

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Russell v. Clayton*, 2020 NSSC 333

Date: 2020-11-20

Docket: SFHPSA 112025

Registry: Halifax

Between:

Charles David Russell

Applicant

v.

Conyer Livingston Clayton

Respondent

Endorsement on Costs

Judge: The Honourable Justice Theresa M Forgeron

Decision: November 20, 2020

Submissions: June 30, 2020

*Counsel: Kenzie MacKinnon, QC for the Applicant, David Russell
Cassandra L Armsworthy for the Respondent, Conyer Clayton*

Introduction

[1] David Russell seeks \$10,000 in costs from Conyer Clayton arising from the spousal support decision cited as ***Russell v. Clayton***, 2020 NSSC 141. Conversely, Conyer Clayton states that each party should bear their own costs.

Position of David Russell

[2] Mr. Russell provides reasons to support his position as follows:

- He was the successful party.
- Ms. Clayton refused to participate in a settlement conference.
- Tariff A is appropriately used as the matter was not a motion hearing.
- The amount involved equates to \$28,300 which is the total amount of the lump sum and periodic spousal support awarded.
- Scale 3 of tariff A is appropriate because counsel advised through correspondence dated November 21, 2019 that Mr. Russell was willing to resolve the matter in exchange for a lump sum payment of \$25,000. Mr. Russell's offer was thus more favourable than the court decision even if a tax discount was applied, given the additional costs associated with a trial. This results in a costs award of \$7,813.
- Tariff A requires an additional \$2,000 be added for each day of trial. The hearing took one day.
- Further disbursements of \$193.09 should likewise be added.

Position of Conyer Clayton

[3] Ms. Clayton disagrees. She states that the parties had mixed success. She grounds her submission in the following facts:

- The contested application was scheduled to determine both property division and spousal support issues. The trial was set for November 21, 2019. The trial was adjourned at the last moment and rescheduled to January 22, 2020.
- Mr. Russell did not abandon his property division claim until November 8, 2019. By his abandonment, Ms. Clayton was the successful litigant on the property division issue. Further, by November 8, 2019, trial preparation was already completed on both issues.
- Mr. Russell's concession on the property issue should have been communicated much earlier than it was.
- Mr. Russell's conduct is a mitigating factor. He was late filing his updated financial statements and supplementary affidavit. Although Mr. Russell was

to file his documents by May 2019, he did not do so until October 2019. Courts discourage late filing by costs awards.

- The settlement offer was not made until after the first hearing was adjourned. By the time the offer was received, the majority of the work had already been completed.
- The settlement offer was not as beneficial as the trial outcome once tax consequences are considered.

Law

[4] Rule 77 governs awards of costs in matters before the Supreme Court of Nova Scotia. In **Armoyan v. Armoyan**, 2013 NSCA 136, Fichaud, J.A., reviewed the principles to be applied when determining costs. The following relevant points stem from that decision:

- The court's overall mandate is to "do justice between the parties": para. 10.
- Unless otherwise ordered, party and party costs are quantified according to the tariffs. The court has discretion to raise or lower the tariffs applying listed factors, which include unaccepted written settlement offers and the conduct of the parties insofar as it affects the speed or expense of the proceeding: paras 12 and 13.
- The Rule permits the court to award lump sum costs and depart from the tariffs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras 14 and 15.
- The basic principle is that a cost award should afford a substantial contribution to the party's reasonable fees and expenses which means not a complete indemnity, but rather more than 50 and less than 100% of a lawyer's reasonable bill for services: para 16.
- 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. When subjectivity exceeds a critical level, the tariffs may be more distracting than useful. In such a situation, it is more realistic to circumvent the tariffs and channel that discretion directly to the calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law: paras 17 and 18.

[5] In addition, I reviewed and considered the cases submitted by counsel: *Gagnon v. Gagnon*, 2012 NSSC 137; *Moore v. Moore*, 2013 NSSC 281; *Lake v. Lake*, 2016 NSSC 255; *Hanakowski v. Hanakowski*, 2002 CanLII 41639; *Kennedy-Dowell v. Dowell*, 2002 NSSF 50; *Bowden v Brinton*, 2018 NSSC 57; and *Windover v. Windover*, 2019 NSSC 240..

Decision

[6] I order costs of \$6,000 plus disbursements of \$100 payable from Ms. Clayton to Mr. Russell. Such an award will do justice between the parties. The contested matter involved spousal support issues surrounding entitlement, quantum and duration. The decision was important to the parties. Further, because entitlement was contested, the hearing was more complex than otherwise necessary. The hearing itself proceeded in an efficient fashion. Counsel were both prepared and focused.

[7] In making this cost decision, I apply scale 2 of tariff A because Mr. Russell was successful in the contested issues before the court during the one-day hearing. The base scale is \$4,000 plus \$2,000 for one day of trial. I differ from Mr. Russell's calculations because I find that the amount involved was less than \$25,000 after discounting the maintenance award for income tax consequences.

[8] In addition, I find that an increased award under scale 3 is not warranted because of the following mitigating factors:

- Mr. Russell did not abandon his property claim until November 2019. Ms. Conyer thus incurred unnecessary litigation expense. Mr. Russell should have communicated his decision to discontinue earlier in the proceeding.
- Mr. Russell filed documents late. There are often costs consequences associated with late filing.

[9] Further, the settlement offer is a neutral consideration. Mr. Russell's settlement offer did not mirror the court's decision. Mr. Russell's offer was based on a lump sum payment of \$25,000. Yet, I ordered only \$8,000 as a lump sum award. The balance of the maintenance award was composed of periodic payments in the monthly amount of \$700 which were payable from January 1, 2020 until and including May 1, 2022. The periodic payments were tax deductible to Ms. Clayton and taxable to Mr. Russell. In such circumstances, Mr. Russell's settlement offer cannot be said to be as or more favourable than my decision.

Conclusion

[10] Mr. MacKinnon, Q.C. is to draft the costs order requiring Ms. Clayton to pay Mr. Russell \$6,100 in costs and disbursements on or before December 20, 2020.

Forgeron, J.