

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *McLeod v. McLeod*, 2023 NSSC 76

**Date:** 20230309

**Docket:** SFH No. 1201-073275

**Registry:** Halifax

**Between:**

Jodi-Anne McLeod

Applicant

v

Dr. Magnus Murdoch Bruce McLeod

Respondent

**Judge:** The Honourable Justice Theresa M Forgeron

**Heard:** November 21 and 22, 2022, in Halifax, Nova Scotia

**Costs Submissions:** December 8 and 15, 2022

**Decision:** March 9, 2023

**Counsel:** Eugene Tan, for the Petitioner, Dr. McLeod  
Michelle Axworthy, for the Respondent, Ms. McLeod

**By the Court:**

**Introduction**

[1] Jodi-Anne McLeod seeks costs from Dr. Magnus McLeod arising from the interim maintenance hearing held on November 21 and 22, 2022. Although the parties ultimately resolved the interim support issues on the second day of the hearing, they could not agree on the amount of costs payable.

[2] For her part, Ms. McLeod seeks \$29,448.38 in costs.

[3] In contrast, Dr. McLeod asks that costs be determined pursuant to tariff C. In the event tariff C is not used, then Dr. McLeod requests that a taxation be ordered to identify only those legal fees related to the interim proceeding. Further, Dr. McLeod asks that any costs attributed to spousal support be in the cause.

**Issues**

[4] What is the just and appropriate costs award?

**Background**

[5] In 2003, the parties began to live together. They married in August 2005. Dr. McLeod completed medical school, specialties, and fellowships during the parties' relationship which included studies in countries other than Canada. One daughter was born in April 2012. The parties separated in October 2019.

[6] At separation, Ms. McLeod's financial circumstances were bleak. She and her daughter were completely reliant on Dr. McLeod. Ms. McLeod was unable to work because of her health. She had not worked outside of the home since about 2006. Further, she received no property transfer and had little in way of savings.

[7] In January 2020, Dr. McLeod began to voluntarily pay \$2,349 in child support and \$8,660 in spousal support. He did not contribute to s. 7 expenses. The informal support arrangement was achieved without Dr. MacLeod providing comprehensive disclosure. Support was based on Dr. McLeod earning only \$299,000 per year. There was no court order or written agreement confirming the support or disclosure obligations.

[8] In contrast, the parties did negotiate and execute a parenting agreement which provided Ms. McLeod with sole custody and permission to relocate to British Columbia. In March 2020, Ms. McLeod and her daughter moved to Victoria.

[9] In March 2021, Dr. McLeod commenced divorce proceedings.

[10] In September 2021, Dr. McLeod unilaterally stopped paying spousal support. Ms. McLeod's counsel unsuccessfully attempted to resolve the issue. There was no response. In March 2022, Dr. McLeod unilaterally stopped paying child support. In March 2022, being out of viable options, Ms. McLeod filed an interim motion for child and spousal support.

[11] On May 25, 2022, the parties appeared before me for a conference, at which time the following was completed:

- Dr. McLeod was ordered to pay \$3,476 in interim child support on a without prejudice basis. Child support was subject to adjustment once Dr. McLeod's income was determined, including s. 7 expenses.
- Dr. McLeod was ordered to file outstanding financial disclosure by June 17, 2022.
- The contested, interim hearing was scheduled for August 22 and 23, 2022 and a pretrial conference was scheduled for June 23, 2022.
- Ms. McLeod was permitted to attend the August hearing virtually provided she made all necessary arrangements.

[12] The collection of child support was problematic. The Maintenance Enforcement Program was enlisted, and child support was finally received in mid-August 2022.

[13] On June 23, 2022, the interim hearing was rescheduled because Ms. McLeod was unable to make the necessary virtual arrangements. The hearing was adjourned to my next available date. Further nominal costs of \$365 were ordered against Dr. McLeod because he failed to file an updated Statement of Income and a statement outlining his position on the interim motion.

[14] The interim hearing proceeded on November 21 and 22, 2022. During the hearing, Ms. McLeod testified and was cross examined on her affidavit and financial statements. Dr. McLeod did not file an affidavit, so his evidence was limited to the various financial materials that he produced. Unfortunately, because disclosure continued to be lacking, Dr. McLeod was ordered to gather the missing financial data and to bring it to the hearing scheduled for the next day. Dr. McLeod did so.

[15] Before the interim hearing resumed on the second day, the parties were able to reach agreement about the following:

- Dr. McLeod's income was stipulated to be \$569,212.
- Dr. McLeod's monthly child support obligation was set at \$4,343 for the table amount and \$2,500 for s. 7 expenses.
- Dr. McLeod's monthly spousal support obligation was set at \$13,103.

[16] The parties did not reach agreement on costs. They asked to file costs submissions. Ms. McLeod's submissions were filed on December 8, 2022, but were not provided to me until December 22, 2022. Dr. McLeod's submissions were filed on December 15, 2022.

### Analysis

[17] **What is the just and appropriate costs award?**

*Ms. McLeod's position*

[18] Ms. McLeod seeks costs of \$29,448.38. She notes many extenuating circumstances to justify this amount, including:

- Ms. McLeod tried on numerous occasions to settle the interim maintenance application for amounts that were less than ultimately concluded. For example, before filing the interim motion, Ms. McLeod's counsel prepared a draft order which stipulated Dr. McLeod's income at \$413,000; child support of \$3,187 (table amount) and \$1,927 (s.7 expenses); and spousal support of \$13,103. Two other offers, more beneficial to Dr. McLeod than that ultimately determined, were likewise not accepted.
- Dr. McLeod did not file all outstanding disclosure until after the interim hearing was in progress. Dr. McLeod was alleging an income of \$376,732. Instead, his annual income was specified to be \$569,212.
- The interim hearing became necessary because Dr. McLeod stopped paying support, despite Ms. McLeod's need, which included all expenses associated with the parties' daughter. Ms. McLeod eventually had to seek provincial social assistance. Further, and at great expense, Ms. McLeod made many attempts to have Dr. McLeod resume his support payments.

Dr. McLeod refused to do so. Dr. McLeod's unilateral conduct necessitated the interim motion.

- Dr. McLeod made good on his post-separation threat "to cut me [Ms. McLeod] off financially if I [Ms. McLeod] did not do what he said." He stopped paying maintenance and removed Ms. McLeod and his daughter from his medical/dental plan. Dr. McLeod only resumed paying support after the court ordered him to do so.
- Ms. McLeod was forced to file a motion permitting the late filing of her Answer. Disbursements and fees are part of the legal fees that Ms. McLeod unnecessarily incurred after her settlement proposal of November 2021.
- Dr. McLeod's position that spousal support and s. 7 expenses were not properly before the court was without merit.
- Ms. McLeod incurred \$525 in fees to Verbatim Recording to attend the appearance virtually from British Columbia.

[19] Ms. McLeod states that a tariff C costs award would only produce an award of \$8,725. From her perspective, this amount is insufficient, and the court should exercise its discretion to increase that amount given the unique circumstances of the case.

[20] In exercising its discretion, Ms. McLeod asked the court to adopt the approach outlined in *Armoyan v Armoyan*, 2013 NSCA 136 wherein costs were awarded based on 66% of the legal fees incurred before the settlement offer was made, and 88% of the legal fees incurred after the settlement offer was made. Ms. McLeod noted that *Armoyan* principles apply to this interim motion, which include the promotion of reasonable settlement and the disincentivizing of unreasonable approaches to litigation, especially where there are power imbalances.

[21] Ms. McLeod said that she incurred only \$4,065 in legal fees prior to October 25, 2021, which was the date her first settlement proposal was sent to Dr. McLeod's counsel. The balance of her legal fees are associated with the interim hearing.

[22] Given that the matter is interim, Ms. McLeod seeks 88% of \$30,365.48, which represents the amount of legal fees incurred after October 25<sup>th</sup>, together with \$2,200 in disbursements, and \$525 for virtual participation fees.

*Dr. McLeod's Position*

[23] Dr. McLeod disputes the amount of costs sought by Ms. McLeod based on Rules 77.03(1); 77.03(2); 77.05(1); 77.16(2); 77.16(3); and 77.16(4). He states that what is being sought is akin to solicitor client costs, which is not appropriate: *Jachimowicz v Jachimowicz*, 2007 NSSC 303 and *Slater v Slater*, 2013 NSSC 17. Dr. McLeod noted that in *Jachimowicz*, solicitor client costs were refused even though the court found that the unsuccessful litigant's conduct was unacceptable. Further, as stated in *Slater*, solicitor client costs can only be awarded where a party engaged in reprehensible, scandalous, and outrageous conduct.

[24] Dr. McLeod stated that he did not engage in reprehensible, scandalous, or outrageous conduct. He notes that his corporation only became active on May 1, 2021. Thus, his first fiscal year-end did not occur until April 30, 2022. Under the provisions of the *Income Tax Act*, his corporate return was not due until October 31, 2022. The corporate return was disclosed shortly after it was filed and other banking records were eventually produced to clarify his circumstances, which ultimately lead to the agreement.

[25] In addition, Dr. McLeod noted that Ms. McLeod only disclosed the provincial disability assistance payments that she received after the hearing commenced. Dr. McLeod also said that Ms. McLeod's entitlement to support is in question so the amount of interim, spousal support paid may be rejected or substantially reduced at trial. At the very least, the costs award should recognize the differential basis for evaluation.

[26] Dr. McLeod also distinguished *Armoyan v Armoyan*, *supra*, noting that the case is largely considered in the context of trials, or motions that effectively terminate a proceeding, and as such, all of the expended costs would be attributable to the result. In contrast, this matter involved the disposition of child and spousal support on an interim basis, and spousal support remains a live issue for future litigation.

[27] Further, Dr. McLeod argued that costs should be based on tariff C which would produce an award in the range of \$1,000 to \$2,000. He noted that the respondent in *Wall v Leedham*, 2020 NSSC 249 was only ordered to pay \$2,000, which ought to be the high-water mark for the tariff C approach.

[28] In the alternative, if the court does not accept the tariff C approach, then Dr. McLeod requests a taxation of Ms. McLeod's legal fees. He states that counsel's fees are too high.

### *Rule Provisions*

[29] Rule 77 provides me with the jurisdiction to make a costs award. Rule 77.05(1) states that tariff C applies to a motion unless I order otherwise. Section (3) of tariff C, states that in the exercise of my discretion, notwithstanding tariff C, I may award costs that are just and appropriate in the circumstances.

[30] Tariff C is the starting point. The interim motion involved two conferences and two, half-day appearances, although the second half day concluded early because agreement was reached. Ordinarily, costs of about \$2,000 plus disbursements would be both just and appropriate.

[31] I find, however, that \$2,000 plus disbursements would not produce an award that is either just or appropriate in the circumstances because of Dr. McLeod's conduct and the unaccepted settlement offers. I will now review each of these factors.

### ***Dr. McLeod's Conduct***

[32] Dr. McLeod's conduct was entirely inappropriate and should be sanctioned by a substantial costs award. Inappropriate conduct included the following:

- Dr. McLeod unilaterally stopped pay spousal and child support to Ms. McLeod despite the fact that she and the child were wholly, financially dependant on him. Ms. McLeod would not have filed the interim motion for support if Dr. McLeod had not stopped paying support.
- Dr. McLeod stopped paying support even though he earned a significant income.
- After separation, Ms. McLeod was no longer able to access Dr. MacLeod's medical and dental plans. She and the child were removed from Dr. McLeod's health plans despite Dr. McLeod being aware of Ms. McLeod's longstanding health conditions and that the child would require health and dental coverage.
- Dr. McLeod's attempts to use financial coercion to extract settlement terms favourable to him cannot be condoned. As noted in *Armoyan v Armoyan, supra*, costs are appropriately levied where a spouse attempts to take advantage of his "opponent's financial stress": para 26.

- Dr. McLeod provided incorrect information about his income. The informal maintenance agreement was predicated on Dr. McLeod earning an annual income of \$299,000. This figure was incorrect. Dr. McLeod's Statements of Income also inaccurately stated income information. Ultimately, the parties agreed that Dr. McLeod's income was \$569,212, about \$340,000 more than he stated in his Income Statement filed on November 18, 2022, and about \$238,000 more than he stated in his Income Statement filed on March 17, 2021.
- Financial disclosure must be filed in a timely fashion – not while an interim hearing is in progress. Court filing deadlines are not determined by CRA filing deadlines. Dr. McLeod's corporate fiscal year end was April 22, 2022. He had sufficient time to file his financial information well in advance of November 16, 2022.
- Ms. McLeod, through counsel, made good faith efforts to resolve the matter but her efforts were rebuffed.

### *Unaccepted Settlement Offers*

[33] Rule 10.03 states that when determining costs, I may consider settlement offers. In this case, Ms. McLeod made three settlement offers which were more beneficial to Dr. McLeod than the ultimate interim agreement reached by the parties. For example, on October 25, 2021, before filing her interim motion for support, Ms. McLeod offered to settle the maintenance issues as follows:

- Dr. McLeod's income being set at \$413,000.
- Child support of \$3,187 (table) and \$1,927 (s.7).
- Spousal support of \$9,653.

[34] In her prehearing brief filed on November 7, 2022, Ms. McLeod appended a draft order suggesting the matter be resolved as follows:

- Dr. McLeod's income being set at \$473,972.
- Child support of \$3,638 (table) and \$2,521 (s. 7).
- Spousal support of \$11,125.



[35] Approximately one week before the interim hearing and after receiving partial disclosure, Ms. McLeod offered to resolve the matter as follows:

- Dr. McLeod's income being set at \$499,781.
- Child support of \$3,829 (table) and \$2,514 (s.7).
- Spousal support of \$11,318.
- Costs of \$3,500.

[36] Dr. McLeod should have accepted one of these beneficial offers. A significant portion of Ms. McLeod's legal fees and disbursements could have been avoided had one of these three offers been accepted.

### *Costs Amount*

[37] In determining the amount of the costs award, I agree that this is not a case where solicitor client costs are appropriate. However, Ms. McLeod did not seek costs on a solicitor client basis. Rather, in keeping with *Armoyan*, Ms. McLeod sought 88% of the legal fees incurred after her first settlement offer was sent because the interim motion could have been avoided had her offer been accepted.

[38] Even though solicitor client costs were not argued, Ms. McLeod's costs position is problematic for two reasons. First, Ms. McLeod did not produce a copy of her legal bills. In such circumstances, it is difficult to assess the reasonableness of the claimed fees or to identify fees incurred solely for the purposes of the interim motion. Second, I am awarding costs for the interim motion, and not the entire litigation. The interim order did not resolve the issues on a final basis. Work completed for the interim motion will also be useful during the resolution of the issues on a final basis.

[39] In all the circumstances, I find that a costs award of \$18,725 is just and appropriate. This award is based on a lump sum of \$16,000, plus disbursements of \$2,200 and \$525 for the virtual appearance costs, for a total award \$18,725.

[40] In calculating this amount, I apply minimal weight to the fact that Ms. McLeod was late in disclosing the social assistance benefits that she applied for and received because Dr. McLeod stopped paying support and she had no other recourse.

### **Conclusion**

[41] Dr. McLeod must pay Ms. McLeod costs of \$18,725, which are payable in 30 days. Ms. Axworthy is to draft and circulate the order.

Forgeron, J.