SUPREME COURT OF NOVA SCOTIA
Citation: O'Neil v. O'Neil 2013 NSSC 64

Date: February 21, 2013
Docket: 1201-058514
Registry: Halifax

Between:

Leonard Samuel Gerard O'Neil

Petitioner

and

Linda Margaret O'Neil

Respondent

DECISION ON COSTS

Judge:	Justice Carole A. Beaton
Written Submissions:	Received from the Applicant on February 12, 2013 Received from the Respondent on February 15, 2013
Date of Decision:	February 21, 2013
Counsel:	Deborah Conrad and Jessica Chapman for the Applicant, Leonard O'Neil Lynn Reierson and Amber Penney, counsel for the Respondent, Linda O'Neil

By the Court:

[1] This is a decision on costs arising from a Variation Application pursuant to the *Divorce Act*, R.S.C. 1985, c.3. The one day hearing was conducted on October 15, 2012. The parties filed affidavit evidence in advance and the hearing was dedicated to cross-examination and oral submissions. A written decision was rendered on January 31, 2013 (*O'Neil v. O'Neil*, 2013 NSSC 44).

[2] At the Hearing, the Applicant sought to have his spousal support obligation to the Respondent terminated and the requirement that he fund medical/health insurance and life insurance in favour of the Respondent rescinded. In the alternative, he argued the evidence concerning his recent reduction in annual income would support a downward variation in the quantum of his spousal support obligation.

[3] The Respondent opposed the Application, seeking to have her spousal support entitlement remain intact. The Respondent did agree that the recent retirement of the Applicant constituted a change in circumstances for the purposes of s.17 of the *Divorce Act*, *supra* but maintained the quantum of spousal support continued to be appropriate.

[4] The Applicant was partially successful, to the extent that the Court did not terminate spousal support, but rather ordered a variation of the Corollary Relief Judgment, continuing the Applicant's spousal support obligation but reducing it from $3000.00 per month to $1000.00 per month. The Respondent too was partially successful, to the extent that the Applicant's request for rescission of that aspect of the Corollary Relief Judgment that required him to fund both medical/health insurance and life insurance in favour of the Respondent was rejected.

[5] Rule 77 of the Civil Procedure Rules governs the matter of costs; it identifies the relevant Tariff to be applied once a monetary amount equating to the issue(s) in play has been determined by the Court. There is also a mechanism found in decisions of the Court for assessing an amount outside the Tariff in family law cases: *Darlington v. Moore* 2011 NSSC 425; *Harrington v. Coombs* [2011] NSSC 141; *Urquhart v. Urquhart* (1998) 169 N.S.R. (2d).

[6] In the instant case counsel have agreed it is appropriate to apply Tariff A of Rule 77. The parties disagree as to whom it is that an award of $6000.00 costs belongs. The Applicant asserts that he is the "successful party", entitled to costs pursuant to Tariff A, Scale 2 in the amount of $4000.00 plus an additional $2000.00 for one day of trial, for a total of $6000.00 plus allowable disbursements of $1226.06 (consisting of $1066.14 and interest of $159.92). The Respondent agrees with the figure of $6000.00 put forward by the Applicant but maintains that she is the "successful party" in the litigation and costs should therefore be payable to her. The Respondent did not provide any information as to possible disbursements she may have incurred.

[7] In *Fermin v. Yang*, 2009 NSSC 222 MacDonald, J. wrote:

> [3] Several principles emerge from the Rules and the case law:
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> 1. Costs are in the discretion of the Court.
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> 2. A successful party is generally entitled to a cost award.
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> 3. A decision not to award costs must be for a "very good reason" and be based on principle.
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> 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.
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> 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".
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> 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:
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> > "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]."
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> 7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
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> 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".
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> 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".
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> 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.
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> 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.
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> 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.

Guided by those principles I have examined and considered the respective positions of the parties and in particular, the significance of various offers to settle exchanged between the parties.

[8] In their written submissions on costs, counsel for both parties summarized the history of settlement offers exchanged, all of which apparently occurred prior to the actual commencement of the proceeding with the filing of an Application to Vary on December 23, 2011. On October 5, 2011 counsel for the Applicant wrote to the Respondent and put forward a formal Offer to Settle to reduce spousal support from $3000.00 per month to $900.00 per month, indicating: "...Dr. O'Neil's offer is a formal Offer to Settle and will be used on the issue of costs in

the event it is necessary for him to make an application to vary the spousal support." Subsequently, on November 21, 2011 the Applicant himself, in an email directly to the Respondent, advised he was repeating the same offer contained in the October letter from his counsel, which offer would expire in ten days. On November 22, the Respondent replied directly to the Applicant and agreed to $900.00 per month spousal support, contingent on the offer including continuation of the life insurance benefit component of the Corollary Relief Judgment (thereby effectively increasing the "value" to the Respondent by $185.00 per month).

[9] The Applicant then replied directly to the Respondent on November 25, offering to pay the fixed sum of $1000.00 per month indefinite spousal support and to retain the Respondent on his drug plan, but requiring her to assume the cost of the $185.00 per month life insurance premiums. The Applicant described this as his "final offer", open for acceptance until December 1. By an email reply on November 29 the Respondent rejected that offer. On the same evening the Applicant replied that he would be "contacting my lawyer tomorrow to proceed with the Court case".

[10] The negotiations occurred directly between the parties, save the initial letter sent by counsel for the Applicant to the Respondent. Throughout the exchange of offers the Respondent had apparently not yet received any financial disclosure from the Applicant (his Application was not filed until the following month). While the Respondent referenced in her emails having received legal advice, I am able to infer she did not formally retain counsel until some time after the offers were exchanged. Each offer to settle made by the Applicant had a time limit associated with it; by contrast the last offer put forward by the Respondent was apparently never withdrawn by her.

[11] Counsel for the Applicant refers to and relies on a previous decision of this Court in *MacPhee v. MacPhee,* 2012 NSSC 43 asserting that the result therein was "your ladyship granted costs to the Applicant as his formal offer to settle more closely resembled the Court's decision than did the Respondent's offer." With respect, the result in *MacPhee, supra* was that because neither party succeeded in their respective position on the one contested issue each brought forward, no costs were awarded.

[12] I am of the view that the same result is appropriate here. Ironically the decision in this case mirrors closely the offers exchanged between the parties. Ultimately, when negotiations ended the Applicant was prepared to provide $1000.00 in spousal support and the Respondent was prepared to accept $900.00 in spousal support plus $185.00 in value representing the Applicant's payment of life insurance to the benefit of the Respondent. Although one could, strictly speaking, characterize the Respondent as having done marginally better at trial than the last offer she put forward, it is unsettling that the offers reveal each party was prepared to spend the time, energy and legal fees associated with having the court adjudicate on an application where they were but dollars apart in their respective positions. For that reason it is appropriate that each party should bear their own costs in the action.

J.