

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Harris v. Harris, 2011 NSSC 418

Date: 20111110

Docket: 1201-064495, SFHD-069818

Registry: Halifax

Between:

Reaud Murray Harris

Petitioner

v.

Stephanie Robyn Harris

Respondent

Judge:

The Honourable Justice Beryl MacDonald

Written Submissions:

Written submissions on costs filed by Reaud Harris September 30, 2011 and by Stephanie Harris October 17, 2011

Counsel:

Lynn Reiersen, Q.C., for Reaud Harris;
Richard Bureau, for Stephanie Harris

By the Court:

[1] On September 12, 2011 I delivered an oral decision confirming the validity and binding nature of an agreement reached between the parties with the assistance of counsel. The decision resulted from a motion made by Reaud Harris in which he was the successful party. He now requests a costs award.

[2] I have reviewed the *Civil Procedure Rules* and several decisions commenting on costs, including *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (T.D.); *Campbell v. Jones et al.* (2001), 197 N.S.R. (2d) 212 (T.D.); *Grant v. Grant* (2000), 200 N.S.R. (2d) 173 (T.D.); *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.); *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (T.D.); *Kennedy-Dowell v. Dowell* 2002 CarswellNS 487; *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.); *Jachimowicz v. Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.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.

4. Deference to the best interests of a child, impecuniosity of the parties, 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 or reduce a cost award to an otherwise successful party.
5. The amount of a party and party cost award should "represent a substantial contribution towards the reasonable expenses of presenting or defending the proceeding, but should not amount to a complete indemnity".
6. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
7. 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".
8. 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 \$20,000.00 in order to determine the "amount involved" .

9. If the award determined by the tariff does not represent a substantial contribution towards the 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.
10. 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.

[4] A very important issue throughout the proceedings between these parties was the disposition of a TD Waterhouse Account. Because of an order of this court dated October 4, 2010, this account was “frozen” and as a result increases and decreased in its value were left to the vicissitudes of the market. The account was without management. Its value appears to have declined substantially since the imposition of the order. Reaud Harris now seeks costs in an amount equal to those loses - the sum of \$166,465.00. He basis his request upon the wording of *Civil Procedure Rule 77.01 (1)*:

- (a) party and party costs, by which one party compensates another party for part of the compensated party’s expenses of litigation...

and Rule 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.

[5] The essence of Mr. Harris' submission is that his expense of litigation is most properly represented by the loss of value in the TD Waterhouse Account. To do justice between he and his former wife he argues he should receive compensation for that loss of value at least from the date of their settlement agreement, April 7, 2011, until that agreement was held to be binding upon Ms. Harris by my decision given September 12, 2011. Essentially the submission is a request for damages or compensation from Stephanie Harris for her failure to accept that the agreement negotiated with the assistance of her lawyer was a binding, enforceable agreement.

[6] This is a totally inappropriate costs submission. It completely ignores the jurisprudence that has developed in respect to costs. It rests upon a failure to apply that jurisprudence to the interpretation of the present *Civil Procedure Rules* and upon a completely untenable interpretation of the words I have underlined above.

[7] Rule 63 governed costs under the former *Civil Procedure Rules*. It did not define costs nor did it define the purpose of costs. It may be trite to say, but I believe, no definition was required because all those involved knew costs referred to the expense of legal representation. All of the cases I have reviewed, and mentioned above, involved an assessment of the appropriate amount to provide the successful party with a contribution toward his or her expense

of engaging a lawyer. The adoption of the present costs provisions in the *Civil Procedure Rules* has not changed that purpose.

[8] Mr. Harris did, in his motion, seek a damage award against Ms. Harris but that request was not addressed by counsel for either party in the hearing before me.

[9] Mr. Harris' costs submission does not analyse whether the Tariffs should be used nor how the particular circumstances of this case justify an award that is greater than the amounts provided by the Tariffs. It does discuss factors that Mr. Harris' alleges should result in the award he seeks some of which would be relevant to an appropriate costs analysis. I have considered these in my decision.

[10] Unfortunately Stephanie Harris has found it necessary to respond to Reaud Harris inappropriate submissions and this has caused her an unnecessary expense. I have taken this into account in my costs award.

[11] Ms. Harris has complained about Mr. Harris' repeated failure to provide financial disclosure. This complaint has validity, however, some of that failure justifiably relates to the disorganized state of Mr. Harris' financial affairs and the outstanding liabilities owing to the Canadian Revenue Agency that could, and did, have a significant impact on the profitability of his business enterprise and his personal wealth. This made it difficult for him to produce a straight forward financial statement.

[12] The motion before me was made in a divorce proceeding. Ms. Harris argued that if I decided an agreement was concluded, it should be set aside because it was unconscionable and unduly harsh. By the time this motion was heard the parties had settled the parenting arrangements. There was a Motion to Release the TD Waterhouse Account that was to be heard if I did not uphold the settlement agreement. Both parties had filed significant material in support of that motion. As a result of my decision the parties can now proceed to have this divorce finalized on a non- contested basis. My decision has effectively resolved the remaining issues in this proceeding.

[13] There is no particular Tariff that mentions costs following upon a successful motion. However, Tariff C does mention applications heard in Chambers. The previous *Civil Procedure Rules* referred to Originating and Interlocutory Applications. The present Rule 5.01 (1) defines an application as an original proceeding and a motion as an interlocutory step in a proceeding. Although this rule does not mention motions, neither do any of the other Tariff provisions. I have considered Tariff C in reaching this costs decision and in particular I have taken some direction from Tariff C (4):

When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3, or 4 times, depending on the following factors:

- (a) the complexity of the matter,

- (b) the importance of the matter to the parties,
- (c) the amount of effort involved in preparing for and conducting the application.

If my decision was not, in itself, determinative of the entire matters at issue, it was very nearly so.

[14] This motion was not particularly complex but the effort involved in preparing for and conducting the hearing was significant. Mr. Harris' counsel needed to organize and present material that was supportive of the existence of a binding agreement and explained the background and context within which the parties were negotiating. The latter information was required so I could determine whether the agreement reached was unconscionable or unduly harsh upon Ms. Harris. Resolution of the issues before me was very important to both parties so they could proceed with the divorce and move on with their lives.

[15] The hearing on the motion lasted approximately 4 hours. My decision was delivered orally in approximately ½ hour. A full day in our court is usually 5 hours.

[16] I have been informed about the legal fees charged to Mr. Harris as a result of this motion. Some of the account does relate to preparation for the Motion to Release the TD Waterhouse Account. That motion was necessary because Ms. Harris failed to abide by the terms of the settlement agreement and sought to have it declared unenforceable against her. I have considered this in my costs award.

[17] Ms. Harris objects to the apparent hourly rate charged by counsel for Mr. Harris. I do not intend to second guess what counsel should charge a client. I may consider whether the work preformed was necessary. Mr. Harris objects to counsel's discovery of former counsel engaged by Ms. Harris who negotiated the settlement agreement. I consider this a reasonable expense in preparation for the motion hearing.

[18] Ms. Harris objects to the amount charged for disbursements. She objects to the inclusion of HST. However, these are sums included on counsel's fees to the client. Mr. Harris is seeking a lump sum costs award, although in a amount I was not prepared to consider. I will make a costs award that I believe will represent a substantial contribution towards the reasonable expenses of presenting and arguing this motion, but which does not amount to a complete indemnity. I do not intend to refer specifically to disbursements as one might when conducting a taxation of a lawyer's account.

[19] Ms. Harris requests that no costs be awarded against her because to do so will impede her financial ability to care for the children. I have no evidence to support this proposition. She increased her own costs by her failure to confirm the agreement reached between counsel about which she was fully informed. She will receive a property settlement and may pursue enforcement remedies if there is default. She is receiving child support. She is 41 years old and was employed prior to her marriage. Her children are young but they are in school. She likely will need to seek employment to contribute to their financial security. She alleges Mr. Harris still maintains a "lavish lifestyle". I have no evidence to support this statement. I do have evidence about what happened in the past and it suggests the lifestyle this couple lived was based on debt

and money that otherwise should have been used to pay income tax obligations. Mr. Harris has taken on full responsibility for the debt and the consequences of the failure to pay those tax obligations.

[20] Taking into account the considerations I have discussed and using Tariff C as a guide I have decided to use the amount suggested for a one day hearing multiplied by a factor of 3 for a total costs award of \$6,000.00 to be paid by Ms. Harris to Mr. Harris.

J.