

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Pellicer v. Williams, 2012 NSSC 359

**Date:** 20121019

**Docket:** 1201-063597

**Registry:** Halifax

**Between:**

Rocio (Williams) Pellicer

Applicant

and

Paul Edward Williams

Respondent

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

**Submissions:** Written Submissions on costs were received from Ms. Rocio (Williams) Pellicer, counsel only

**Related**

**Decision(s):** 2012 NSSC 267

**Counsel:** Janet M. Stevenson, for the Applicant  
Paul E. Williams, Self Represented

**By the Court:**

**Background**

[1] This is a costs decision. The parties litigated the apportionment of custody and access rights and the quantification of child support and special expenses for their two children.

[2] An oral decision on October 27, 2011 followed a custody/access hearing on October 25, 2011. A written decision followed the June 20, 2012 hearing on child support. This later decision is reported at 2012 NSSC 267.

[3] **Issue**

1. If the court is to make a costs award, what is the appropriate order?

**General Principles Governing Costs**

[4] 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 (CanLII), 2010 NSSC 363, reviewed the transition from the 1972 Rules to the new Rules. His commentary is a helpful guide in tracing the changes.

[5] Justice B. MacDonald of this court summarized the applicable principles to apply when determining an appropriate costs award in *L. (N.D.) v. L. (M.S.)*, 2010 NSSC 159 (CanLII), 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 (CanLII), 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 (CanLII), 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.

[6] Justice Gass, in *Pelrine v. Pelrine*, 2007 NSSC 123 (CanLII), 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.

[7] 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.

[8] In *Robar v. Arseneau*, 2010 NSSC 175 (CanLII), 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.

[9] 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).

[10] 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)).

[11] In *Burchill v. Savoie*, 2011 NSSC 163, I ordered costs of \$35,000 inclusive of taxes and disbursements.

[12] In *Shurson v. Shurson*, 2011 NSSC 344, I ordered the parties to pay their own costs given the mixed success of the parties.

[13] Justice Jollimore, in *Peraud v Peraud*, 2011 NSSC 80 (CanLII), 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.

[14] 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 families and 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**

[15] Ms. Williams' counsel seeks an award of costs valued at \$3,000 based on an application of Scale 1 of Tariff "A" of the *Costs and Fees Act*, R.S.N.S. 1989, c.104. Ms. Williams argues that no costs should be awarded to either party.

### **Conclusion**

[16] Should I deem the award of costs warranted, as mandated by Rule 77.06, party and party costs should be fixed in accordance with the tariffs. I am satisfied that Scale 1 of Tariff "A" of the *Costs and Fees Act, supra* is the governing tariff for the purpose of determining an appropriate costs award. The tariff is reproduced following Rule 77.18.

[17] This proceeding required Court time on two days and additional chambers time when the Court was required to resolve disagreements between the parties. I assigned an additional one half day of Court time to this aspect of the case.

[18] The Applicant, Ms. Williams was the successful party.

[19] On the important parenting issue, the evidence established that the Applicant was the appropriate primary care parent.

[20] Mr. Williams' initiative in seeking to vary the existing order was not reasonable and responsible.

[21] The assessment of child support was a central issue. Again, Ms. Williams clearly prevailed. Income was imputed to Mr. Williams by the Court. Mr. Williams did not persuade the Court to reduce his child support obligation. It is my conclusion that Mr. Williams's submissions needlessly resulted in the expenditure of time and effort by all involved and delayed the issuance of an order herein. In the end, the Court imputed an income level to Mr. Williams that Ms. Pellicer was prepared to accept prior to the commencement of the hearing (\$25,000).

[22] Costs of \$3,000 are assessed against Mr. Williams. They are payable at a rate of \$150 per month until paid in full, commencing December 1, 2012.

**ACJ**