SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Pennell v. Larkin*, 2022 NSSC 303

Date: 20221027
Docket: SFHMCA No. 105179
Registry: Halifax

Between:

Courtney Pennell

Applicant

v.

Liam Larkin

Respondent

Judge:	The Honourable Justice R. Lester Jesudason
Submissions On Costs:	October 12, 2022, and October 21, 2022
Decision:	October 27, 2022
Counsel:	James Violande for Courtney Pennell Matt Conrad and Jenna Shaddock for Liam Larkin

By the Court:

[1] This is a decision on costs following my written decision released on August 18, 2022: 2022 NSSC 233. The parties were unable to reach agreement on costs so filed written submissions on costs on October 12, 2022, and October 21, 2022, respectively.

1.0 BACKGROUND

[2] This proceeding arises from a Variation Application filed by Ms. Pennell on September 21, 2020, and a Response to Variation Application filed by Mr. Larkin on January 7, 2021, seeking changes to parenting arrangements and child support for the parties' child, Braylen.

[3] For most of this proceeding, the parties represented themselves. On October 19, 2021, I scheduled a three-day variation hearing for June 1, 2, and 3, 2022. The parties were given filing deadlines for the hearing.

[4] Both parties eventually retained lawyers to represent them with Mr. Larkin retaining two lawyers from the same firm to represent him about three weeks before the hearing, and without having filed his required materials within the directed timeframes.

[5] After Mr. Larkin retained counsel, I had to deal with several issues on an urgent basis including:

- Mr. Larkin's counsel's request to adjourn the hearing to give them additional time to prepare;
- Mr. Larkin's counsel's request to file materials for the hearing late;
- Ms. Pennell's request to strike any late materials filed by Mr. Larkin; and
- Ms. Pennell's request for significant costs should the hearing be adjourned, or should Mr. Larkin be allowed to file materials late.

[6] Through emergency pre-hearing telephone conferences, and correspondence with counsel, all the urgent issues were able to be resolved without delaying the hearing. It was also agreed that both parties could be later heard on the issue of costs incurred in dealing with these urgent pre-hearing issues.

[7] When the parties and counsel appeared for the first day of the hearing on June 1, 2022, there were many issues in dispute. Based on their pre-hearing briefs, the parties' positions appeared far apart on many of them.

[8] In an effort to streamline the issues and narrow the focus of the parties' evidence before they took the stand, I spent considerable time at the outset of the hearing delving into the parties' positions, as well as their underlying rationales for same.

[9] During this initial discussion, counsel candidly acknowledged that they hadn't made any meaningful efforts to assist the parties in resolving any of the disputed issues. Rather, because Mr. Larkin had only recently retained counsel, their focus had largely been on getting ready for the hearing.

[10] During this initial discussion, it appeared to me that the parties may not be as far apart on some of the issues despite what was contained in their pre-hearing briefs. Thus, given the recognized benefits of parents having a meaningful opportunity to attempt to resolve family disputes involving their children in a manner consistent with the children's best interests, I informed counsel that should they wish to have some additional time to discuss whether any of the issues could be resolved before the parties took the stand to give evidence, I would give them that opportunity.

[11] Counsel agreed that this would be helpful and expressed their appreciation for this opportunity. Thus, after receiving evidence from a non-party witness who had been waiting in the courthouse to give her evidence, counsel requested that the hearing break and that the parties be given an extended lunch hour to have some discussions. I granted that request.

[12] Minutes after breaking, counsel made a further request to not come back during the afternoon to allow them more time to explore settlement. They advised that the parties intended to meet at Ms. Pennell's lawyer's office that afternoon and were hoping that some, if not all, of the issues would be resolved. The further said they were confident that, if all matters could not be settled, the hearing could still be completed in the remaining two days. They undertook to advise me of what progress was made by the end of the day. I agreed to their request.

[13] I received an update from counsel at 4:28 p.m. advising that while the parties were unable to resolve all the issues, they were able to reach agreements on many of them. Those agreements, combined with agreements subsequently reached during the hearing, resulted in the parties agreeing on approximately 50 points including previously hotly contested issues such as where Braylen would go to

primary, right of first refusal, how the parties will communicate with each other, and summer and special time parenting arrangements.

[14] In light of parties' agreements, the remaining issues I was asked to decide were:

- What decision-making arrangement for non-medical decisions was in Braylen's best interests?

- What parenting arrangement during the school year was in Braylen's best interests?

- Should I order a review of the parenting arrangements?

[15] The evidence was concluded on June 3, 2022, and the parties subsequently filed written arguments. In my written decision, I ordered the following in relation to the remaining disputed issues:

Decision-Making Arrangement for Non-Medical Decisions

- The parties must meaningfully consult on same in writing through the agreed upon method of using the app, Our Family Wizard, or any other agreed upon method;

- Each party must respond in writing to any request for input on any such decisions within 48 hours failing which the requesting parent can make the decision if no response is received; and

- Should the parties, after meaningful consultation, be unable to agree on a major non-medical decision involving Braylen, Ms. Pennell is given final decision-making authority.

Parenting Arrangement During the School Year

- **Week 1**: Braylen will be in Mr. Larkin's care from Thursday after school until Sunday 7:30 p.m.;

- **Week 2**: Braylen will be in Mr. Larkin's care Tuesday and Thursday from after school until 7:30 p.m.;

- Mr. Larkin's weekend parenting time will be extended by an extra day should it fall adjacent to a holiday or an in-service day.

Review

- Either party can seek a review of the parenting arrangements I have ordered by no earlier than June 1, 2023, without needing to prove a material change in circumstances.

2.0 PARTIES' POSITIONS ON COSTS

[16] Ms. Pennell seeks costs from Mr. Larkin in the amount of $25,621.72 inclusive of disbursements of $575.51. She seeks that these costs be paid immediately.

[17] Mr. Larkin submits that he should pay costs to Ms. Pennell of $10,250.00 on the following payment schedule: $2,250 payable immediately upon issuance of the Order and $1000.00 payable on the first day of each month for the following eight months.

3.0 PARTIES' ARGUMENTS

Ms. Pennell

[18] In support of Ms. Pennell's request for costs of $25,621.72, her lawyer makes a number arguments including, but not limited to, the following:

- He was retained shortly before a pre-hearing conference on March 21, 2022, and expressed concern at that conference that if Mr. Larkin was unable to obtain counsel who was available on the hearing dates and could meet Mr. Larkin's filing dates, this could result in additional costs to Ms. Pennell. Mr. Larkin advised at that conference that he would be proceeding with the hearing even if he didn't retain counsel.

- Mr. Larkin missed his original filing deadlines and, when he retained counsel shortly before the hearing, Ms. Pennell had to incur additional costs responding to the urgent issues raised with respect to Mr. Larkin's counsel's request to adjourn the hearing and file materials late.

- On May 13, 2022, he sent a formal offer to settle on behalf of Ms. Pennell to Mr. Larkin's counsel which was rejected on May 15, 2022, without any

counter-offer. He argues that the terms of that offer were substantially similar to the parenting time I ordered for Mr. Larkin and were more favorable to Mr. Larkin in relation to decision-making than what I ordered. Any costs award should therefore acknowledge Mr. Larkin's rejection of that offer.

- Based on ***Armoyan v. Armoyan***, 2013 NSCA 136, "The basic principle is that a costs award should afford substantial contribution to the party's reasonable legal fees and expenses". He argues that as outlined in paragraph 37 of ***Armoyan***, a substantial contribution should represent 66% of the legal fees before a formal offer to settle and 80% of the legal fees thereafter. Based on that formula, and the rejection of Ms. Pennell's formal offer to settle sent on May 13, 2022, Ms. Pennell's costs claim is calculated as follows:

Date	Amount Billed (Including HST)	Costs on Fees Billed
March 1 to May 15	$13,409.71	$8,850.40 *(66%)*
May 15 to June 30	$20,244.76	$16,195.81 (80%)
Disbursements	$345.51+$230	$575.51
Total		$25,621.72

- The amount of costs awarded under Tariff A would be inappropriate as it would not amount to a substantial contribution towards Ms. Pennell's legal fees. If Tariff A was used, it should be based on Scale 3, to recognize Mr. Larkin's conduct during the proceeding increased costs by requiring additional court appearances to deal with his failure to obtain counsel and filed documents as directed.

  Using $20,000 per day as the amount involved under Tariff "A", Scale 3 would result in a costs award of only $15,063. Such an amount would represent only 44% of the costs Ms. Pennell incurred in this proceeding. Thus, a costs award of $25,621.72 is warranted and the evidence at trial demonstrates that Mr. Larkin can make this payment forthwith.

Mr. Larkin

[19] In support of his position that costs of $10,250 should be ordered in accordance with his proposed payment schedule, his counsel makes a number of arguments including, but not limited to, the following:

- In the interest of access to justice and a fair hearing, they felt Mr. Larkin deserved representation and agreed to take on the file despite not having much time to prepare.

- They had to request an extension to file affidavits as it was important to Mr. Larkin to put his best evidence before the Court so that the outcome would reflect Braylen's best interests. Ms. Pennell opposed this request resulting in additional costs to the parties, and additional court time being needed. Ms. Pennell's objection wasn't warranted as there was no prejudice to her because Mr. Larkin's affidavits would still be filed two weeks before the start of the hearing. Furthermore, the filing of the evidence before the hearing allowed for productive settlement discussion on the first day of the hearing and allowed for Ms. Pennell's counsel to prepare a focused cross-examination which ultimately shortened the court time needed.

- The weeks before the hearing were consumed by learning the file and preparing for same. Consequently, the parties were unable to engage in meaningful discussions before June 1, 2022. Mr. Larkin's counsel says that, as the presiding judge, I helped create a space where the parties and counsel had open dialogue and allowed them to take the afternoon to engage in settlement discussions out of court. This approach proved successful as the parties agreed on most of the issues and significantly narrowed the issues in dispute leaving the main disputed issue for me to decide being Braylen's parenting arrangement during the school year.

- To the extent Ms. Pennell relies on the offer to settle sent on May 13, 2022, as a formal offer to settle, *Civil Procedure Rule* 10 does not apply to family cases as outlined by *Civil Procedure Rule* 59.39(7). The offer made by Ms. Pennell should be just one factor to consider and should be given no weight as the parties settled most issues on the first day of the hearing without requiring me to make a ruling. Furthermore, Ms. Pennell's offer was not "substantially similar" to my decision which was, on some issues, significantly more favourable to Mr. Larkin than Ms. Pennell's offer.

- Although the hearing was scheduled for three days, only two of those days were used for a contested hearing. The parties used the first day for settlement discussions which significantly narrowed and focused the litigious issues for the hearing.

- Calculating costs as was done by the Court of Appeal in ***Armoyan*** is not appropriate. ***Armoyan*** was complex matrimonial litigation, while the evidence and issues involved in this case were not complex.

- As stated in paragraph 12 in ***Ward v. Lucis***, 2018 NSSC 249, courts have wide discretion when awarding costs and can consider the negative financial impact of a costs award on children.

- Ms. Pennell's claim that she is entitled to a costs award of $25,621.72, payable forthwith, is almost half of Mr. Larkin's yearly income of $59,885.00. Allowing such a claim would be a "crushing blow" to Mr. Larkin, as all monies saved to purchase a home for him and Braylen would be exhausted. Braylen would be negatively impacted by such a costs award as Mr. Larkin's funds available to care for him would decrease significantly.

- *Rule* 77.06(2) states that party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial. Applying the "rule of thumb" of equating each day of a hearing to $20,000.00, the amount involved in dispute is $40,000.00. Scale 2 of Tariff A is appropriate in these circumstances, resulting in a cost award to Ms. Pennell of $10,250.00 (i.e. $6,250.00, plus $2,000.00 for each day of trial).

4.0 ANALYSIS

The Law

[20] *Civil Procedure Rule 77* deals with the awarding of costs. It gives the court a wide discretion when awarding costs.

[21] In ***Armoyan,*** our Court of Appeal provided helpful guidance on the principles that should be considered when determining costs. Justice Fichaud stated:

1. The court's overall mandate is to do "justice between the parties": para. 10;

2. Unless otherwise ordered, costs are quantified according to the tariffs; however, 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 the offer was made formally

under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12-13;

3. The Rule permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15;

4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16;

5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17;

6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding workload, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and

7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the Rules or case law: para. 18.

5.0 CONCLUSION ON COSTS

[22] When I consider the provisions of Civil Procedure Rule 77, the principles with respect to the awarding of costs from the case law, and the unique circumstances of this case, I exercise my discretion to award costs to Ms. Pennell in the amount of $20,000. The first $5,000 of this amount shall be payable forthwith. The remaining $15,000 shall be paid in $1,000 installments beginning on December 1, 2022, and continuing thereafter on the first day of each month until the full balance is paid.

[23] I come to this conclusion for the following reasons:

1. Ms. Pennell was clearly the more successful party on the issues which I had to decide. I conclude that there is no principled reason why, as the more

successful party, she should be deprived of a costs award that represents a substantial indemnity of her reasonable legal fees and expenses;

2. The reasonableness of Ms. Pennell's total legal fees and disbursements of approximately $34,000 has not been challenged by Mr. Larkin;

3. While l agree that applying the tariffs is the norm, and should generally be applied when awarding costs, I conclude that a lump sum award is more appropriate here because the parenting issues cannot be readily assigned a dollar value. I also reject the "rule of thumb" approach be applied in this case for similar reasons as stated by Justice Forgeron in paras. 18-20 in ***KG. v. HG***,, 2021 NSSC 142. Specifically, I agree with her that such a rule of thumb approach does not represent "an appropriate yardstick", is "dated" and was not employed by the Court of Appeal when calculating costs in ***Armoyan.***

4. I have considered the overall success and conduct of the parties in this litigation. While Ms. Pennell was clearly more successful, I agree with Mr. Larkin that she was not entirely successful. I agree with him that the May 13, 2022, offer she made offered him significantly less parenting time that what was ultimately ordered, and sought retroactive child support of $13,286 when the parties later agreed on June 1, 2022, that the appropriate amount was only $6,020.

5. I agree that Mr. Larkin's late filing of materials should attract an award of costs. The missed filing dates which necessitated court intervention should be met with disapproval. On the other hand, I do accept that allowing him to file his materials despite them being late over the objection of Ms. Pennell, did allow me to receive better evidence on the parenting issues and was useful in assisting the parties in settlement discussions which considerably narrowed the issues which required a hearing.

6. I agree with Justice Forgeron in ***KG v. HG***, that the 66% and 80% costs formula applied in ***Armoyan*** must be viewed in the context of circumstances where there was misconduct and other special circumstances. These are not static standard percentages that must be applied in all cases particularly in cases, such as the present one, where I do not conclude that Mr. Larkin engaged in misconduct but, rather, was litigating a genuine parenting dispute.

7. By requiring Mr. Larkin to pay $5,000 of the costs award now, with the remaining $15,000 being payable in $1,000 installments over the next

several months, this should diminish any concerns that ordering a significant costs award payable immediately would, as his counsel suggests, represent a "crushing blow" to him and negatively impact on his ability to care for Braylen. Indeed, it represents an initial payment of $2,500 more than Mr. Larkin suggested should be paid immediately and simply extends the time period for additional payments of $1,000 per month he suggested would be appropriate. Thus, presumably such a payment schedule is something Mr. Larkin believes is doable for him and he has not persuaded me with any evidence that the payment schedule I have ordered would result in undue hardship to him or negatively impact on Braylen; and

8. My costs award represents a reimbursement of close to 60% of Ms. Pennell's stated legal fees. In all the circumstances, I conclude that such as cost award is just and appropriate and does justice between the parties.

[24] I would ask that Mr. Violande kindly prepare the appropriate form of Costs Order arising from my decision which should be consented to as to form only by counsel. I would ask that the Order be sent to me for review by no later than two weeks from today.

JESUDASON, J.

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Judge:	The Honourable Justice R. Lester Jesudason
Submissions on Costs:	October 12 and 21, 2022
Decision:	October 27, 2022
Summary:	Following a three-day variation hearing on issues of parenting and child support, and a decision rendered on August 18, 2022, the parties were unable to reach agreement on costs. Mother claimed lump sum award of costs of $25,621.72 payable forthwith. Father suggested that, based on Tariff "A", costs award of $10,250.00 was appropriate with $2,500 payable forthwith and $1,000 payable on the first day of each month for the following 8 months.
Result:	Lump sum costs of $20,000 awarded to Mother with $5000 payable now and remaining $15,000 paid in $1,000 installments beginning on December 1, 2022, and continuing thereafter on the first day of each month until the full balance is paid.