

SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)

Citation: *Barkhouse-Pace v. Pace*, 2017 NSSC 350

ENDORSEMENT

Roberta Barkhouse-Pace v. Duane Pace

1201-063997; SFH-D 0066815

September 15, 2017

- Nicole MacIsaac for Roberta Barkhouse-Pace
- Beth Newton for Duane Pace

Duane Pace requests costs of \$5,000.00 following a one-day hearing on an application relating to a Corollary Relief Order negotiated at a settlement conference. Roberta Barkhouse-Pace asks that no costs be awarded or that they be awarded based on Tariff C.

Decision:

Ms. Barkhouse-Pace shall pay Mr. Pace costs of \$4,500.00.

Reasons:

1. Ms. Barkhouse-Pace applied to vary the terms of a Corollary Relief Order which was negotiated at a judicial settlement conference, or to void the Order based on common mistake or unilateral mistake, or to set aside the Order under section 29 of the *Matrimonial Property Act*. Her application was dismissed.
2. The hearing required more than one-half day and less than one full day. There were two earlier conferences before me.
3. Following the granting of the Corollary Relief Order, the parties returned to Justice Williams who was unable to assist in the absence of jurisdiction.
4. Civil Procedure Rule 77.03(3) provides that “Costs of a proceeding follow the result”. Costs are in my discretion. A decision not to award costs must be principled.
5. Costs promote the rational conduct of litigation. They discourage parties from pursuing cases which are unlikely to succeed.
6. Ms. Barkhouse-Pace argues that she ought not be ordered to pay costs because she is of limited means. She receives social assistance payments and has counsel retained through Nova Scotia Legal Aid.

7. Ms. Barkhouse-Pace is entitled to a payout of \$75,000.00 from Mr. Pace's pension which, when received, could finance a costs award.
8. Representation by Legal Aid counsel does not immunize a party against an order for costs. This can only be done by an order granted on a motion under Rule 77.04.
9. Ms. Barkhouse-Pace has not sought or been granted an order under Rule 77.04.
10. Judge Dyer reminds me, in *M.C.Q. [sic M.Q.C.] v. P.L.T.*, 2005 NSFC 27 (CanLII): 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". If this happens, Judge Dyer said, "Fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *A.E.M. v. R.G.L.*, 2004 BCSC 65 (CanLII)]".
11. Ms. Barkhouse-Pace argues that the appropriate Tariff to apply is Tariff C.
12. I apply Tariff A as is the practice in the Family Division: *Armoyan*, 2013 NSCA 136 at paragraph 20.
13. To apply Tariff A, I must know the amount involved in the case. Where there's a substantial non-monetary issue involved, the amount involved is determined having regard to the complexity of the proceeding and the importance of the issues.
14. In both *Collins v. Speight*, 1993 CanLII 4668 (NS SC), and in *Wyatt v. Franklin*, 1993 CanLII 4580 (NS SC), Justice Goodfellow concluded that the amount involved in two and one-half day trials was \$45,000.00. *Collins v. Speight*, 1993 CanLII 4668 (NS SC), was a case involving a dispute over an entitlement to a right of way and *Wyatt v. Franklin*, 1993 CanLII 4580 (NS SC), was a land dispute. Justice Goodfellow described both as not complex. Later, in *Toronto Dominion Bank v. Lienaux*, 1997 CanLII 15017 (NS SC), Justice Goodfellow suggested a general rule for cases where a substantial non-monetary issue was involved. He said that he treated each day or part day of the trial as equivalent to \$15,000.00 for determining the "amount involved".
15. Justice Lynch reviewed this general rule in *Jachimowicz*, 2007 NSSC 303 (CanLII), at paragraph 26, where a parenting trial took approximately thirteen days. She adjusted the daily equivalent amount from \$15,000.00 to \$20,000.00 "to reflect the increased costs of litigation".

16. Mr. Pace did not file an affidavit, reducing his legal expense.
17. Mr. Pace was faced with the need to respond to a *subpoena* issued for his previous lawyer. While the hearing date was set seven months ago, the *subpoena* was only served in the week before the trial date.
18. Civil Procedure Rule 77.02(1) states that I “may, at any time, make any order about costs as [I am] satisfied will do justice between the parties”.
19. Pursuant to Civil Procedure Rule 77.02(2) I have a general discretion to award costs so as to do justice between the parties, regardless of whether costs have been specifically claimed.
20. Having regard to the result achieved, the amount deemed to be involved, and the duration of the hearing, I order Ms. Barkhouse-Pace to pay Mr. Pace costs of \$4,500.00.

Elizabeth Jollimore, J.S.C.(F.D.)