

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Lyle v. Myer*, 2019 NSSC 387

Date: 2019 12 20

Docket: SFHMCA 083379

Registry: Halifax

Between:

David Harold Gordon Lyle

Applicant

v.

Hannah Elizabeth Myer

Respondent

Judge: The Honourable Chief Justice Deborah K. Smith

Written Applicant: October 7th, 2019

Submissions: Respondent: September 27th and December 19th, 2019

Counsel: Applicant: Self Represented
Respondent: Philip Whitehead

By the Court:

[1] On November 10th, 2017, David Lyle filed a Variation Application in the Supreme Court of Nova Scotia (Family Division) applying to vary an Order of Associate Chief Justice Lawrence O’Neil issued October 29th, 2014. In particular, Mr. Lyle sought the following:

- Custody of ECL
- Parenting arrangements for the child
- Parenting time
- Contact time or interaction
- Grandparent contact time or interaction
- Child support
 - Table amount
 - Retroactive variation
 - Termination of child support

[2] As the proceeding progressed, he also requested that all of his child support arrears be forgiven.

[3] Mr. Lyle’s application was heard before Justice R. Lester Jesudason on December 10th and 11th, 2018 and January 23rd and July 8th, 2019. A decision was rendered by Justice Jesudason on August 22nd, 2019, reported at 2019 NSSC 244. The court reserved on the issue of costs and the parties were given thirty (30) days to make written submissions. The solicitor for Ms. Myer filed written submissions on September 27th, 2019. Mr. Lyle’s submissions (limited as they are) were sent to

the court on October 7th, 2019. Shortly thereafter, Justice Jesudason recused himself from further involvement in the proceeding. Pursuant to Civil Procedure Rule 82.19, I took over the conduct of the matter. Mr. Lyle was then given additional time to forward further submissions on costs if he wished to do so. No further submissions were received. This is my decision relating to costs.

[4] Costs are governed by Civil Procedure Rule 77. Rule 77.02 provides:

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.

[5] Rule 77.03 provides:

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.

.....

[6] Rule 77.06 provides:

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.

(2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.

(3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

[7] Rule 77.07 provides:

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.

[8] Rule 77.08 provides:

Lump sum amount instead of tariff

77.08 A judge may award lump sum costs instead of tariff costs.

[9] Finally, Rule 77.10 provides:

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.

[10] As can be seen from the above, the court is given latitude when dealing with the issue of costs. Certain principles, however, have been developed. These include the following: (i) a successful party is generally entitled to costs; (ii) the Tariffs are the norm (*Armoyan v. Armoyan*, 2013 NSCA 136, at ¶ 15); and (iii) the basic principle is that a costs award should afford substantial contribution to the parties' reasonable fees and disbursements (*Armoyan, supra*, at ¶ 16, and the cases referred to therein).

[11] Ms. Myer was the successful litigant in this matter. She is entitled to costs.

[12] This proceeding was an application in court. Accordingly, Tariff A applies unless I order otherwise (CPR 77.06(2)).

[13] Tariff A provides:

TARIFF A

**Tariff of Fees for Solicitor's Services Allowable to a Party
Entitled to Costs on a Decision or Order in a Proceeding**

In applying this Schedule the "length of trial" is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars (\$2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

Amount Involved	Scale 1(-25%)	Scale 2 (Basic)	Scale 3 (+25%)
Less than \$25,000	\$3,000	\$4,000	\$5,000
\$25,000-\$40,000	\$4,688	\$6,250	\$7,813
\$40,001-\$65,000	\$5,138	\$7,250	\$9,063
\$65,001-\$90,000	\$7,313	\$9,750	\$12,188
\$90,001-\$125,000	\$9,188	\$12,250	\$15,313
\$125,001- \$200,000	\$12,563	\$16,750	\$20,938
\$200,001-\$300,000	\$17,063	\$22,750	\$28,438
\$300,001-\$500,000	\$26,063	\$34,750	\$43,438
\$500,001-\$750,000	\$37,313	\$49,750	\$63,188
\$750,001-\$1,000,000	\$48,563	\$64,750	\$80,938
more than \$1,000,000	The Basic Scale is derived by multiplying the "amount involved" by 6.5%.		

[14] The Tariffs further provide:

In these Tariffs unless otherwise prescribed, the "amount involved" shall be	
(a)	where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
(i)	the amount allowed,
(ii)	the complexity of the proceeding, and
(iii)	the importance of the issues;
(b)	where the main issue is a monetary claim which is dismissed, an amount determined having regard to
(i)	the amount of damages provisionally assessed by the court, if any,
(ii)	the amount claimed, if any,
(iii)	the complexity of the proceeding, and
(iv)	the importance of the issues;
(c)	where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to

- (i) the complexity of the proceeding, and
- (ii) the importance of the issues;
- (d) an amount agreed upon by the parties.

[15] This proceeding primarily involved non-monetary issues. While Mr. Lyle put the matter of child support in issue, including the forgiving of arrears, it is clear that the primary focus of the hearing was custody of, and access to, the parties' daughter. In these circumstances, Mr. Whitehead invites the court to use what is referred to as the "rule of thumb" approach, where the court equates each day of trial to \$20,000.00, in order to determine the "amount involved". He notes that the hearing took 3.5 days and submits that using the "rule of thumb" of \$20,000.00 per day, would result in an "amount involved" of \$70,000.00. Using Scale 2 of Tariff A would result in a basic costs of award of \$9,750.00. A further \$2,000.00 per day, as provided by Tariff A, would result in additional costs of \$7,000.00. The Respondent seeks a total costs award in the amount of \$16,750.00 ($\$9,750.00 + \$7,000.00 = \$16,750.00$).

[16] The "rule of thumb" approach has been endorsed many times by trial judges (see, for example, *Harrington v. Coomb*, 2011 NSSC 141 and *Fermin v. Yang*, 2009 NSSC 222, at ¶ 3(9)). However, this "rule of thumb" approach is not without controversy.

[17] In *Veinot v. Veinot Estate*, 1998 NSCA 164, Pugsley J.A. stated the following at p. 8:

With respect, I do not agree, however, that the rule of thumb, employed by the trial judge was an appropriate yardstick. It is, in my view, an arbitrary classification which in most cases, except by happenstance, would be of little relevance. I would, however, not interfere with the determination by the trial judge of the amount involved at \$105,000, as I consider that to reasonably approximate the amount in issue for Gerald Veinot.

[18] In *Bevis v. CTV Inc.*, 2004 NSSC 209, Justice Moir warned against using artificial means, such as the selection of an artificial “amount involved”, in order to make the Tariff system work (see ¶ 13). Similarly in *Chisholm v. Nova Scotia (Attorney General)*, 2009 NSSC 29, the Defendants asked the court to use a “rule of thumb” of \$15,000.00 per day of trial in order to determine an “amount involved” of \$60,000.00. At ¶ 16 Murphy, J stated:

..... I do not subscribe to the Defendants’ theory that [the] amount in issue should be a *per diem* value based on trial length – that factor is addressed in the \$2,000.00 daily costs component in the tariff and its use to determine “amount involved” would be artificial.

[19] Finally, in *Armoyan v. Armoyan, supra*, the Court of Appeal stated at ¶ 22:

But this proceeding had no “amount involved” within Tariff A In *Williamson* Justice Freeman noted that the artificiality of a notional “amount involved” supported the use of a lump sum award:

Any attempt to adjust the amount involved to factor in the special circumstances of the present appeal to arrive at a more just result would require the arbitrary determination of a fictitious “amount involved” bearing no relationship to the matters in issue.

[20] The Court in *Armoyan, supra*, concluded that in that case, lump sum costs were appropriate.

[21] As noted previously, the Tariffs are the norm. There must be a reason to consider a lump sum (*Armoyan, supra*, at ¶ 15).

[22] In the circumstances of this case, where the proceeding primarily involved non-monetary issues, I am satisfied that it is appropriate to award lump sum costs instead of tariff costs (CPR 77.08).

[23] It is well recognized in this province that a costs award should represent a substantial contribution toward a party's reasonable legal fees and expenses but should not amount to complete indemnity. Mr. Whitehead has filed an affidavit indicating that up to the end of the hearing, Ms. Myer had incurred legal fees and taxes of \$18,852.03. In addition, he has sworn that his client has incurred disbursements of \$285.62 plus tax on disbursements of \$42.85 for total disbursements of \$328.47. It appears from a further affidavit filed by Mr. Whitehead on December 19th, 2019, that Ms. Myer's total fees to date in relation to this matter are in the amount of \$20,264.02.

[24] Mr. Whitehead has not provided the court with copies of the invoices that he forwarded to Ms. Myer in support of his fees. He has explained to the court that his invoices are very detailed and include records of conversations with his client,

instructions, etc. In these circumstances, it is common for counsel to provide the court with copies of the invoices with all privileged information redacted. However, I have concluded that in the circumstances of this case, I do not require the actual invoices themselves.

[25] I am fully satisfied, based on the materials that I have been given, that Mr. Whitehead's fees and disbursements in relation to this file are reasonable. A number of affidavits were prepared and filed on behalf of Ms. Myer in response to the application. Financial information was prepared, including a sworn Statement of Income. Briefs were prepared for an interim hearing and the final hearing, as well as on the issue of costs. The hearing itself took place over three and a half days.

[26] In addition to the hearing, Mr. Whitehead attended court on the following occasions on Ms. Myer's behalf:

January 11th, 2018: Motion for Directions and motion by Mr. Lyle's then counsel to be removed as solicitor of record;

January 31st, 2018: Court conference;

April 16th, 2018: Matter scheduled for an interim hearing. Proceeded by consent.

July 5th, 2018: Court conference;

August 10th, 2018: Court conference;

January 24th, 2019: Court conference. *

[27] It is clear from the file materials that this was not a run-of-the-mill case. While the issues before the court were not particularly complex, the proceeding itself was challenging, as is evidenced by Justice Jesudason's decision. One can appreciate the amount of time that it would take to deal with the matter properly. I am fully satisfied that Mr. Whitehead's fees are reasonable.

[28] In my view, the matters at issue in this proceeding were of great importance. Justice Jesudason's decision reflects this.

[29] Taking all relevant matters into account, I have concluded that Ms. Myer should be awarded lump sum costs of \$14,500.00 plus disbursements in the amount of \$328.47 for a total costs award of \$14,828.47. I am satisfied that this award will do justice between the parties (CPR 77.02(1)).

[30] An Order will issue accordingly.

Deborah K. Smith
Chief Justice

* Note: I have not included the April 15th, 2019 court appearance in the list of dates that Mr. Whitehead was required to attend court as Justice Jesudason has already dealt with the costs consequences of that appearance.