for **part** of the [. . .] expenses of litigation". The emphasis is mine.

[26] In these circumstances, I opt to award costs in a lump sum, as permitted by *Rule 77.08*. To compensate Ms. Peraud for part of the expenses of her litigation and to recognize the expenses needlessly incurred by Mr. Peraud in the adjourned application, I award her costs of \$5,500.00. This amount considers all fees, disbursements and taxes incurred by her.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia