

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Brown v. Walters*, 2020 NSSC 56

**Date:** 2020-02-21

**Docket:** SFHPSA-106329

**Registry:** Halifax

**Between:**

Donna Louise Brown

Applicant

v.

Rory James Walters

Respondent

**Judge:** The Honourable Justice R. Lester Jesudason

**Hearing Dates:** October 22-23, 2019

**Oral Decisions:** October 23 and December 18, 2019

**Final Submission on** January 17, 2020

**Costs:**

**Counsel:** Bryen E. Mooney, counsel for Donna Louise Brown  
Rory James Walters, self-represented

**By the Court:**

[1] This is a decision on costs following my oral decisions given on October 23, 2019, and December 18, 2019.

**Parties' Positions:**

[2] Ms. Brown filed a written submission on costs on January 17, 2020. Her counsel, Bryen E. Mooney, also filed a solicitor's affidavit on that date deposing that, between March 23, 2017, and December 31, 2019, her firm has billed Ms. Brown legal fees totalling \$43,937.55, not including HST or disbursements. Ms. Brown seeks costs of \$38,903.39 plus recovery of disbursements of \$2,054.06. She also seeks confirmation that 30% of such costs, namely \$11,671.02, are associated with the issues of obtaining disclosure and determination/payment of child support. She makes this request as she believes recovery of this amount can be enforced under the *Maintenance and Enforcement Act*.

[3] Mr. Walters hasn't filed any submission on costs. He was given until January 31, 2020, to do so. He appeared at various court appearances in this proceeding before different judges but did not take part in the final hearing before me despite having notice of same. He was present in court on April 23, 2019, when the final hearing was scheduled and filing directions were given. The final hearing dates and filing directions were also confirmed in a written Conference Memorandum from me sent to the parties on April 25, 2019.

**Ms. Brown's Arguments:**

[4] In support of Ms. Brown's costs request, her counsel makes several arguments. I summarize the main ones as follows:

- Following a settlement conference in the Summer of 2018, Ms. Brown forwarded a formal offer to settle all issues dated August 9, 2018, which was more favorable to Mr. Walters than what I ultimately ordered.
- Mr. Walters ought to have accepted the August 9, 2018, offer. His failure to do warrants Ms. Brown being reimbursed all of her legal fees from that date forward.
- Mr. Walters failed to provide updated disclosure as ordered by the court for the final hearing and also failed to attend a number of pre-hearing appearances. Various motions had to be brought which ultimately were not contested and resolved in Ms. Brown's favour. This resulted in extra legal costs for Ms. Brown.
- While Ms. Brown was awarded costs in the total amount of \$1,750 at prior appearances due to Mr. Walters failing to provide disclosure, and Ms. Brown's successful motion to have 50% of the net proceeds released from trust from the sale of the jointly owned residence, this should not impact on Ms. Brown's ability to receive a substantial

contribution to her legal fees. Her counsel therefore suggests that these prior costs awards should be reversed or deducted from the overall costs which Ms. Brown now seeks.

- Ms. Brown has incurred significant legal fees while not receiving court-ordered child support.
- Given the various pre-trial conferences and motions, it is impossible to determine the number of days of hearing and thus the appropriate Tariff amount. Ms. Brown should therefore receive a lump sum costs award providing her with reimbursement of 75% of her legal fees prior to the August 9, 2018, offer, and 100% of her legal fees after then.

**The Law:**

[7] *Civil Procedure Rule 77* deals with the awarding of costs. It gives the court a wide discretion to award costs to do “justice between the parties”.

[8] There is a wealth of jurisprudence written on the awarding of costs. I have nothing novel to add.

[9] In *Armoyan v. Armoyan*, 2013 NSCA 136, Justice Fichaud provided helpful guidance on the principles that should be considered when determining costs. He stated:

1. The court’s overall mandate is to do “justice between the parties”: para. 10;
2. Unless otherwise ordered, costs are quantified according to the Tariffs; however, 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 the offer was made formally under Rule 10, and the parties’ conduct that affected the speed or expense of the proceeding: paras. 12 and 13;
3. The *Rule* permits the court to award lump sum costs and depart from Tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15;
4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party’s reasonable fees and expenses: para. 16;
5. The Tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17;
6. Some cases bear no resemblance to the Tariffs’ assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions. A case may have “no amount involved” with other important issues at stake or the case

may assume a complexity with a corresponding work load, that is far disproportionate to the court time by which costs are assessed under the Tariffs, etc.: paras. 17 and 18; and

7. When the subjectivity of applying the Tariffs exceeds a critical level, the Tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the Tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the *Rules* or case law: para. 18.

### Analysis:

[10] I accept that the following are valid considerations when determining what amount of costs will do justice to the parties here:

- Ms. Brown’s overall reasonable legal fees incurred in this proceeding;
- Mr. Walter’s conduct (e.g. his failure to provide disclosure, his refusal to consent to requests which resulted in multiple court appearances and motions); and
- Ms. Brown’s offer to settle dated August 9, 2018, which was overall more favorable to Mr. Walters than what I ordered.

[11] On the other hand, I have difficulty with a number of the arguments advanced by Ms. Brown’s counsel. I will address some of them below:

- The August 9, 2018, offer was not a “formal offer to settle”. Formal offers to settle are governed by Rule 10. They have certain requirements as outlined in Rule 10.05 - hence they are called formal offers. The August 9, 2018, offer does not conform with the requirements for a formal offer to settle. It was simply a “without prejudice” letter that asked for Mr. Walters to provide a response by September 7, 2018, if he agreed.
- Ms. Brown’s counsel is essentially arguing for solicitor-client costs from the date of the August 9, 2018, offer forward on account of Mr. Walters’ failure to accept same. Even if I concluded that the August 9, 2018, offer was a formal offer to settle, which I do not, Rules 10.08 and 10.09 specify how costs are determined when a formal offer isn’t accepted. Those Rules would not justify Ms. Brown being provided what amounts to solicitor-client costs from the date of that offer forward. Furthermore, this is not one of the “rare and exceptional” cases where there has been “reprehensible, scandalous or outrageous conduct” on the part of one of the parties which should attract an award of solicitor-client costs: Rule 77.03(2); *Young v. Young* [1993] 4 S.C.R. 3; *Brown v. Metropolitan Authority*, (1996), 150 NSR (2d) 43 (NSCA).
- Ms. Brown was already awarded costs for various pre-hearing steps in this proceeding. One of those costs awards was ordered by another judge relating to a motion. Costs for motions are generally governed by Tariff C. In these circumstances, I’m not prepared to

go back and revisit the prior costs awards by reversing them or effectively award a higher amount of costs for the work done in relation to the prior appearances.

- Ms. Brown's solicitor deposes that Ms. Brown was billed in excess of \$43,000 for legal fees over the course of this proceeding. There was never a contested hearing in this matter. While some billing information was provided, there is little to no information provided as to what work was done to justify that amount of legal fees.

Costs should be awarded to allow the successful party a substantial contribution to that party's reasonable legal fees. Here, I was given no helpful way to assess the reasonableness of the legal fees charged to Ms. Brown. Thus, I'm not prepared to simply accept, absent of being provided with sufficient evidence, that the entire amount billed to Ms. Brown was reasonable in the circumstances.

Furthermore, during the hearing before me, it became apparent that there were some errors in the materials filed by Ms. Brown's counsel which I pointed out. This resulted in Ms. Brown's solicitor providing further written submissions correcting the errors and revising Ms. Brown's position. In my view, any extra work required as a result of those errors, or revision of Ms. Brown's position, should not necessarily attract cost consequences to Mr. Walters.

- While I agree that Ms. Brown was overall more successful during the hearing than her August 9, 2018, offer, Ms. Brown wasn't successful on all issues she advanced before me. For example, I refused to impute income to Mr. Walters as requested by Ms. Brown and didn't award retroactive support at the amount she sought. Furthermore, while I ordered a 60/40 unequal division in the jointly owned home in Ms. Brown's favour, this was a much smaller unequal division than what was originally sought by Ms. Brown.
- As noted, the application of the Tariffs is the norm. I disagree that one cannot reasonably apply the Tariffs here. The hearing was scheduled for two full days. It ended up requiring less time than this as Mr. Walters didn't appear or file any materials contesting what Ms. Brown was seeking. While I acknowledge the significant preparation that was done by Ms. Brown's counsel, it is reasonable to assume that less preparation time was required for the final hearing for things such as cross-examination, etc., given that it was known in advance that Mr. Walters had not filed any materials contesting the claims being sought by Ms. Walters.

Furthermore, while the parenting issues were not capable of being quantified as an "amount involved", there were specific amounts involved claimed in relation to Ms. Brown's claim for retroactive child support (\$15,812.93) and her claim for an unequal division of net proceeds from the sale of the jointly owned family home (at the time of the hearing, there was approximately \$24,000 of the net proceeds remaining in trust)

- Finally, Ms. Brown has given me no reasonable basis to conclude, as her counsel suggests, that 30% of the fees should be attributable to the issues of obtaining disclosure

or determination/payment of child support. Indeed, in the solicitor's affidavit, Ms. Brown's counsel simply provides me with information as to global legal fees billed to Ms. Brown without providing any breakdown as to what the work done related to. In these circumstances, I'm not prepared to simply assign an arbitrary percentage as to what amount relates to obtaining disclosure and child support issues versus what percentage relates to other issues such as parenting and division of property.

**Conclusion:**

[12] I exercise my discretion to award Ms. Brown costs in the amount of \$6,000 plus disbursements of \$2,054.06 which I order shall be paid by Mr. Walters no later than 90 days from today's date. If funds are still available in trust from the net proceeds of the sale of the jointly owned home, I order that they be released immediately towards the payment of this costs award.

[13] I conclude that such an award does justice to the parties when I consider all the relevant factors including, but not limited to:

- the monetary value of the amounts in dispute;
- the relative success of the parties on the various issues;
- the offer made by Ms. Brown;
- the length of the proceeding and the fees which would have been reasonably incurred;
- the conduct of the parties which affected the speed or expense of the proceeding; and
- Civil Procedure Rule 77, the Tariffs and the guidance from the case law as they apply to the unique facts of this case.

[15] I direct that Ms. Brown's counsel prepare the appropriate form of Order reflecting my decision on costs which should be sent to Mr. Walters and me within ten days.

Jesudason, J.