SUPREME COURT OF NOVA SCOTIA
Citation: *Day* v. *Muir*, 2022 NSSC 196

Date: 20220714
Docket: Hfx No. 504228
Registry: Halifax

Between:

John J. Day and Judith A. Day

Applicants

v.

David Muir and Carol Winnifred Muir

Respondents

COSTS DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	July 8, 2021, in Halifax, Nova Scotia
Written Decision:	January 18, 2022
Counsel:	John O'Neill, for the Applicants Colin D. Bryson, Q.C., for the Respondents

By the Court:

BACKGROUND FACTS

[1] This hearing of this application was completed in one-day, on July 8, 2021.

[2] On January 18, 2022, I released my decision in this matter (the "**Decision**"). I granted certain relief in favour of the Applicants including:

1. Declaring an easement over that portion of a 10' Disputed Driveway (as that term was defined in paragraph 4 of the decision) located on the Respondents' cottage property for the purposes of travelling to and from the Applicants' cottage property; and
2. An Order requiring the Respondents, at their expense, to remove obstructions constructed on the Disputed Driveway and, in particular, a garage built on the Disputed Driveway together with part of a fence built across the Disputed Driveway.

[3] At paragraph 105 of the Decision, should either party seek costs, I invited written submissions. The parties were unable to agree on the issue of costs and filed written submissions.

[4] The Applicants seek $18,000 in costs plus an additional $3,418.19 in disbursements. The Respondents argue that the parties should each bear their own costs. The Respondents say that the same offer was made to, and rejected by, the Applicants. Thus, the Respondents argue that if the Court accepts this submission (i.e. that the parties bear their own costs), $750 be awarded to the Respondents for having to unnecessarily prepare cost submissions.

Entitlement to costs

[5] The Respondents argue that the parties should bear their own costs because:

1. The Applicants were only partially successful. The Respondents point out that the Applicants claimed an easement over the Disputed Driveway, a parking easement at the end of the Disputed Driveway and damages. The Applicants succeeded in respect of the easement and certain related issues (e.g. the removal of obstructions); however, their claims for a parking easement and damages failed;

2. The Applicants refused a pre-hearing settlement offer. The Respondents say that this offer was better than that which was achieved at trial for as long as the Applicants used their cottage property.

[6] In my view, the Applicants are entitled to costs for the following reasons:

1. Costs are typically awarded to the "successful" party. The party whose position most closely aligns with the Court's ultimate disposition is normally deemed to have "succeeded" in the litigation. Thus, Rule 77.03(3) states: "Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise." Having said that, there are degrees of success. Thus, a party who fails on certain collateral issues but prevails on the main issues may still be entitled to costs. Conversely, opposing parties may have equally prevailed on certain key issues such that no party can legitimately claim to have "won" (i.e. "success" is truly divided). In this case and in my view, the Applicants prevailed on the primary issue at trial: a right of way to their cottage. The fact that they did not prevail on what I would describe as the secondary or collateral issues (e.g. a parking easement) does not disqualify them from costs;

2. I do not agree that the Applicants' entitlement to costs is diminished by the Respondents' settlement offer. I accept that settlement offers may also bear upon the issue of "success" and entitlement to costs. The Courts encourage and promote reasonable, good faith attempts to resolve legal disputes through negotiation. As Scanlan, J.A. wrote in *Marson* v *Nova Scotia*, 2017 NSCA 17: "Courts have repeatedly emphasized the benefits of early resolution of matters. Early settlement minimizes the expense to the parties, both the victors and the vanquished" (at paragraph 53). However, in this case, the settlement offer was made only three days before the commencement of the hearing on July 8, 2021. Thus, the settlement offer did not significantly minimize pre-hearing costs. More importantly, the settlement offer was not "better" than the remedy granted at trial. It is true that the offer included both the right to travel along the Disputed Driveway (which was granted) and a parking space (which was not granted); however, the rights in question were personal to the Applicants. The offer described these rights as "non-transferable and will expire at the earliest of your clients (personally) ceasing to use

> their property, selling their property or dying." Unlike the remedy granted, the rights in the settlement offer did not attach to the land. As such, they were only of value so long as the Applicants used their property, retained ownership of the property or were alive. The difference significantly diminished the value of the offer, in my view;

[7] Either considered separately or together, these two factors (partial success and the settlement offer) do not undermine the Applicants' success at trial and do not deprive them of an entitlement to costs. Having said that, these issues may become factors in determining an appropriate quantum (see Rule 77).

Quantum

[8] In *Armoyan* v *Armoyan*, 2013 NSCA 136 ("***Armoyan***"), Fichaud, J.A. confirmed: "The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses" (at paragraph 16). Quantifying party and party costs (or determining a "substantial contribution" to a party's reasonable fees and expenses) normally involves the application of the Tariffs of Costs and Fees. Rule 77.06(1) states:

> 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.

[9] In *Armoyan*, Fichaud, J.A. confirmed that the Tariffs are the "norm" (at paragraph 15) and explained at paragraph 17 that:

> 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.

[10] While the Tariffs will typically guide the assessment of costs, the Court retains the necessary discretion to fashion a cost award which fulfills the ends of justice; and rigid adherence to the Tariffs will not always achieve that objective. The reasons include the fact that "some cases bear no resemblance to the tariffs' assumptions" (*Armoyan*, at paragraph 18). On this, the key, preliminary variable

which then drives cost awards under Tariff A is the "amount involved".[1] However, in many cases, the matter in issue may not be easily reduced to a monetary value. In appropriate circumstances, artificially developing an "amount involved" simply to engage the Tariff may become exceedingly subjective to the point where the Tariff no longer generates a just result.

[11] In my view, the Tariffs in this case provide useful guidance against which an appropriate cost award might be compared but are not, by themselves, sufficient to achieve a just result. Rather, a lump sum award is more appropriate. My reasons include:

1. The procedural complexity of this case is somewhat unique and not fully reflected in the Tariffs. For example, this proceeding was commenced as an Application in Chambers. This would normally engage Tariff C. However, absent leave from the Court, an application in chambers must be heard in less than a half-hour and cross-examination is not permitted (Rule 5.05(1)). Even where additional time and cross-examination is required, the default time limit is a half-day (Rule 5.05(2)). In this case, the Application involved cross-examination and continued for a full (not half) day. In my view, this proceeding began as an Application in Chambers but ultimately assumed trial functions, which militates away from Tariff C and leans towards a lump sum award (*Armoyan*, paragraph 18). A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A.

2. The predominant issue in this case (a right of way to/from cottage property) was important in that it involved access to a cherished cottage property. However, the legal issues did not require that the right of way be ascribed a specific monetary value. There was no "amount involved" in respect of the key legal issues. This distinguishes it from the financial presumptions which, as indicated, typically drive Tariff A and Tariff C costs and it inclines the Court towards a lump sum figure.[2]

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[1] This connection between costs and the monetary value of the remedy granted may also be seen in Rule 77.07(2)(a) which provides that the Tariff cost award may be increased or decreased having regard to "the amount claimed in relation to the amount recovered"

[2] Note that paragraph 2 of Tariff C states that "the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A." In other words, applying both Tariff A and Tariff C involve, to varying degrees, the need to establish an "amount involved".

[12] Overall, in my view, a lump sum cost award of $7,500 is appropriate and just. In reaching this conclusion, I weighed and balanced the following factors:

1. The issue of an easement was clearly very important to the Applicants. It had the potential to very seriously undermine their ongoing enjoyment of the cottage property and/or result in significant costs attempting to find alternative solutions;
2. The Applicants did not obtain a parking easement. Moreover, my concerns regarding their attempts to impose a parking easement upon the Respondents is described in my Decision (see paragraphs 68 – 71 and 80 -87);
3. The Applicants retained three different sets of lawyers in the years leading up to the hearing. Changing counsel necessarily introduces a degree of redundancy and, in turn, increased legal fees. I recognize that counsel of record as at the date of the hearing (John O'Neill) discounted his fees to at least partially account for any redundancy. Nevertheless, this remains a factor that bears upon costs;
4. There was a certain legal complexity associated with this matter, particularly in respect of implied easements. Having said that, in fairness, the Respondents' properly recognized the significance of (and briefed) the law around implied easements which was critical to my ultimate decision. The Applicants did not; and
5. A costs award of $7,500 is just in comparison to the Tariffs having regard to the fact that the hearing took a full day – and both Tariff A and C suggest $2,000 per day of trial.

[13] I also award the Applicants an additional $723.52 for disbursements. I am not prepared to award $2,875.00 claimed by the Applicants for a survey completed by LPW Survey Inc. as it was not among the evidence which informed my decision.

Conclusion

[14] The Applicants are awarded costs in the amount of $8,223.52, all inclusive and payable forthwith.

Keith, J.