<u>Supreme Court of Nova Scotia (Family Division)</u>
Citation: *Leyte v. Leyte*, 2020 NSSC 215

ENDORSEMENT

Bryan Andrew Leyte and Tracey Anne Leyte

August 5, 2020

Court file no. 1201-071892

Appearances:

William Leahey on behalf of Bryan Leyte

Jennifer Schofield on behalf of Tracey Leyte

Bryan Leyte applied to vary parenting in 2015. In June, 2017 Tracey. Leyte applied to vary child support. In August, 2017 Mr. Leyte applied to vary parenting arrangements (or to "reactivate" his 2015 Variation Application).

1. **October 26, 2017** - the parties appeared before me. Ms. Leyte was seeking an Order for Production of Mr. Leyte's employment file. Mr. Leyte was seeking an Order for a Voice of Child Report.
2. **January 25, 2018** - motion hearing initially scheduled regarding Order for Production of RCMP records. The parties settled the issue prior to the hearing, however the issue of costs relating to Ms. Leyte's motion was deferred.
3. **June 15, 2018** - the parties appeared before another Justice for case management. Various court dates were scheduled and subsequently re-scheduled after a further appearance before another Justice in July 2018.
4. **September 24, 2018** - the parties appeared before me for a conference.
5. **October 19, 2018** – the issue of interim child support was set to be heard. The parties resolved this prior to the hearing date. Per the Consent Order, costs of the motion were deferred until the final hearing. Mr. Leyte argued he received certain information related to an increase in his income in early October 2018, and he negotiated an agreement shortly thereafter providing Ms. Leyte with retroactive child support of $9,554.00, and ongoing monthly child support of $1,541.00 commencing November 1, 2018.
6. **October 31, 2018** - the parties appeared before me for a pre-trial. Mr. Leyte appeared with new legal counsel, requested and was granted an adjournment of the trial dates of November 5 and 6, 2018. On that date Ms. Leyte sought exclude medical evidence on behalf of Mr. Leyte, and Mr. Leyte raised concerns about Ms. Leyte's employment situation, her disclosure of other financial information related to persons residing in her

home, and her disclosure of sensitive information elicited as a result of an Order for Production. Further disclosure was requested.

7. **December 12, 2018** - the parties appeared before me to present five consent orders for disclosure.
8. **February 1, 2019** - a motion for a Voice of the Child Report was filed. Trial dates of May 6, 7, 8, 2019 were moved to June 3 and 4, 2019 due to the Court's scheduling issue. Ms. Leyte raised a concern about her lack of legal representation at that time.
9. **April 11, 2019** - the parties appeared for a further conference, Ms. Leyte had retained new legal counsel.
10. **April 18, 2019** - the parties appeared before the Honourable Associate Chief Justice Lawrence O'Neil for a motion hearing in relation to two issues: an order to allow the children to attend counseling (Ms. Leyte's request), and an Order for a Voice of the Child Report (Mr. Leyte's request. (9:30 – 13:53). Both orders were granted / success wqas divided between the parties.
11. Ms. Leyte unsuccessfully appealed the decision to grant a Voice of the Child Report, and the Court of Appeal ordered her to pay costs of $1000.00.
12. June 3, 2019 trial date.
13. June 4, 2019 trial date.
14. June 28, 2019 written decision on parenting.
15. October 23, 2019 submissions on costs were received.
16. October 24, 2019 oral decsion on child support.

Decision:

Lump sum costs of costs, $31,620.00 awarded, to be set off.

Reasons:

1. Costs are in the discretion of the Court. A successful party is generally entitled to a cost award, and a decision not to award costs must be for a "very good reason" and be based on principle.

2. Ms. Leyte was successful at having interim child support increased pending trial. Ms. Leyte acknowledges Mr. Leyte was "the successful litigant with respect to obtaining shared parenting of the children", as a result ongoing child support was adjusted accordingly.

3. I found Ms. Leyte's "ongoing and persistent attacks on Mr. Leyte's character", resulted in Mr. Leyte's reluctance to share information for fear Ms. Leyte would use the information to try to further limit his contact with the children or ignore his requests to consider increasing his contact, rather than focus on the children's needs. Both parties at times failed to reveal relevant information to the other, complicating the litigation.

4. Ultimately I found Ms. Leyte's "extreme reaction and ongoing anger in relation to perceived transgressions", either perceived or real transgressions or shortcomings she attributed to Mr. Leyte, contributed to the parties, and the children's stress and resulted in a finding of a material change of circumstances necessitating a change in the parenting and child support arrangements.

5. Ms. Leyte argued each party should cover their own costs. Mr. Leyte sought 65% of his litigation costs or $39,650.00. Mr. Leyte's counsel did not provide time entry's or bills. Ms. Leyte's counsel did provide a client ledger and claimed to have incurred legal expenses of $44,374.86.

6. In *McPhee, Hill and MacLean v. CUPE,* 2008 NSCA 104. Justice Cromwell, writing for the unanimous court said at paragraph 76:

> [76] The reasons why costs should generally be awarded to the successful party were set out by Saunders, J. (as he then was) in ***Landymore v. Hardy*** (1992), 1992 CanLII 2801 (NS SC), 112 N.S.R. (2d) 410 (S.C.):
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> > [17] Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. The parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. **Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged.** ..." [Emphasis added by Counsel]

Justice Cromwell went on to state at paragraph 77 as follows:

> . . . I acknowledge the very sympathetic personal circumstances of the appellants. However, one must not lose sight of the fact that they made and persisted in very serious allegations of misconduct against the respondents. . . .

7. Justice B. MacDonald of this court summarized the applicable principles when assessing costs in *L. (N.D.) v. L. (M.S.),* 2010 NSSC 159 and more recently in *Gagnon v. Gagnon,* 2012 NSSC 137. She stated the following at paragraph 3 in *L. (N.D.)*:

Several principles emerge from the Rules and the case law.

1. Costs are in the discretion of the Court.

2. A successful party is generally entitled to a cost award.

3. A decision not to award costs must be for a "very good reason" and be based on principle.

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.

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".

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: "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]."

7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

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".

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".

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.

> 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.

8. There was no specific monetary amount involved. I have considered the parties' financial circumstances, the parties' conduct throughout the proceeding, the nature of the evidence involved in the proceeding, all issues raised with respect to disclosure, adjournments, and all other relevant factors.

9. Justice Jollimore in *Moore v. Moore*, 2013 NSSC 281 at paragraph 14 addressed the applicability of Tariff "C" to applications in the Family Division:

> [14] Initial guidance in determining costs is the tariff of costs and fees. The proceeding before me was a variation application. Formally, Tariff C applies to applications. As I said in *MacLean v. Boylan*, 2011 NSSC 406 at paragraph 30, applications in the Family Division are, in practice, trials. Rule 77's Tariffs have not changed from the Tariffs of Rule 63 of the Nova Scotia Civil Procedure Rules (1972). Despite the distinction between an action and application created in our current Rules, the Tariffs have not been revised. My view has not changed since I decided *MacLean v. Boylan*, 2011 NSSC 406: I don't intend to give effect to the current Rules and their incorporation of the pre-existing Tariffs where this routinely results in lesser awards of costs for the majority of proceedings in the Family Division, such as corollary relief applications, variation applications and applications under the Maintenance and Custody Act or the Matrimonial Property Act. In these situations I intend to apply Tariff A as has been done by others in the Family Division: Justice Gass' decision in *Hopkie*, 2010 NSSC 345 and Justice MacDonald in *Kozma*, 2013 NSSC 20.

10. In *Armoyan* v. *Armoyan*, 2013 NSCA 136 the court of appeal stated at paragraphs

> [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".
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> [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 not 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:
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> "… 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."

11. 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. (my emphasis)

[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**. (my emphasis)
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> [19] In my view, this is such a case for a lump sum award. I say this for the following reasons.
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> [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, para 7, per Gass, J.; *MacLean v. Boylan*, 2011 NSSC 406, paras 29-30, per Jollimore, J.; *Kozma v. Kozma*, 2013 NSSC 20, para 2, per MacDonald, J.; *Robinson v. Robinson*, 2009 NSSC 409, para 10, per Campbell, J..

12. Neither party referred to the Tariffs in their submissions on costs.

13. Using Tariff A, I would reach the following conclusion. Considering the two days of trial, and adding another day to account for all the conferences, at $20,000.00 for an "amount involved" of $60,000.00, with scale two the amount would be $7,250.00 + $2000.00 per day of trial $6000.00 = $13,250.00.

14. This does not provide a substantial contribution to Mr. Leyte's legal expenses.

15. The issue of hardship was raised by Ms. Leyte. In the case of *Goodrick* v. *Goodrick* 2009 NSSC 119, the court considered costs in cases of financial hardship, and stated:

> [12] Ms. Goodrick advances a second principled reason for withholding costs which she describes as "impecuniosity". The case law is more nuanced. In *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (A.D.) at para 8, Justice Macdonald said that "if the awarding of costs would create an undue financial hardship, it would be a proper exercise of the judicial discretion to refuse to grant them" and the Appeal Division upheld Justice Richard's decision to withhold costs. His Lordship withheld costs on the basis that Mrs. Kaye's income exceeded Mr. Campbell's and Mr. Campbell had been ordered to pay child support. In these circumstances, the additional hardship of costs was a burden Mr. Campbell should not have to bear.

> [13] Justice Gass explained this consideration in *Connelly*, 2005 NSSC 203. Mr. Connolly faced significant access costs and had been ordered to pay substantial arrears of child support. He argued that an award of costs would cause him considerable financial hardship and impair both his ability to exercise access to his children and to meet his child support obligation. At para 9, Justice Gass wrote, "Any order of costs should not have an adverse impact on the children's emotional or material well being. Access with their father is important for their emotional well being and the child support obligations are critical to their material well being." Justice Gass declined to award costs against Mr. Connelly.
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> [14] The Goodricks have three children, Trisha, Danielle and Samantha, whose ages range from 14 ½ to 19. Ms. Goodrick's total income on her 2008 income tax return was $24,681.49. She does not pay child support and she does not have access to her daughters, so she does not contribute indirectly to the girls' needs by paying for expenses incurred during access.
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> [15] An award of costs against Ms. Goodrick would have no adverse impact on the children's emotional or material well being. This reason for withholding costs is not applicable to Mr. Goodrick's claim.

16. Ms. Leyte argued she had certain expenses she needed to be able to cover and that the parties came to terms to allow her and the children to stay in the former matrimonial home. The parenting arrangement was then varied by the Court to a shared parenting arrangement. Given the new responsibilities, and the requirement for the children to have two homes, there is less money to go around. Both parties needed to adjust their budgets and live within new parameters. The result is that it may be Ms. Leyte cannot continue to live in the previous matrimonial home.

17. I have found the Tariff A amount of $13,250.00 does not provide Mr. Leyte, the successful party, with a substantial contribution toward his legal expenses. .

18. After deducting HST from the $62,000.00 in legal expenses claimed by Mr. Leyte ($52,700.00), considering three days of court time, and the advance preparation time necessary before each appearance, I believe a 60% contribution to costs, $31,620.00 would make a substantial contribution to Mr. Leyte's legal costs, and this amount can be set-off against monthly child support payments owed to Ms. Leyte.

Directions:

Mr. Leahey shall prepare the Order for Costs.

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Cindy G. Cormier, J.S.C.(F.D.)