

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Lilly v. Lilly, 2011 NSSC 162

**Date:** 20110427

**Docket:** 1201-063739

**Registry:** Halifax

**Between:**

Sheila Margaret Lilly

Petitioner

and

Bruce Maxim Lilly

Respondent

**Judge:** Associate Chief Justice Lawrence I. O'Neil

**Written**

**Submissions:** Written Submissions on costs were received in March 2011

**Counsel:** Joseph M.J. Cooper, Q.C., for the Petitioner  
Bruce M. Lilly, Self Represented

**By the Court:**

**Introduction (Costs Decision)**

[1] This is a ruling on costs after the Court's decision, reported at 2011 NSSC 61 following a hearing in November 2010. The application related primarily to the Petitioner's entitlement to and quantum of spousal support and to child support.

[2] Written submissions on costs were received in March 2011.

## General Principles Governing Costs

[3] 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.

[4] 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.

[5] Justice Gass in her recent decision in *Anderson v. Anderson*, 2011 NSSC 90 applied these principles. I will do the same.

[6] 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.

[7] It is settled that costs can be granted in matrimonial matters. Justice Williams in *Grant v. Grant* [2002] N.S.J. No. 14 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 former Rule 63.04(1) and (2).

[8] 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.

[9] 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.

[10] 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.

[11] In *Conrad v. Bremner*, 2006 NSSC 99, Justice MacDonald was dealing with costs following a trial and once again the case involved an offer to settle as provided by former 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.

[12] Justice Goodfellow in *Gardiner v. Gardiner*, 2007 NSSC 282 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.

[13] 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.

[14] 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.

[15] 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.

[16] 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.

[17] 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 misled 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.

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

[19] 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.

[20] 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)).

[21] 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)).

## **Position of the Parties**

[22] Counsel for Ms. Lilly argues that Mr. Lilly should pay \$10,250 in costs. He observes that the trial was held over two days and Ms. Lilly was successful in gaining a favourable spousal support order. It is asserted that Tariff A determines the amount involved to be \$25,000 - \$40,000. The basic costs amount is therefore \$6,250 and \$2,000 must be added for each day in court. Her counsel represents her legal fees incurred to be approximately \$23,000.

[23] On the issue of the outcome of the litigation, Ms. Lilly argues that she was the more successful party.

[24] She argues that Mr. Lilly had unreasonably argued that Ms. Lilly was self sufficient and what offer he did make was minimal.

[25] Mr. Lilly counters that the court outcome in terms of the quantum of child support was close to his most recent offer. He submitted that Ms. Lilly's demands were excessive. He points out that he only learned on the eve of the trial that she was unemployed.

[26] Mr. Lilly offered \$1,100 per month as spousal support when Ms. Lilly was employed. It was rejected. The court ordered \$1,320 when she was in receipt of employment insurance. The offer made by Mr. Lilly was reasonable.

[27] However, Mr. Lilly wanted a fixed term to the spousal support. The court ordered support for an indefinite period.

[28] Mr. Lilly's argument on the entitlement to the subject tax refund prevailed. Ms. Lilly was ordered to pay child support.

[29] Mr. Lilly represents that he incurred legal costs in the range of \$13,000 before he decided to represent himself. He seeks costs of \$10,000.

## **Conclusion**

[30] I am satisfied that in the negotiations that preceded the hearing, both parties had unreasonable positions. Ms. Lilly had an exaggerated view of the quantum of support to which she was entitled. She also unreasonably maintained her position on the ownership of the subject tax refund.

[31] Mr. Lilly's position at trial was that Ms. Lilly had no entitlement to spousal support. He had also sought a short term of entitlement in the course of pre-trial negotiations.

[32] The success of the parties is mixed.

[33] Therefore, each party is ordered to bear their own costs.

**ACJ.**