SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Conohan v. Cholock*, 2017 NSSC 69

Date: 2017-03-08
Docket: No. SFSNMCA-016558
Registry: Sydney

Between:

Pamela Rose Conohan

Applicant

v.

Thomas Claude Cholock

Respondent

DECISION ON COSTS

Judge:	The Honourable Justice Darryl Wilson
Submissions by Applicant:	January 25 and February 8, 2017
Submissions by Respondent:	February 7 and 9, 2017
Written Decision:	March 8, 2017
Counsel:	Elaine Gibney and Heidi Hannem - Counsel for Applicant Thomas Claude Cholock – Self-Represented

By the Court:

[1] The Applicant requests an order for costs of an application to vary child support, including table and section 7 expenses.

[2] The proceeding began with the filing of a notice of variation application on September 3, 2015. The relief requested included (a) an increase in the table amount of child maintenance based on an increase in the Respondent's income; (b) an amount for section 7(3) health related expenses and section 7(f) extra-ordinary expenses for extra-curricular activities; and (c) retroactive child maintenance for table and section 7 amounts.

[3] There was a pretrial conference on March 30, 2016, a settlement conference on May 4, 2016, a further pretrial conference on August 22, 2016, and a hearing on November 4, 2016, which took 3 hours.

[4] The parties were the only persons to testify.

[5] The court awarded the Applicant $14,730.93 in child maintenance, including a retroactive table amount of $13,391.00, and section 7 amounts of $141.43 for health related expenses and $1,198.50 for extra-ordinary expenses for extra-curricular activities. The child maintenance award included an amount for a period which predated the filing of the Application to Vary.

[6] Prospective child maintenance was fixed at $682.00 monthly, based on an annual income of $80,600.00.

[7] The parties agreed to participate in the Recalculation Program.

[8] The Applicant made a formal offer to settle, dated June 1, 2016, following the settlement conference of May 4, 2016, which included retroactive child maintenance of $14,864.00; prospective child maintenance of $643.00 per month based on an annual income of $75,000, with an annual adjustment; $137.00 per month towards section 7 expenses, excluding unexpected medical and/or dental expenses and future university expenses, and costs payable in an amount to be determined by the court. The offer to settle was open for acceptance to the start of the hearing.

[9] The Applicant's position at trial was a claim for retroactive child maintenance (table amount), of $18,986.00 and section 7 contributions of $7,029.17, for a total of $26,015.17.

[10] The Applicant incurred legal costs of $16,816.00, consisting of legal fees of $14,460.00, disbursements of $170.50, and HST of $2,185.51. The Applicant seeks costs of $12,392.60, consisting of 66% of legal fees incurred prior to the settlement offer ($4,998.10), plus 80% of fees after the settlement offer $7,394.50). The Applicant's offer to settle was accompanied by a letter from counsel dated June 1, 2016, that stated legal costs would be in the vicinity of $10,000.00. The fees build to the Applicant included time for senior and junior counsel to prepare and attend the hearing.

[11] The Applicant's position is that she made reasonable offers to settle at conciliation and the settlement conference that were refused by the Respondent. The offers to settle were more favorable or at least comparable to the total amounts awarded by the court decision. As a result, she was forced to pursue her claim for child maintenance through a contested hearing.

[12] Counsel for the Applicant also advanced Rule 10.09 as a basis for awarding costs where there was a formal offer to settle. However, Rule 10.09 is not applicable to this proceeding per Rule 59.39(7).

[13] The Respondent's position is that both parties were successful in the outcome of the November 4, 2016, hearing, and that no costs should be awarded.

[14] The Respondent states he made informal settlement proposals during conciliation and at the settlement conference. He proposed a $4,000.00 settlement for child support during the conciliation meeting in December 2016, with section 7 expenses to be determined based on agreement of the parties. At conciliation he disagreed with the Applicant's position that the order contain a general provision that the parties be responsible to pay their proportionate share of any qualifying section 7 expenses, including post-secondary education expenses. He was not prepared to accept uncontrolled section 7 expenses.

[15] At the settlement conference, he proposed to settle the matter of retroactive child maintenance by paying the amount of $10,728.00 and a provision with limits on section 7 expenses. The Respondent's position is that his settlement proposal of $10,728.00 for retroactive child maintenance, as well as section 7 expenses controlled and limited is very close to what the court ordered. While the table amount ordered by the court was greater than the settlement proposal he offered, section 7 expenses awarded by the court were less than that claimed by the Applicant.

Legal Analysis

[16] **Civil Procedure Rule** 77 addresses the issue of costs. The Rule provides *inter alia*:

> 77.01 (1) The court deals with each of the following kinds of costs:
>
> (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
>
> (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
>
> (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.
>
> General discretion (party and party costs)
>
> 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.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.
>
> Liability for costs
>
> 77.03 (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.
>
> (2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.
>
> (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> . . . . .
>
> Assessment of costs under tariff at end of proceeding

77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the Costs and Fees Act, a copy of which is reproduced at the end of this Rule 77.

. . . . .

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

(a) the amount claimed in relation to the amount recovered;

(b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

(c) an offer of contribution;

(d) a payment into court;

(e) conduct of a party affecting the speed or expense of the proceeding;

(f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

(g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

. . . . .

Disbursements included in award

77.10 (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

(2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.

[17] The Court of Appeal in ***Armoyan v. Armoyan***, 2013 NSCA 136 (CanLII) stated that:

> [10] The Court's overall mandate, under Rule 77.02(1), is to "do justice between the parties".
>
> …
>
> [12] Rule 77.06 says that, unless ordered otherwise, party and party costs are quantified according to the tariffs, reproduced in Rule 77. These are costs of a trial or an application in court under Tariff A, a motion or application in chambers under Tariff C (see also Rule 77.05), and an appeal under Tariff B. Tariff B prescribes appeal costs of 40% trial costs "unless a different amount is set by the Nova Scotia Court of Appeal".
>
> [13] By Rule 77.07(1), the court has discretion to raise or lower the tariff costs, applying factors such as those listed in Rule 77.07(2). These factors include an unaccepted written settlement offer, whether or not the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding.
>
> [14] Rule 77.08 permits the court to award lump sum costs. The Rule does specify the circumstances when the Court should depart from tariff costs for a lump sum.
>
> Tariff or Lump Sum?
>
> [15] The tariffs are the norm, and there must be a reason to consider a lump sum.
>
> [16] The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses. In Williamson, while discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from Landymore v. Hardy (1992), 1992 CanLII 2801 (NS SC), 112 N.S.R. (2d) 410:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
>
> > "… the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity."

Justice Freeman continued:

> In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[17] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.

[18] But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no "amount involved", other important issues being at stake. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity – e.g. to define an artificial "amount involved" as Justice Freeman noted in Williamson – that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A

principled calculation should turn on the objective criteria that are accepted by the Rules or case law. [emphasis added]

[19] In my view, this is such a case for a lump sum award. I say this for the following reasons.

[20] Justices of the Family Division have stated that trial-like hearings in matrimonial matters are more appropriate for Tariff A than Tariff C: Hopkie v. Hopkie, 2010 NSSC 345 (CanLII), para 7, per Gass, J.; MacLean v. Boylan, 2011 NSSC 406 (CanLII), paras 29-30, per Jollimore, J.; Kozma v. Kozma, 2013 NSSC 20 (CanLII), para 2, per MacDonald, J.; Robinson v. Robinson, 2009 NSSC 409 (CanLII), para 10, per Campbell, J..

[23] Rule 77.07(2)(e) permits an adjustment based on "conduct of a party affecting the speed or expense of the proceeding". The supervening criterion is that the costs award "do justice between the parties" under Rule 77.02(1).

Conclusion

[18] I find the Applicant was the successful party and is entitled to an award of costs.

[19] The Applicant was required by the Respondent to pursue a claim for child maintenance through a contested hearing. The Respondent should have admitted his obligation to increase the table amount of child maintenance when requested by the Applicant. She did not receive the appropriate amount of child maintenance in a timely manner.

[20] There was no clear successful party with respect to section 7 expenses. The Applicant's claim at trial was excessive and the court awarded the Applicant section 7 expenses which the Respondent contested.

[21] The Applicant's offer to settle was comparable to what the court decided. However, the court decision did not provide a fixed amount for section 7 expenses which consumed much of the trial time.

[22] Counsel for the Applicant relies upon **Armoyan**, *supra*, for authority for awarding a lump sum based on 66% of pre settlement offer legal fees and 80% of post settlement offer legal fees. However, unlike Armoyan, I find the circumstances in this proceeding "conform generally to the parameters assumed by the Tariff" (Fichaud, JA at paragraph 17 of Armoyan).

[23] The Tariffs are the norm and I do not have a reason to consider a lump sum.

[24] Many justices of the Family Division have determined that trial like hearings in matrimonial matters are more appropriate for Tariff A than Tariff C. I accept this reasoning.

[25] I find the amount involved to be $14,730.93.

[26] In determining the applicant's reasonable expenses I considered the legal bill as well as counsel's letter of June 1, estimating legal fees of $10,000.00.

[27] Tariff A provides a basic amount of $4,000.00 for costs where the amount involved is less than $25,000.00. The court may add an amount for each day at trial. This trial was more than one half day but less than a full day. I am also increasing the Tariff amount for the respondent's failure to acknowledge his obligation to increase the table amount of child maintenance.

[28] I award the Applicant $6,500.00 in costs. The costs are payable over a 3 year period beginning April 1, 2017, in the amount of $180.55 per month. The cost award may be registered as a maintenance order for purposes of enforcement though the Maintenance Enforcement Program.

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Wilson, J.