

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *CT v. JB*, 2023 NSSC 351

Date: 20231101
Docket: 082045
Registry: Sydney

Between:

CT

Applicant

v.

JB

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: November 22, 23, 24, 2022; March 2, 3, 2023; July 18, 19, 20, 2023; and August 17, 2023 in Sydney, Nova Scotia

Written Release: November 1, 2023

Counsel: Chris Conohan for the Applicant
Alan Stanwick for the Respondent

By the Court:

[1] This is a costs decision arising from a hearing on parenting and child support. The hearing took nine days, with most of the time being dedicated to parenting.

[2] In the end, CT was awarded primary care and decision-making responsibility for the parties' daughter. JB was granted parenting time. She was also ordered to pay prospective and retroactive child support; a retroactive adjustment was also calculated for what CT owed her for years of underpayment.

[3] CT claims costs payable by JB because he says that he was the more successful party. JB says that each party should bear their own costs because success was mixed.

[4] *Civil Procedure Rule 77* governs costs. The relevant sections read:

77.01 Scope of Rule 77

(1) The court deals with each of the following kinds of costs:

(a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;

...

77.02 General discretion (party and party costs)

(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

...

77.03 Liability for costs

(1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.

...

77.06 Assessment of costs under tariff at end of proceeding

(1) 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

...

77.07 Increasing or decreasing tariff amount

(1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs. (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

- (a) the amount claimed in relation to the amount recovered;
- (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
- (c) an offer of contribution;
- (d) a payment into court;
- (e) conduct of a party affecting the speed or expense of the proceeding;
- (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
- (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
- (h) a failure to admit something that should have been admitted.

...

77.08 Lump sum amount instead of tariff

A judge may award lump sum costs instead of tariff costs.

...

77.10 Disbursements included in award

(1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[5] Where costs are granted, the award should reflect a substantial contribution towards the successful party's reasonable legal fees and expenses (*Armoyan v. Armoyan*, 2013 NSCA 136).

[6] In advancing his claim, CT offers two options for a calculation of costs:

- Tariff costs – \$24,840.95
- Lump sum – \$60,000.00

[7] CT provided copies of his legal accounts showing that he incurred legal fees, disbursements, and taxes in excess of \$113,000.00 (net of a discount).

[8] Under Tariff A, Scale 3 using the 'rule of thumb' of \$20,000 per day of trial, he calculates a Tariff award at \$24,840.95. However, he says that doesn't equate to a "substantial contribution" to his actual costs.

[9] Instead, CT asks instead that the court award a lump sum of \$60,000.00 inclusive of disbursements, which he notes is just over 50% of his actual costs.

[10] JB argues that CT's legal account is unreasonable, and that to award costs based on it would be "untenable and unjustified and would be manifestly unfair and unjust."

[11] As Jollimore, J. noted in *Bose v. Bose*, 2023 NSSC 269, parties are entitled to retain counsel of their choosing, and to pay whatever rate they contract to pay. That's not a matter on which the court should comment.

[12] Instead, the question for the court is what amount JB should be required to contribute towards CT's **reasonable** legal fees and expenses. Because JB argues that the accounts are unreasonable, I have carefully reviewed CT's legal accounts with that in mind.

[13] I'm satisfied that the counsel fees shown in the accounts relate to actions taken on live issues before the court. Each entry provides sufficient detail to understand the basis for the charge, and the time allotted per entry doesn't appear to be overstated, given the kind of attention this type of high conflict file demands.

[14] In addition, the amounts CT paid for the Voice of the Child (VOC) reports are not included in the accounts. They are an additional expense he incurred.

[15] I'm satisfied that the only feature of the accounts that could be considered unreasonable is the disbursements, which are billed at a higher rate than allowed for taxation purposes under Practice Memorandum #10.

[16] However, CT does not ask for a lump sum costs award PLUS disbursements. He includes them in his proposed award of \$60,000.00.

[17] I turn next to JB's argument that both sides should bear their own costs, because there was mixed success in the proceeding. While that's technically true, the majority of court time was spent on parenting. On the parenting issue, CT was wholly successful. JB met with some success on the issue of child support, but that took very little court time.

[18] The general rule is that a successful party is entitled to an award of costs. There is no good reason to deny CT his costs of this proceeding. Indeed, on the facts of this case, it would do an injustice between the parties to deny CT costs because:

- JB opposed the request to obtain a VOC report, as well as the updated report, so this required court time to address;
- JB took the position that the VOC reports were unreliable, so she required the VOC assessor to appear for cross-examination. This extended the hearing, and despite questioning by her counsel, JB failed to prove that the reports were unreliable;
- JB extended the hearing by her evasive and obstructive approach to cross-examination;
- JB failed to file materials for, or participate in, a settlement conference scheduled by the court;
- A case management judge had to intervene at CT's request on at least two occasions to assist the parties in reaching agreement on summer and Christmas parenting time for CT;
- JB refused to accept the recommendation of a settlement justice who proposed a shared parenting arrangement, which would have given her more parenting time than she was ultimately granted.

[19] CT was not completely blameless, but JB's choices created more need for court time overall.

[20] I'm satisfied that a Tariff award of costs is not appropriate in this case. It's impossible to put a dollar value on the parenting issue for purposes of the Tariffs, and use of the "rule of thumb" would result in a "woefully inadequate" (*Urquhart v. MacIsaac*, 2018 NSSC 36) figure that wouldn't provide CT with a substantial contribution towards his reasonable legal fees and expenses.

[21] I find that a lump sum is merited in this case. However, I do not accept that the figure proposed by CT is appropriate. He relies on cases like *Jachimowicz v. Jachimowicz*, 2007 NSSC 303, where an award of \$50,000.00 was made after a 13-day trial, but the wife's behaviour was far more egregious in that case.

[22] I also note that JB met with success on the child support issue, such that CT was found liable for a significant underpayment of child support.

[23] In all of these circumstances, I find that a lump sum costs award, inclusive of disbursements and taxes, of \$45,000.00 payable by JB represents a fair and substantial contribution towards CT's costs. It will do justice between the parties by compensating CT, yet not cripple JB financially because she can pay it over time.

[24] I direct that JB pay costs to CT of \$45,000.00 inclusive. The costs shall be paid in a monthly sum of \$500.00 starting November 1, 2023 and continue until the award is paid in full.

[25] Mr. Conohan is asked to prepare the order.

MacLeod-Archer, J.