

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Burchill v. Savoie, 2011 NSSC 236

Date: 20110706

Docket: 1201-061267
(SFHD-50075)

Registry: Halifax

Between:

David Gordon Burchill

Petitioner

and

Isabelle Savoie

Respondent

Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Written Submissions: Written Submissions on costs were received during the period December 2010 to May 2011

Written Decision: July 6, 2011

Counsel: Kenzie MacKinnon, for the Petitioner
Lynn Reiersen, Q.C., for the Respondent

By the Court:

Background

[1] The parties litigated certain marital issues before me in the context of a divorce hearing. The hearing lasted six days. A written decision followed. It is reported as *Burchill v. Savoie*, 2008 NSSC 307. Subsequent to the decision, the parties were unable to agree upon the form of the Corollary Relief Judgment. The court issued a second decision reported as *Burchell v. Savoie*, 2008 NSSC 205. The Corollary Relief Judgment is dated April 20, 2010.

[2] The respondent filed a Notice of Appeal of my decision on May 20, 2010. She sought to vary the spousal support clause of the Corollary Relief Judgment. She had already filed a variation application on March 10, 2010, seeking to vary the custody and access provisions of the Corollary Relief Judgment. Since the variation application preceded the issuance of the Corollary Relief Judgment, there was a procedural gap and an incentive for the parties to resolve their disagreement on the form of the Corollary Relief Judgment. The variation application could not proceed until the Corollary Relief Judgment issued.

[3] The variation application resulted in a consent variation order issued September 16, 2010, following a settlement conference in July 2010. As part of the settlement, the respondent withdrew her appeal of the Corollary Relief Judgment and concluded the variation proceeding.

Costs

[4] In December 2010, Mr. Kenzie MacKinnon, counsel for the petitioner, wrote the court and asked that a costs order against the respondent issue. He now seeks a lump sum costs award of \$65,000.00. Ms. Lynn Reiersen, Q.C., counsel for the respondent, wrote the court in response on December 21, 2010. She submitted that all financial matters between the parties had been finalized with the consent variation order.

[5] The court received a submission from Mr. MacKinnon on January 14, 2011, contesting Ms. Reiersen's position and setting forth the basis for the petitioner's belief that the costs issue pertaining to the trial remained alive. By letter dated February 3, 2011, Ms. Reiersen, Q.C. submitted *inter alia* that her client

reasonably believed that no request for costs was forthcoming from the petitioner. Mr. MacKinnon responded to this claim by letter received by the court on February 8, 2011. Brief correspondence was also received from both parties in April and May 2011.

Issues

[6] The issues are:

1. Did the original decision of the court allow for submissions on costs?
2. If so, did the parties agree implicitly or explicitly to relinquish the opportunity to seek costs?
3. Regardless, are there any bars in law or in equity to the court considering submissions on costs at this time?
4. If the court is to consider making a costs award, what is the appropriate order?

Issue 1: Did the original decision of the court allow for submissions on costs?

[7] The Corollary Relief Judgment dated April 20, 2010, at clause 17, provided for submissions on costs; first from the petitioner and then from the respondent. This is not in dispute.

Issue 2: If submissions on costs were provided for, did the parties agree implicitly or explicitly to relinquish the opportunity to do so?

[8] Ms. Reiersen, Q.C. appears to be arguing that, given the totality of the circumstances, it was reasonable for her client to believe that no claim for costs flowing from the trial would be made by Mr. Burchill. In particular, she points to the delay in those submissions after the consent variation order was issued in September 2010. She also asserts that the current variation order addressed all issues outstanding, including the pending appeal. As stated, the order resulted in the appeal being discontinued and made a hearing on the variation application unnecessary.

[9] I am satisfied that Mr. Burchill did not waive his opportunity to seek costs, through his conduct and representations.

[10] Following the court's decision and in his letter to the court dated October 31, 2008, Mr. MacKinnon confirmed that his client wanted to make a submission on costs. He expressed a desire to do so after the form of the Corollary Relief Judgment was agreed to. His request was unopposed and not a difficulty for the court. Regrettably, the Corollary Relief Judgment did not issue for another eighteen months because a dispute developed between the parties over the form of the Judgment.

[11] In his letter to the court dated March 25, 2010, Mr. MacKenzie confirmed his client's continuing desire to make a submission on costs. In her response dated March 30, 2010, Ms. Reiersen, Q.C. stated that no costs should be payable by either party.

[12] The Corollary Relief Judgment did issue on April 17, 2010, and, as stated, clause 17 provided for the parties to make submissions on costs. As already noted, the respondent filed a Notice of Variation Application and a Notice of Appeal in the March - April period of 2010. Both of those proceedings ended with the issuance of a consent order on September 16, 2010. Mr. MacKenzie made a written submission on costs which was received by the court on December 17, 2010.

[13] I have reviewed the consent variation order that flowed from the parties' settlement conference in July 2010. It addresses the issue of costs as it relates to the variation application and the Notice of Appeal. At Part II and Part III, on page 4, the order provides that no costs will be paid by either party for the appeal or its withdrawal and, further, that no costs were payable by either party for the variation application. It is silent on the issue of costs flowing from the trial proceeding.

Issue 3: Are there any bars in law or in equity to the court considering submissions on costs in this proceeding?

[14] I am not aware of any bars to the court considering the costs submission of the petitioner. The lengthy passage of time since my decision is explained. The petitioner cannot be faulted for it.

General Principles Governing Costs

[15] The new *Rule* on costs is *Rule 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.

[16] 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.

[17] 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 \$11,000.00 in costs, including HST and disbursements, and the respondent sought approximately \$9,000.00 plus disbursements of approximately \$3,600.00.

[18] 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 \$2,000.00 towards disbursements.

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

[20] In *Robar v. Arseneau*, 2010 NSSC 175, I ordered costs of \$5,138.00 inclusive of HST and disbursements to be paid at a rate of \$150.00 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 \$40,001.00 - \$65,000.00 range. Ms. Robar was subject to significant financial hardship at the time. This was a factor weighing against a higher costs award.

[21] 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 \$40,001.00 - \$65,000.00 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 \$3,000.00 inclusive of HST and disbursements were ordered [2010 NSSC 423 (cost decision)].

[22] The case of *R. (A.) v. R.(G.)*, 2010 NSSC 377 resulted in a costs award of \$3,000.00 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 \$20,000.00 this representing the amount involved when a full day of court time is consumed [2010 NSSC 424 (cost decision)].

[23] 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.

Position of the Parties

[24] Mr. Burchill’s legal costs were approximately \$74,221.00 to the end of the trial. The trial lasted six and one-half days. The parties disagreed on the form of the Corollary Relief Judgment. The resulting legal costs that flowed from this disagreement increased his total legal costs to \$118,774.00 inclusive of disbursements and taxes. Mr. MacKinnon, on behalf of Mr. Burchell, seeks a lump sum costs award of \$65,000.00; this amount representing 55% of Mr. Burchill’s total legal costs.

[25] Justice Jollimore, in *Peraud v Peraud*, 2011 NSSC 80, reviewed the law governing when a litigant may be permitted to deduct legal expenses from total income for income tax purposes. At paragraph 19, she wrote:

[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.

[26] Mr. Burchill advises the court that the tax benefit to him for legal expenses related to a claim for support is not known by him. It appears he has not yet claimed the deduction.

[27] Ms. Reiersen, Q.C., on behalf of Ms. Savoie, argues that each party should bear their own costs.

Conclusion

[28] As mandated by *Rule 77.06*, party and party costs will be fixed in accordance with the Tariffs. I am satisfied that Tariff "A" of the *Costs and Fees Act*, R.S.N.S. 1989, c. 104 is the governing Tariff for the purpose of determining an appropriate costs award. The Tariff is reproduced following *Rule 77.18*.

[29] This proceeding required six days of court time and subsequent appearances to address the parties' disagreement on the form of the order required an additional day of court time, i.e. two appearances of one-half day each. As stated, *supra*, adjudication of this matter required me to issue two written decisions.

[30] The petitioner has been the more successful party. The respondent's argument that the petitioner was not entitled to spousal support was not accepted. The respondent's argument that he should receive \$5,000.00 per month in ongoing spousal support was not accepted. The court ordered lump sum spousal support and ruled that periodic spousal support would be determined on an ongoing basis based on the parties' incomes which were fluid.

[31] The petitioner's argument in support of his claim to remain the primary care parent was accepted by the court.

[32] The respondent's conduct is a factor that weighs in favour of the petitioner's claim for costs. I found that she was not forthright in some of her evidence and significantly I found that strategic considerations motivated her, in large part, to become a part-time resident. The court imputed income to her as a result. I am satisfied that her approach to resolving the parties' marital/legal issues unnecessarily prolonged the litigation.

[33] I place the amount involved as \$200,001.00 - \$300,000.00 based solely on the value of the lump sum spousal support award ordered. I have not considered the value of future spousal support given the contingencies involved. Nor have I considered the value of child support. I am satisfied that the parties' principal monetary disagreement related to spousal support. Scale 2, the basic scale of Tariff "A" sets costs at \$22,750.00 based solely on an amount involved analysis. However, Tariff "A" also provides for additional costs based on the length of the trial, with \$2,000.00 in additional costs being added for each day of trial. Given the history of this matter, that represents an additional \$14,000.00 in costs.

[34] After considering the success of the parties, the conduct of the litigation and the net legal costs of the petitioner, as well as the tariffs, I direct costs of \$35,000.00 inclusive of taxes and disbursements. These shall be payable to Mr. Burchill at a rate of \$300.00 per month commencing January 15, 2012, and continuing for every month thereafter until paid in full.

ACJ