SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Arnold v Streatch*, 2020 NSSC 254

Date: 2020-09-18
Docket: 1201-066505
Registry: Halifax

ENDORSEMENT

Rhoda Shirley Arnold (Streatch) v. Demmick Stephen James Streatch

September 18, 2020

Court file no. 1201-066505

Bryen E. Mooney, on behalf of Ms. Arnold (Streatch)

Owen G. Bland, on behalf of Mr. Streatch

Decision:

Mr. Streatch to pay costs of $19,354.40 to Ms. Arnold forthwith.

Reasons:

1. On May 17, 2018 Rhoda Arnold filed a Notice of Variation Application pursuant to the *Divorce Act*. Ms. Arnold sought to vary the child support provisions included in the Corollary Relief Order agreed to in April 2013. She sought to vary child support retroactive to August 10, 2013.

2. On June 28, 2018 Mr. Streatch filed a Notice of Motion for Interim Relief seeking interim custody, and on June 29, 2018, Mr. Streatch filed a Response to Ms. Arnold's Application. He sought to vary the custody and parenting provisions contained in the Corollary Relief Order (CRO). The CRO issued in 2013 allowed Ms. Arnold to relocate to Alberta with the child. Ms. Arnold stated she did not move to Alberta in 2013 "due to the bad economy".

Circumstances at the time of the April 2013 Corollary Relief Oder

3. The terms of the Corollary Relief Order negotiated by the parties in April 2013, and issued July 10, 2013, included a preamble acknowledging Mr. Streatch to be receiving employment insurance, and to have an annual income for child support of $21,788.00 based on his employment insurance benefits.

4. The parties understood Mr. Streatch was expected to return to work in May 2013.

5. Mr. Streatch agreed to advise Ms. Arnold of his rate of pay within seven days of securing employment. He agreed to pay the table amount of child support to Ms. Arnold on the first day of the month following his return to paid employment.

6. The parties agreed that in the event Mr. Streatch was laid off again, he would advise Ms. Arnold within seven days, and he would advise her of his rate of employment insurance, and begin payment the following month based on his new income.

7. Upon agreeing to terms allowing Ms. Arnold to relocate with their child, the parties also agreed to account for the cost of travel for Mr. Streatch's parenting time. The parties agreed to reduce child support by half, but only if Mr. Stretch exercised his right to parenting time by paying the child's travel costs per terms included in the Corollary Relief Order.

8. Ms. Arnold did not relocate with the child as was anticipated in 2013.

9. A conference was held in July 2018.

    a. Issues identified included the following:

Change of circumstances

b. Had there been a change of circumstances since the Corollary Relief Order was issued in 2013.

Relocation

c. Ms. Arnold sought to relocate with the parties' then 12-year old child to Grand Prairie Alberta. She wished to relocate to live with her new husband. Ms. Arnold was expecting a new child with her new husband.

"RRSP"

d. In their divorce, Mr. Streatch agreed to transfer the entirety of an RRSP to Ms. Arnold. It emerged that the financial asset was a LIRA (later determined to be a worth approximately $26,000), and not an RRSP. In July 2018 SunLife confirmed only one-half of the LIRA could be transferred to Ms. Arnold.

e. Mr. Streatch was directed by the Court to provide a PDF to Ms. Arnold allowing her to complete the transfer of that part of the asset which could be transferred. It remained an issue how Ms. Arnold would be compensated for the remaining value of the LIRA.

Child support

f. Ms. Arnold requested Mr. Streatch adjust his child support so it would match his income. Ms. Arnold was willing to take less child support if she was able to move. The parties were encouraged to discuss a pre-trial adjustment while the child remained in Nova Scotia. They were encouraged to talk about what child support should look like IF a move was allowed and IF a move was not allowed – with the possibility of narrowing the issues, and having the issue of mobility dealt with in trial.

g. Ms. Arnold sought child support including prospective child support, retroactive child support (August 10, 2013), and medical / dental insurance for the child. Ms. Arnold also sought to have Mr. Streatch

pay the remainder of the lump sum award of arrears (granted in 2013 and fixed at $7,639.12 in the CRO), paid to her in one lump payment.

h. Costs of $250.00 were awarded on July 10, 2018, for Mr. Streatch's failure to file a pre-conference summary.

10. On September 6, 2018, the parties attended a settlement conference. No agreements were reached. The matter was scheduled for an application hearing in November 2018.

11. On October 17, 2018, the Court granted an Order for a Voice of the Child Report, and disclosure orders were granted for the records of the Royal Canadian Mounted Police and the Department of Community Services.

12. On November 1, 2018, the parties participated in a conference with their legal counsel. The Voice of the Child Report was not complete and expected by the end of the year. The matter was adjourned to a case management conference, and trial dates.

13. In January 2019, a case management conference was held. Mr. Streatch was advised he must file a sworn Statement of Income. Mr. Streatch filed a sworn Statement of Income in May 2019. Both parties were directed to provide updated financial information prior to trial.

14. In March 2019, a conference was held, and on June 11, 2019, a further case management conference was held

15. On June 25, 2019, a judicial settlement conference was held. The parties agreed the issues to be dealt with at trial included relocation of the child and retroactive child support. Trial dates had been converted into a judicial settlement conference by agreement of the parties. Trial dates initially scheduled June 24, and 25, 2019, were adjourned to December 3 and 4, 2019.

16. Evidence was presented on December 3, and December 4, 2019, with an oral decision rendered on December 4, 2019. There is no order in the Court file arising from the trial.

17. I have reviewed the Voxlog recording and I would note the following findings and orders were made by the Court on December 4, 2019:

Change of circumstances found since last Order 2013:

a. The Court found there was a change of circumstances. Specifically, although Ms. Arnold was granted permission by the Court to relocate with the child in 2013, Ms. Arnold did not move. This development was not anticipated by the parties, or the Court, and the Court determined there was a change of circumstances.

Custody

b. Joint custody was ordered, with the court finding that decisions to be made with respect to the child's health, education, religion, and extra curricular activities, should involve Mr. Streatch.

c. Ms. Arnold was found to have a positive obligation to provide Mr. Stretch with all information necessary for him to inform himself about the child's health, education, and extra curricular involvement. If Mr. Streatch is unable to obtain information from service providers directly, Ms. Arnold must keep Mr. Streatch informed about, and she must provide timely and relevant updates regarding the child's overall development.

Parenting

d. The Court found it was in the best interests of the child to be permitted to relocate to Alberta with Ms. Arnold. Ms. Arnold was found to be the child's primary parent.

e. The Court found it was in the child's best interest to relocate with Ms. Arnold to live in Alberta with Ms. Arnold and her new husband, Kyle Megowen. The Court determined that if Ms. Arnold's circumstances change in the future, in a manner not contemplated by the Court, including but not limited to any future circumstance where Ms. Arnold is no longer in a relationship with her current partner, or any future move from the province of Alberta, parenting terms may be reviewed by the Court at that time. A return of the child to the province of Nova Scotia may be considered.

f. If Mr. Streatch, or other family members are travelling to Alberta, Ms. Arnold will make every effort to arrange parenting time for Mr. Streatch of up to 10 days per month, or meaningful contact time for the child with other family members.

g. Ms. Arnold has an obligation to help the child maintain a relationship with Mr. Streatch primarily, but also with extended members of the Arnold, and the Streatch families, including but not limited to helping the child maintain contact with her grandparents on both sides, Marilyn Stretch and Verna Arnold; contact with Ms. Arnold's sister, Michelle Arnold; and contact with Mr. Streatch's partner, Ms. Knee.

h. Certain terms for joint parenting included in the Corollary Relief Order granted in April 2013, and issued in July 2013 were continued, including paragraphs 1, and 2.a, (although the court recommended Mr. Streatch's parenting time be expanded before the child left for Alberta), and 2. b, if the child relocated, the additional parenting provisions agreed to in 2013 would apply. The parties are free to adjust those provisions by written agreement between the parties.

Child support

i. Mr. Streatch was found to have an income of $88,709.37 for 2019, with a corresponding child support payment of $753.00 per month. With respect to financial matters, paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the CRO continue to apply.

j. Mr. Streatch's yearly income in 2019, for prospective child support was based on calculations derived from his Statement of Income and attachments thereto.

Retroactive Child Support from June 1, 2015

k. The Court declined to grant a retroactive award between July 1st, 2013 and May 1, 2015.

l. The Court did consider the Financial Information filed by Mr. Streatch in May 2019, including the following:

   i. line 150 of Mr. Streatch's 2014 Assessment indicates his income was $179,690.00 (with other income of $1,737.00 documented at line 104); and

   ii. line 150 of his 2013 Assessment indicates an income of $128,717.00 (with other income of $1,037.00 at line 104, and Employment Insurance and other benefits of $8,211 listed at line 119).

m. After considering the factors outlined in *DBS* and all relevant evidence, the Court granted a retroactive child support award back to June 1st, 2015.

n. The Court relied on Mr. Streatch's Statement of Income, and attachments, including Mr. Streatch's tax information. To be clear, Mr. Streatch was found to have an income for child support purposes of **$88,709.37 in 2019**; an income of **$81,596.00 in 2018**; an income of **$173,505.00 in 2017** (no EI reflected in his Notice of Assessment); an income of **$178,189 in 2016** (no EI reflected in his Notice of Assessment); and an income of **$184,924 in 2015** (no EI reflected in his Notice of Assessment). No final calculations were provided at trial.

Special and extraordinary expenses

a. The Court directed Mr. Streatch to provide Ms. Arnold with the necessary information and documentation to enable the child to benefit from Mr. Streatch's medical and dental insurance plan pursuant to section 7. b of the *Child Support Guidelines*.

b. After the court granted an Order allowing the child to relocate with Ms. Arnold to Alberta, Ms. Arnold confirmed she was withdrawing her request for special or extraordinary expenses pursuant to sections 7. a, c, d, and f of the *Child Support Guidelines*, filed May 17, 2018.

c. Both Ms. Arnold and Mr. Stretch reserve the right to apply to the court to have the other parent contribute to any future post-secondary expenses for the child pursuant to section 7. e of the *Child Support Guidelines*.

LIRA (transfer of property pursuant to the Corollary Relief Oder granted following agreement of the parties during a judicial settlement conference held in 2013). SunLife Financial RRSP account (D1749105940795)

d. The issue of property division was not included in the parties' pleadings. However, the issue was raised with the court at the first conference held in July 2018. Ms. Arnold received correspondence from SunLife on July 13, 2018 explaining the issue. The parties attended without legal counsel and raised the matter as an issue to be resolved by the parties.

e. At trial in December 2019, Ms. Arnold suggested 50% of the LIRA account be transferred to her immediately, that once the initial 50% was transferred, the other 50% owing to Ms. Arnold should be reduced by 30% , and the net cash value transferred to Ms. Arnold by Mr. Streatch.

f. The Court gave Mr. Streatch an opportunity to make inquiries and submit an alternate method of ensuring payment to Ms. Arnold.

g. The Court determined that if a further order was necessary to ensure fulfillment of the intended property division outlined in paragraph 10 of the Corollary Relief Order granted in 2013, and no further submissions were received from Mr. Stretch, the Court was prepared to endorse an order incorporating Ms. Arnold's suggested terms.

Lump sum payment vs. periodic payments

h. Ms. Arnold argued Mr. Streatch should be ordered to pay all monetary awards to her forthwith, including:

    i. The retroactive child support award granted by the Court, back to June1, 2015;

    ii. The monetary award to satisfy property division agreed to by the parties in 2013 (LIRA); and
    iii. The arrears owing per paragraph 10 of the Corollary Relief Order granted in 2013.

i. The Court determined that Mr. Streatch's Statement of Property could be filed and considered by the Court when determining if Mr. Streatch is in a financial position to pay a lump sum award, rather than make periodic payments.

j. Mr. Streatch was given permission to provide a Statement of Property to Ms. Arnold, and to the Court before December 18, 2019. Counsel were directed to provide submissions with respect to the manner of payment of the retroactive award granted by the court on December 4, 2019.

o. Ms. Arnold argued Mr. Streatch should be ordered to pay all monetary awards to her forthwith, including: the retroactive child support award granted by the Court, back to June1, 2015; the monetary award to

satisfy property division agreed to by the parties in 2013 (LIRA); and the arrears owing per paragraph 10 of the Corollary Relief Order granted in 2013.

p. On December 4, 2019, the Court confirmed that provisions of the Corollary Relief Order not varied by the oral decision rendered that day, would continue in full force. The terms for payment contemplated in paragraph 9 (periodic payments) and 11 (value of the account to be transferred forthwith), of the Corollary Relief Order remain in effect. Specifically:

    i. Mr. Streatch shall continue to make payments of $100.00 per month on the amount owing from 2013, based on the total award of $7,659.12; and

    ii. Mr. Steatch must transfer the total value of the property (misidentified by Mr. Streatch), to Ms. Arnold forthwith.

Submissions from legal counsel post hearing December 4, 2019

18. On December 6, 2019 I received correspondence from Ms. Arnold's counsel indicating:

    a. Ms. Arnold received confirmation from SunLife that all documentation necessary for the transfer to Ms. Arnold was received. The value was $30,447.34, 50% of which would be transferred to Ms. Arnold.

    b. Ms. Arnold argued that based on the above noted amount, the amount owed by Mr. Streatch was $15,223.67 gross. Taking into consideration tax of 30%, Ms. Arnold further argued she was owed $10,656.57. Ms. Arnold requested the funds be transferred to her from Mr. Streatch forthwith.

19. On December 18, 2019, the Court received Mr. Streatch's sworn Statement of Property with several attachments. The document was filed in support of Mr. Streatch's argument that he was not able to pay a lump sum toward a

retroactive child support award back dated to June 1, 2015. (my emphasis)

20. On January 6, 2020, submissions were received from Mr. Streatch's legal counsel regarding outstanding matters, and costs. Mr. Streatch stated in part, "following the hearing held before your Ladyship the issue of a potential **cost award**, as well as the **manner of the retroactive award**, remained to be decided by your ladyship. (my emphasis).

21. Based on Mr. Streatch's submissions it appeared the issue of the LIRA had been resolved between counsel, per correspondence received from Ms. Arnold's legal counsel on December 6, 2019.

22. On January 6, 2020, submissions were received from Ms. Arnold's legal counsel regarding outstanding matters, and costs. Ms. Arnold stated in part:

> "Your ladyship provided an oral decision on the matter and directions regarding the filing of (sic) Mr. Streatch's Statement of Property (regarding a potential request that arrears (sic)" …

23. I am assuming counsel misspoke and intended to refer to the retroactive award granted to the court on December 4, 2019, and not "arrears".

> …"be provided as periodic payments), Mr. Streatch's position regarding the funds owed from the previously agreed upon property division and filing for Cost Submissions".

Court response to legal counsel regarding the LIRA account

24. Following receipt of Ms. Arnold's letter, I was no longer certain there was agreement between the parties regarding the additional amount to be transferred from Mr. Streatch to Ms. Arnold.

25. If there is no agreement between the parties regarding the amount owed, I adopt Ms. Arnold's approach regarding the manner of affecting property division per paragraph 11 of the Corollary Relief Order granted in 2013. Specifically, I find that after the transfer of the first 50% of the LIRA, an

account found to be worth $30,447.34 in total, that Mr. Streatch owes Ms. Arnold an additional $10,656.57 to be paid forthwith.

26. If the transfer from Mr. Streatch to Ms. Arnold of the additional $10,656.57 has not already been completed, I am prepared to endorse an Order including the above noted terms.

Court response to legal counsel regarding the manner of payment of the retroactive award granted on December 4, 2019 (back to June 1, 2015)

27. The court file does not contain any revised charts, or revised submissions from the parties providing final calculations for the retroactive child support award. The Court was not provided with a copy of the Maintenance Enforcement Program records for child support payments back to June 1, 2015.

28. The evidence reviewed and accepted by the Court indicates Mr. Streatch was initially ordered to pay child support in the amount of $160. However, it appears that Mr. Streatch increased his child support payment to $300.00 after he returned to work in July 2013.
29. Based on Mr. Streatch's financial information, he was found to have an income for child support purposes of $88,709.37 for 2019; an income of $81,596.00 for 2018; an income of $173,505.00 for 2017; an income of $178,189 for 2016; and an income of $184,924 for 2015.

30. I find that at all times Mr. Streatch was aware of his obligation to pay the table amount of child support that that it was not until August 2018 that Ms. Arnold was advised tMr. Streatch was earning significantly more than he had suggested by increasing his payment from $160 to $300. Mr. Streatch continued paying $300.00 in child support, and $100.00 toward arrears until November (Mr. Streatch's evidence) or December 2018 (Ms. Arnold's evidence). Where the parties evidence conflicts I have accepted Mr. Streatch's statement that he increased his child support payment to $571.00 as of November 2018.

31. Ms. Arnold left for Alberta in November 2018, leaving the child in the care of family friends. Ms. Arnold remained in Alberta throughout December, January, February, and part of March 2019 due to concerns regarding her pregnancy. The child returned to Ms. Arnold's care on March 16, 2019. Mr. Streatch chose not to pay child support to Ms. Arnold in January, February, and March of 2019. I found that although the child was with Mr. Streatch between December 12, 2018, and March 15, 2018, the period was comparable to the child spending the summer with him, and Ms. Arnold continued to be the primary parent throughout that period.

32. Ms. Arnold stated that Mr. Streatch paid child support of $570 in April (per Affidavit sworn by Ms. Arnold in May 2019 but not reflected in the chart at paragraph eighty two in her Affidavit sworn November 2019), and $571.00 in May 2019, also per Affidavit sworn by Ms. Arnold in May 2019. Given the conflicting evidence I found in favour of Mr. Streatch.

Retroactive Child Support

According to the evidence before the Court on December 4, 2019, I find Mr. Streatch owes retroactive child support to Ms. Arnold, calculated as follows: $5,568 for 2019; $4,250 for 2018; $13,183.56 for 2017; $13,610.88 for 2016; $8,297.94 for 2015, for a total of $44,910.38

	A	B	C	Total
Period of calculation	Amount previously ordered, if any	Amount paid,if any	Retroactive Amount Owed (A-B)	Outstanding
2019 ($88,709.37)	April 2013 CRO based on income of $21,788.00 on EI, with order to provide new income information no later than 7 days	$570 in April, $571 in May, $571 in June, $250 in July, $300 in August, $657 in Sept, $657 in Oct $3,576.00	$762.00 x 12 = $9,144.00	$5,568.00

	after return to work			
2018 ($81,596.00)	2013 CRO based on income of $21,788.00 on EI.	$300 January – October 2018 x10 = $3000.00 $571.00 November – December 2018 x 2 = $1142 $4,142.00	$700.00 x. 12 = $8,400.00	$4,250.00
2017 ($173,505.00)	2013 CRO based on income of $21,788.00 on EI	$300 January – December 2017 x 12 $3,600.00	January – December 2017: $1220 + .76% of $23,505 = $178.63.00 = $1,398.63 x 12 = $16,783.56	$13,183.56
2016 ($178,189.00)	2013 CRO based on income of $21,788.00 on EI	$300 January – December 2016 x 12 $3,600.00	January – December 2016: $1220 + .76% of $28,189 = $214.24 = $1,434.24 x 12 = $17,210.88	$13,610.88
2015 (June) ($184,924.00)	2013 CRO based on income of $21,788.00 on EI	$300 June – December 2015 x 7 $2,100.00	June – December 2015 $1220 + .76% of $34,924 = $265.42 = $1485.42 x 7 $10,397.94	$8,297.94

I find Mr. Stretch, must pay Ms. Arnold $$44,910.38 in full by December 1, 2020.

33. I have reviewed Mr. Streatch's Statement of Property, and his attachments, and I have reviewed the additional submissions filed by legal counsel.

34. I have considered argument and I have reviewed the totality of the evidence. Upon reviewing Mr. Streatch's line 150 income back to 2013, and Ms.

Arnold's concerns regarding Mr. Streatch's failure to disclose, and his failure to pay the guideline amount of child support as promised in 2013. I find Mr. Streatch knew he should be paying the guideline amount of child support, and he intentionally mislead Ms. Arnold.

35. I find that coincidental with Ms. Arnold's Application to the Court, Mr. Streatch's financial circumstances changed substantially. A change which coincides with an Application to increase child support often results in an adverse inference being drawn by the Court. Despite my concerns about the timing of Mr. Streatch's change in income, I did give him the benefit of the doubt, and I did rely on his representations regarding his 2018 income, and his 2019 income. I did not impute income to him in 2018 and 2019.

36. Ms. Arnold asked the Court to include a provision for the Administrative Recalculation of Mr. Streatch's income on a yearly basis. I would be inclined to grant her request. However, can only do so if I expected both parties would continue to be "ordinarily resident in Nova Scotia". Upon hearing Ms. Arnold's testimony regarding her request to move to Alberta, and upon granting that request, the option for an Administrative Recalculation of Mr. Streatch's income is not available.

37. I find Ms. Arnold and more specifically the child, could have benefited from the child support Mr. Streatch should have paid over the years, and I also find that the child will benefit from child support he will pay in the future, including the payment of a lump sum retroactive award.

38. Given the totality of the circumstances, including: Mr. Streatch's blameworthy behaviour, his lack of disclosure up until May 2019; the court's decision not to impute income to Mr. Streatch in 2018, and in 2019; the court's decision to award retroactive child support to June 1, 2015, and not July 2013; the passage of time since Ms. Arnold filed her Application in May 2018, the time passed since a decision was rendered in December 2019; and considering the factors outlined in *DBS*, (delay, blameworthy behaviour, benefit to the child, and hardship to the payor), I find that to do justice

between the parties Mr. Streatch must pay the total retroactive award in a lump sum by December 1, 2020.

Costs

39. Ms. Arnold seeks costs of $26,950.13 with disbursements of $525.65. Mr. Streatch argued costs should not be awarded as success was mixed.

40. 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. Ms. Arnold was successful overall.

41. When determining costs, I must consider factors that increased the cost of litigation, and therefore the party's entitlement to costs.

42. 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.):
>
> > [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]

43. 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 an 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.

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.

44. I find the primary issues dealt with at trial were Ms. Arnold's requests for sole custody of the child, and her request to relocate with the child to Alberta. The secondary issues were prospective child support, and Ms. Arnold's request for a retroactive award of child support. Other requests, such as the request to clarify how Mr. Streatch would fulfill his obligation to pay arrears, and how Mr. Streatch would transfer funds from a certain banking account to Ms. Arnold, were minor issues requiring very little time at trial.

45. In rendering a decision regarding costs, I have considered the parties' financial circumstances (including any suggested hardship), the parties' conduct throughout the proceeding (including Mr. Streatch's delay in providing financial disclosure), the nature of the evidence involved in the proceeding, (including evidence with respect to the child's best interests, any delay in bringing the Application, any blameworthy behaviour on the part of the payor, whether the child is likely to benefit from a retroactive award, the hardship that may be experienced by the payor with a retroactive award), and all other relevant factors.

46. 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.

47. 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".
>
> [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**. (my emphasis)
>
> [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:
> >
> > "… 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."

48. 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.
>
> [19] In my view, this is such a case for a lump sum award. I say this for the following reasons.

49. In this case I find use of tariff A does justice between the parties.

50. Using the Rule of Thumb approach to account for preparation in advance of attending five court conferences, two settlement conferences, and two days of trial, for a total of approximately three court days, for an amount involved of $60,000.00 Tariff A, Scale 3 given the delay in providing financial

discussion, $9,063.00 + $6000.00 = $15,063.00 + 25% = $18,828.75 considering Rule 10 regarding settlement offers + disbursements of $525.65 = $19,354.40.

51. After reviewing the chart provided in Ms. Arnold's brief dated January 6, 2020, I found Ms. Arnold's offers to settle were reasonable, whereas Mr. Streatch's offers (including but not limited to one offer that the child remain in Nova Scotia, with no child support paid by Ms. Arnold, and another offer that retroactive child support of $9000.00 be awarded), were not reasonable offers based on the evidence.

52. With legal fees of $35,933.50, and disbursements of $525.65, Ms. Arnold sought costs in the amount of $26,950.13 + $525.65. Given Ms. Arnold was not successful in being granted sole custody, or retroactive child support back to June 2013 (or August 2013 as she initially sought), I find an award of $19,354.40 pursuant to Tariff A is fair in the circumstances.

53. In addition to the retroactive award of $44,910.38 to be paid by December 1, 2020, I order Mr. Streatch to pay costs of $19,354.40 to Ms. Arnold forthwith.

Directions:

Ms. Mooney shall prepare the Final Order, and the Order for Costs.

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