SUPREME COURT OF NOVA SCOTIA
Citation: *Layton* v *Layton*, 2022 NSSC 60

Date: 20220228
Docket: Ken No. 492242
Registry: Kentville

Between:

Sandra Layton

Applicant

v.

Laurie William Layton, Linda Christine Layton and Eileen Bennett

Respondents

DECISION (COSTS)

Judge:	The Honourable Justice John A. Keith
Heard:	April 6, 7, 8, 2021
Oral Decision:	May 12, 2021, in Kentville, Nova Scotia
Trial Decision:	July 23, 2021

Counsel:	Dianna Rievaj, for the Applicant Jonathan Cuming, for the Respondents

By the Court:

BACKGROUND

[1] This proceeding involved a dispute over ownership of cottage property located on the Bay of Fundy coast, in the community of Baxter's Harbour, Nova Scotia. The litigation divided a family. The Applicant, Sandra Layton, brought this claim against her parents (the Respondents Laurie Layton and Linda Layton) and her sister (Eileen or "Lee" Layton).

[2] The matter was heard over three days between April 6 – 8, 2021.

[3] The underlying facts and my decision on the substantive legal issues was released on July 23, 2021 as *Layton* v. *Layton*, 2001 NSSC 201 (the "**Decision**"). Very briefly, I:

(a) Set aside a quit claim deed by which Laurie Layton and Linda Layton added their daughter, Lee Layton as a joint tenant owner of the cottage property;

(b) Ordered that Laurie Layton and Linda Layton transfer their interests in the cottage property to their other daughter, Sandra Layton, on the basis of promissory estoppel but reserving a life interest in favour of Laurie Layton and Linda Layton.

[4] There were other, related components to the remedy including, for example, provisions to deal with any tax implications. A complete description of the relief granted may be found at paragraph 46 of the Decision.

[5] This is my decision on the remaining issue of costs.

[6] Counsel for Sandra Layton states that Sandra Layton is entitled to costs, and she seeks a lump sum award representing:

(a) 70% of legal fees invoiced prior to costs submissions ($73,832.11, including taxes and disbursements);

(b) Plus an additional 10% related to an unaccepted, formal settlement offer dated March 9, 2021, about a month before the hearing began.[1]

[7] The total costs claimed by Sandra Layton are $59,000.[2]

[8] The Respondents argue that, in the circumstances of this difficult proceeding which tore a family apart, each party should bear their own costs. Alternatively, the Respondent states that Tariff A should be applied using an "Amount Involved" of $90,001 - $125,000.

DISCRETION AS TO COSTS

[9] In *Armoyan* v *Armoyan*, 2013 NSCA 136 ("***Armoyan***"), Fichaud, J.A. wrote: "The Court's overall mandate, under Rule 77.02(1), is to "do justice between the parties" (at paragraph 10). The Court retains a broad discretion to fulfill that mandate but subject, of course, to the overriding requirement of acting judicially and in a principled manner. (Rule 77.02 and paragraph 24 of *Armco Capital Inc.* v *Armoyan*, 2011 NSCA 22 referred to below as "***Armco Capital***").

ENTITLEMENT TO COSTS

[10] Rule 77.03(3) states: "Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise." This means that the successful party will typically be entitled to costs. In *Landymore* v *Hardy*, 1992 NSSC 79, Justice Saunders (as he then was) explained:

> 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. 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. Winning counsel's fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution. [at paragraph 17]

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[1] The formal offer is attached at Exhibit B to the affidavit of an articled clerk, Hartwell Millett. The Applicant's counsel's written submissions on costs do not compare the terms of the offer to the remedy granted but suggest that $25,000 in legal fees would have been saved if the offer was accepted.

[2] The Applicant does not explain precisely how she calculated $59,000. It appears the total amount of fees invoiced ($73,832.11 including fees, disbursements and taxes) was multiplied against the requested percentage of 70% for a total of $51,682.48. 10% of the same figure ($73,832.11) was then used to calculate the settlement premium ($7,383.21). These two figures total $59,064.49 which seems to have been rounded down to $59,000.

[11] "Success" in litigation is typically measured in terms of the result or outcome. Thus, the party whose position most closely aligns with the Court's disposition is said to have "succeeded". However, determining "success" can prove elusive. For example, a party may not be entirely victorious but substantially prevails on the key issues. Alternatively, the success may have been truly split in terms of the critical issues that divided the parties.

[12] There are other factors which bear upon the question of whether a party achieved "success" sufficient to justify an entitlement to costs. They include:

(a) Settlement offers: Compared only against the pleadings and the positions taken at trial, the Court's decision may favour one party. However, the apparently victorious party may have previously rejected a superior settlement offer. Depending on the circumstances, the claim for costs may be diminished or possibly even forfeit. Settlement offers may also affect the quantum of costs payable and I revisit that issue below; and

(b) Conduct: In rare circumstances, a successful party may be denied costs for having engaged in particularly egregious or wasteful conduct. Setting aside the issue of entitlement, a party's conduct may also serve to increase or decrease the amount of costs payable and, again, I revisit that issue below.

[13] Here, Sandra Layton was substantially successful. She is entitled to costs.

[14] It is true, as the Respondents say, that Sandra Layton did not receive all she wanted. For example, Sandra Layton must share any liability for any tax consequences associated with the transfer of the cottage property. In addition, Sandra Layton's request for general damages and an injunction was denied.

[15] However, a litigant may be substantially successful even if their prayer for relief is not fully answered. Measuring success is not simply a function of comparing the relief granted against the relief requested. The Court may also consider the positions taken by the adverse party. In this case, the Respondents sought to deprive Sandra Layton of any proprietary interest in the cottage property – and they were entirely unsuccessful in the effort.

[16] Respectfully, the fact that Sandra Layton was not granted every remedy she claimed does not render the result "mixed". She was substantially successful in

asserting a propriety interest over the disputed cottage property; and there are no other factors which might undermine her entitlement to costs (e.g. misconduct).

QUANTUM

[17] As indicated, Sandra Layton seeks lump sum costs representing 70% of her invoiced fees and a further 10% related to an unaccepted settlement offer for a total of $59,000. Her counsel argues that a lump sum costs award is appropriate in the circumstances because there is no "amount involved". She explains:

(a) The issue involved ownership of a family cottage. The evidence included a 2014 appraisal suggesting a market value of $164,000 (the "**2014 Appraisal**"). Given that the appraisal is 7 years old, she concludes that "there is no ability for the Court to assess an accurate amount involved" (written submission dated August 25, 2021, paragraph 9);

(b) Using an "amount involved" of $164,000 for the purposes of applying Tariff A would not only undervalue the asset but fails to do justice between the parties because it would not result in a "substantial contribution" to the total of Sandra Layton's legal invoices ($73,832.11 including fees, disbursements and taxes); and

(c) The market value of the property would not capture certain intangible values attached to the cottage property such as "cherished memories and emotional connection with the property" (written submissions dated August 25, 2021, paragraph 9).

[18] Respectfully, I disagree. In my view, a lump sum award is not appropriate in the circumstances for the following reasons:

(a) Rule 77.06(1) states that "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." Moreover: "The tariffs are the norm, and there must be a reason to consider lump sum" (paragraph 15 of *Armoyan*);

(b) As indicated, the main issue in dispute involved Sandra Layton's request to be recognized as owner of the family cottage property. Strictly speaking, therefore, the claim was not about money in the sense

that the primary remedy requested was not reduced to a dollar value. However, realistically speaking, where the dispute concerns assets which can reasonably be ascribed a monetary value, the Court should neither disregard those values nor jettison Tariff A as a rational basis for assessing costs. The benefits associated with the Tariff are compelling. As Fichaud, J.A. explained in *Armoyan*:

> The Tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case where circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for construction adjustment that tailors the tariffs' model to the features of the case. [at paragraph 17]

(c) If the monetary amounts in question can be reasonably ascertained, ignoring the Tariff to reflect a particular litigant's sentimental or emotional response erases the qualities of consistency and predictability which are important for proper exercise of judicial discretion. It equally inserts a certain arbitrariness into the process. In my view, an "amount involved" can be reasonably determined in this case, thus engaging Tariff A as an appropriate starting point;

(d) Rule 77.07(2) expressly provides for circumstances in which the Tariff amount may be increased or decreased based on the parties' conduct and including, for example, settlement offers. Thus, applying the Tariff is not an unyielding chart that rigidly locks in a single cost award without any possibility for adjustments to better reflect the circumstances of a particular case;

(e) Even if an "amount involved" can be reasonably ascertained and even though Rule 77.07(2) offers a degree of flexibility, there will still be rare circumstances in which the Tariff does not generate a just cost award. Extraneous factors may serve to increase the cost of litigation to such a degree that the assumptions embedded within Tariff A begin to unravel. For example, the underlying legal issues may be of such importance or are otherwise exceedingly complex that the effort (and related costs) associated with litigation becomes disproportionate to the actual financial "amounts involved". Alternatively, a party's misconduct may have been so egregious as to significantly and improperly increase the cost of litigation. When this occurs, the Court does not stubbornly adhere to the Tariff and artificially inflate the "amount involved" to somehow conjure a more appropriate cost award.

Rather, when this occurs, the subjectivity required to make Tariff A work:

> … exceeds a critical level, [and] the tariff may be more distracting than useful. Then, it is more 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." [*Armoyan*, at paragraph 18]

In my view, this is not an exceptional case where applying Tariff A demands a degree of subjectivity that exceeds a critical level. First, as indicated, an "amount involved" can be reasonably determined. Second, the issues are neither so important nor complex as to force the Court into making exceedingly subjective determinations (or artificial assessments of the "amount involved") before Tariff A might produce a just result. On this, as I noted in the Decision, the parties agreed that the case turned on the doctrine of promissory estoppel. The only issue was how that doctrine applied in the circumstances of this case. Third, I am not satisfied that there was any procedural misconduct or other extraneous factor that so distorted the costs as to undermine the basic assumptions embedded in the Tariff. There were settlement offers that need to be considered but, in my view, that issue can be fairly and properly addressed through the Tariff.

[19] At this stage, I would also comment upon counsel for the Applicant's argument mentioned above that under Tariff A and using "amount involved" of $164,000 (based on the 2014 Appraisal), "would dictate a costs award of only $16,500 plus $6,000 for the three days of trial. That amount would not come close to substantial contribution to the Applicant's fees." (Applicant's written submissions filed August 25, 2021, paragraph 10). The argument continues that Justice Bodurtha's decision in *Raymond* v *Halifax Regional Municipality*, 2021 NSSC 138 ("***Raymond***") stands for the proposition that "less than substantial contribution is not an acceptable outcome" (Applicant's written submissions filed August 25, 2021 at paragraph 10).

[20] The argument suggests that where Tariff A fails to generate a cost award of at least 50% of the legal expenses invoiced, an injustice may be inferred and the Court should move in the direction of a lump sum cost award. Respectfully, I cannot accept that inference.

[21] In *Williamson* v *Williams*, 1998 NSCA 195 ("***Williamson***") Justice Freeman agreed that the Tariffs should afford a "substantial contribution" towards a successful party's legal expenses but not a complete indemnity. He offered the following additional comments as to what is meant by the phrase "substantial contribution":

> 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. [emphasis added]

[22] This passage was reproduced and accepted in *Armoyan* at paragraph 16.

[23] That said, where there is an "amount involved", legal invoices by themselves do not transform into some sort of diagnostic tool for testing whether Tariff A produces a just result in the circumstances of one particular case. Tariff A is not so vulnerable to *ad hoc* critique. Rather, as confirmed in *Armoyan*, the Tariff is the norm, and Tariff A is presumptively just.[3]

[24] For clarity and emphasis, the Court still retains the discretion to depart from Tariff A in exceptional circumstances - even if there is an "amount involved". In other words, the presumption that Tariff A results in a just cost award can be rebutted. However, the party seeking a lump sum award in these circumstances must demonstrate extraneous factors sufficient to justify abandoning Tariff A and, instead, award a lump sum. The mere fact that the Tariff might not generate a cost award equal to at least 50% of counsel's invoices does not, by itself, justify automatically shifting from the Tariff to a lump sum award. The party seeking lump sum costs must establish a basis for departing from the Tariff. Thus, in *Raymond*, Justice Bodurtha's decision to award lump sum costs responded to an abuse of process involving subpoenas. Similarly, paragraph 24 of *Armoyan* and, as well, the original decision on the merits (2013 NSCA 99) catalogue a litany of procedural misconduct and legal complexities that amply justified a lump sum award in that case.

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[3] Note, as well, that Tariff A has been amended from time to time so that the suggested costs awards contained in that chart approximate the increased cost of litigation in a manner which is fair.

[25] Using legal invoices as a standalone reason for avoiding Tariff A necessarily erodes the tariff's utility as a consistent, predictable and just method for determining costs. Moreover, Tariff A would foreseeably and unnecessarily become the target of perpetual attack based entirely on such vagaries as a particular legal counsel's billing practises is one case. And it bears noting that these challenges would likely arise without corresponding safeguards such as a formal taxation process which considered the reasonableness of the charges presented in the invoice. Alternatively, the Court may be required to constantly make case-by-case assessments as to whether the legal expenses are reasonable in the narrow context of a particular proceeding. The tariffs were intended to offer a more predictable alternative.

[26] In this case, I do not find that there are extraneous factors that would justify the shift from Tariff A to lump sum costs.

[27] I turn now to the application of Tariff A and begin with the "amount involved". I agree that the 2014 Appraisal may serve a starting point but does not take into account market fluctuations in the years leading up to the hearing. Having said that, at paragraph 177 of written submissions filed just prior to the hearing, Sandra Layton referred to the 2014 Appraisal and submitted that "the actual current value of the Property is most likely closer to $200,000". Moreover, in 2014, Sandra Layton offered to purchase the property for $225,000.

[28] In light of the Applicant's own figures and settlement offers, I set an "amount involved" at $200,000 for the disputed property. This figure takes into account the fact that the remedy granted identifies Sandra Layton as the sole owner of the cottage property but subject to the life interest of Laurie Layton and Linda Layton and, as well, Sandra Layton being liable for one-half of the disposition costs (including capital gains) associated with transferring the cottage property.

[29] Using an "amount involved" of $200,000, Tariff A, Scale 2 (Basic) produces a cost award of $22,750. Exercising my discretion under Rule 77.07(2), I would add an additional $2,000 to that figure having regard to the settlement offers made by the Applicant. On the one hand, Sandra Layton's offers of settlement included demands that were neither claimed nor ultimately granted. However, on the other hand and on the critical issue of ownership, Sandra Layton proposed sharing title with Laurie Layton and Linda Layton, as joint tenants. The ultimate remedy granted was more favourable to Sandra Layton. By contrast, I also note that the Respondents neither proposed nor accepted a settlement offer which contemplated an ownership interest for Sandra Layton.

[30] In addition, Tariff A includes an additional $2,000 for each day of hearing. In this case, the hearing took 3 days for a total of $6,000.

[31] In sum, for legal fees, I order a total of $30,750.00.

[32] To this amount, I further award $3,450.00 for disbursements, including HST. I note that the disbursements shown in the legal invoices filed total $3,225.46 plus HST. However, I have applied a deduction on the basis that the Applicant did not provide any basis or explanation for charges related to such things as copying and binding materials (including coils, backing, paper and toner), colour copies of photographs, and USB memory sticks.

[33] The total cost payable by the Respondents, jointly and severally, to the Applicant is $34,200 inclusive of all fees, disbursements and taxes.

Keith, J.