SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Isnor v Boutilier,* 2025 NSSC 73

Date: 2025-02-24
Docket: HFD *SFHMCA*, No. 100989
Registry: Halifax

Between:

Clayton Isnor

Applicant

v.

Emma Boutilier

Respondent

Judge:	The Honourable Justice Cindy G. Cormier
Written Submissions:	September 24, 2024 for the Applicant September 13, 2024 for the Respondent September 27, 2024 Respondent's reply
Counsel:	Kelsey Hudson, counsel for the Applicant Imogen Phipps-Burton, counsel for the Respondent

By the Court:

1 Introduction

[1] This decision relates to costs requested by the parties following my decision reported as *Isnor* v. *Boutilier*, 2024 NSSC 241.

2 Background

[2] The father was 25 years old, and the mother was 17 years old when they met in 2014. The mother became pregnant and gave birth to the party's only child in July 2015. The mother quit high school and moved in with the father's family.

[3] The parties' intimate relationship ended on or about May 4, 2016 and subsequently the mother alleged the father denied her parenting time with the child in or around June 2016. The issue of denial of the mother's parenting time was addressed in or around September 2016.

[4] The parties settled on terms to be included in an Interim Consent Order dated November 22, 2016, agreeing to a joint custodial arrangement with shared parenting. The mother was given responsibility for taking the child to his medical appointments. The parties continued to negotiate and eventually they agreed the father would not pay the table amount of child support, in lieu he would cover the full cost of childcare. A final order is dated March 16, 2018.

[5] The father met his new partner in or around June 2018, and they married in September 2021. The mother became involved with a new intimate partner in or around October 2018. There was violence in the mother's intimate relationship, and she reached out to the father for help with caring for the child.

[6] Child protection services were alerted to the mother's circumstances with her intimate partner, and in October 2018, the father applied to the court seeking primary care of the child. The mother participated in necessary services to address her mental health needs, and she also moved back in with her parents who provided supervision for her parenting time. In June 2019, the mother was approved by child protection services for unsupervised parenting time with the child.

[7] Despite the mother's progress and participation in services, without the consent of the mother, the father registered the child for pre-primary – thereby reducing childcare costs he had agreed to cover in lieu of child support. Although the mother was permitted unsupervised time with the child, the father advised the child's school that the mother was not permitted to pick the child up from his school. In November 2019, the mother's remaining parenting restrictions were lifted.

[8] The mother had mental health services supports in place and / or she completed services as requested by child protection services, with the exception of not completing couple counseling with the intimate partner with whom the mother had experienced intimate family violence. The mother suggested she was no longer in a relationship with that same individual.

[9] In or around July 2020, the mother was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). The parties agreed to terms as set out in a Consent Variation Order dated September 15, 2020 – including an agreement to continue with a joint and shared parenting arrangement. The new consent order removed the requirement for the father to pay for the child's daycare costs but once again did not require the father to pay to the mother any child support.

2.1 New since the Variation Order dated September 15, 2020

[10] In or around September 2020, the mother reported the child's maternal grandmother for "spanking" the child. The mother arranged for the child to stay with the father for a period while she addressed the issue with her mother and child protection services.

[11] The adults involved in the child's life continued to have difficulty managing the child's behaviours. The mother advised the father she would follow up with

her doctor to inquire about a referral for the child to be assessed for Attention Deficit Hyperactivity Disorder (ADHD).

[12] In October 2020, the father spoke with child protection services about counseling for the child and arrangements were made for the parties and / or the child to attend counseling. The father attended counseling, and he reported improvements in the child's presentation and behaviour between late 2020 and March 2021.

[13] In or around February or March 2021, the mother arranged for the child to stay with the father for approximately a month in response to concerns her mother had expressed regarding Covid restrictions. The mother also left her mother's home to reside with an intimate partner.

[14] Sometime after the father met his spouse in 2018, she took over responsibility for communicating with the mother about the parties' child. She claimed the father knew about all communications with the mother about the child, but it was easier for her to communicate with the mother in a concise manner rather than the father who experienced difficulties communicating with the mother due to his symptoms of ADHD.

[15] The relationship between the father's partner and the mother began to deteriorate in or around the winter or spring of 2021.

[16] In June 2021, the mother completed her high school diploma, seeming to suggest she may have benefitted from treatment for symptoms of ADHD following her diagnosis in 2020, and she may be in a better position generally. However, in July 2021, the mother's former intimate partner physically assaulted the mother and her friend. The mother reported the incident to police, and it appeared the mother ended the relationship.

[17] The issue of intimate partner violence in the mother's previous intimate relationship was not new and was of concern to the father. I found that on balance of probabilities, the mother had not always been upfront with child protection services about her ongoing contact with an intimate partner with whom she had experienced previous intimate partner violence.

[18] In addition, in September 2021, the mother was charged with driving while impaired. The child was not with the mother when she was driving while impaired, but the mother admitted she was struggling with misusing alcohol. To her credit, the mother plead guilty, registered for a driving while impaired program (interlock system), and she also registered for addiction counseling services.

[19] Unfortunately, the parties continued to struggle to effectively respond to the child's needs and / or behaviours. In November 2021, the child reported to his mother that his father and his father's spouse had been disciplining the child by physically restraining him and placing soap in his mouth.

[20] Child protection services were contacted, and the child was formally interviewed. The child identified that he felt safe with his mother and at school but he would not feel safe with his father and / or his father's spouse if they continued to discipline him in that manner. The child stated to the interviewers that he was too small to prevent his father and his father's spouse from holding him down, and he would feel better if the workers asked his father to stop disciplining him in that manner.

[21] Conflict related to the care being provided to the child continued between the mother and the father throughout 2021 and 2022. Both parents continued to struggle to address the child's needs / behaviours.

[22] The child was diagnosed with ADHD in or around August 2022. Leading up to and following the child's formal assessment and diagnosis and attempts to implement the recommendations from the assessment, the parties experienced communication issues and some disagreement related to how best to meet the

child's needs / address his behavioural struggles through pharmacological means and otherwise. The parties had differences of opinions related to concerns which were raised about side effects from the child's medication (tics) and related to the parenting schedule which I found made it more difficult for the parties (or at least the mother) to provide the child with his prescribed medication after he had eaten his breakfast each morning.

3 New Application

[23] The father filed a Notice of Application in October 2022. He sought primary care of the child and final decision making in relation to the child with respect to his education, health care, and his extra curricular activities (with a focus on educational and medical decisions). He suggested the mother have care of the child Friday to Sunday every second week, and one weeknight on the mother's "off week." In the alternative, he suggested the child be in his primary care during the school week / year and that the parties share the care of the child in the summer.

[24] Upon review of all the evidence, it appeared the father's most pressing concern in October 2022 related to whether the mother would follow through with the recommendations from the psychoeducational assessment, including pharmacological treatment of the child. He questioned the mother's willingness

and or ability to co-parent with him and / or to provide the child with a stable and predictable environment for the child during the school week. While raising these concerns, he referenced mostly historical concerns related to the mother's mental health, her previous intimate relationship, and her driving while impaired charge.

[25] The evidence suggested the mother had been involved in facilitating the child's participation in publicly funded services through his school, such as speech pathology and other support services. However, in addition to the publicly funded services, the father had arranged – through his spouse's health insurance benefits – for the child to participate in a private psychoeducational assessment, and he had also arranged other services such as private tutoring.

[26] The father argued that he was in a better position to provide a stable and predictable environment for the child during the school week, and it was in the child's best interest for him to reside primarily with his father. The father reported that the mother had often failed to respond to him / his spouse in a reasonable amount of time to provide her consent for the child's participation in private services, including filling in the necessary forms for the psychoeducational assessment.

[27] The father also raised concerns about the mother being unwilling to facilitate the child's attendance at private tutoring or other services during her parenting time and / or to contribute to the cost of those private services, that the mother had failed to contribute to the cost of extracurricular activities for the child, and that the mother had not arranged for proper treatment of and / or she was responsible for certain physical conditions of the child, such as eczema, cold sores, and ear infections.

[28] The mother agreed she had often failed to immediately respond to the father's inquiries through his spouse and suggested she resisted providing a quick response in order to obtain legal advice and avoid further conflict. She explained she did not have the same financial means as the father and / or resources, including that she did not have a flexible schedule, sometimes did not have transportation, and she was concerned about agreeing to cover expenses such for extracurricular activities and other private services as she did not have significant financial resources.

[29] The mother explained that after obtaining legal advice, she did confirm her consent to allow the father to arrange additional private resources for the child during the father's parenting time. She stated that she also agreed to ensure the child could participate in agreed upon extracurricular activities which also

occurred during her parenting time, with a preference that the father and his spouse would not attend the child's activities during her parenting time.

3.1 Appearances in Most Recent Application

[30] A court conference was held on December 14, 2022; a settlement conference was held on February 15, 2023; a case management conference was held on March 10, 2023; and pre-trial conferences were held on March 24, 2023 (at which time the issue of retroactive child support was raised), and on June 1, 2023 (with a focus on redacted material from Mr. Isnor's bank records, and a Third-Party Order for Production being granted to Ms. Boutilier).

[31] Trial dates were cancelled in November 2023 (due to illness), and a further pre-trial was held on January 15, 2024. Evidence was heard on March 21 and 22, 2024, and oral submissions were heard on April 24, 2024.

[32] Based on the totality of the evidence, I find there were ongoing issues requiring intervention by the Court.

4 Issue

[33] What is the appropriate award of costs?

4.1 Pre-trial motions / motions to strike / filing deadlines / discoveries

[34] Significant information was requested and exchanged between the parties, but both parties suggested they did not have a clear picture of the other party's financial situation.

[35] Ms. Boutilier stated that the parties "engaged in significant written and oral discovery," including discovery examination of Mr. Isnor on August 25, 2023 (approximately 5 hours).

4.2 Outcome at trial

4.3 Issue #1 material change

[36] The father argued there was a material change in circumstances with respect to parenting and decision making.

[37] The mother argued there was either no material change of circumstances or it was in the child's best interest to adjust the shared parenting arrangement to a week on / week off parenting arrangement to reduce exchanges.

[38] I found for various reasons that there was a material change of circumstances. I then found that based on the child's presentation and, in particular, his need for stability and predictability, it was in the child's best interest

to adjust his ongoing schedule to reduce the number of exchanges between the homes to a week on week off schedule.

[39] By the time the matter was heard in March 2024, the issues the father had identified as potential problems had been resolved to the Court's satisfaction, except for the need to reduce the number of exchanges between the households. This issue took very little court time. I would assign **5% of trial time** to addressing this issue as both parties were prepared to make some adjustments to the child's schedule based on the child's best interests.

4.4 Issue #2 decision making and parenting

[40] At trial, the father sought final decision-making authority and primary care of the child. In the alternative, he was prepared to allow for shared parenting in the summer months.

1. **On February 23, 2023,** Mr. Isnor offered to settle with him having final decision-making authority and primary care of the child;
2. **On November 14, 2023,** Mr. Isnor offered to settle with him having primary care and decision-making responsibility (but allowing Ms. Boutilier to make emergency decisions for the child while in her care); and

3. **On February 14, 2024,** Mr. Isnor offered to settle with him having primary care and final decision-making.

[41] The mother requested joint decision-making and that the shared care arrangement continue, but she argued it would be in the child's best interest to move to a week on week off shared parenting arrangement:

1. **On May 11, 2023** the mother offered to settle with the parties continuing their existing shared / joint parenting arrangement – on May 25, 2023, Mr. Isnor responded suggesting he was maintaining his position regarding parenting as indicated in his offer of February 23, 2023, with the exception of some changes to the holiday schedule.

2. **On November 28, 2023,** the mother offered to settle with the parties continuing their existing shared / joint parenting arrangement.

3. The mother was mostly successful with respect to decision making and on the parenting issue.

[42] Although I would assign **30% of trial time** to the issue of decision-making and parenting, I find there was some mixed success. Although the mother was successful at maintaining a joint and shared parenting arrangement, and her ability

to have some autonomy with respect to the child's schedule throughout the week, the father was successful in persuading me there was a need to provide direction with respect to response times to co-parenting questions, and direction was needed to ensure the child was able to participate in at least one extracurricular activity during both parties' parenting time. I attribute **20% of the success to the mother** and the remaining **10% to the father**.

[43] At trial in 2024, there were no outstanding risk concerns related to the mother's care of the child. Both parties acknowledged the child was doing very well. The father did not have any credible evidence to prove the child would do better if he was in the father's primary care and / or the child would not be negatively impacted if the child's time with his mother (the child's self identified safe place) was diminished, yet the father persisted with his request for primary care of the child.

4.5 Issue #4 imputing of income to the mother

[44] I imputed income to the mother in the amount of $31,616. The father was substantially successful. I would assign **5% of trial time** to this issue.

4.6 Issue #5 imputing / attribution of income to the dad

[45] I imputed income to the father in the amount of $111,440. The mother was substantially successful. I would assign **5% of trial time** to this issue.

4.7 Issue #6 determination of set-off child support / retroactive set-off of child support

[46] These were other offers to settle from Mr. Isnor:

1. **On February 23, 2023** Mr. Isnor offered to settle with him having final decision-making authority and primary care of the child and no child support payable by either party, but an equal sharing of uninsured medical costs and activity costs agreed upon in writing in advance – he claimed the father's and mother's incomes were similar;

2. **On November 14, 2023** Mr. Isnor offered to settle with him having primary care and decision-making responsibility (but allowing Ms. Boutilier to make emergency decisions for the child while in her care), and that no child support would be payable.

3. **On February 14, 2024** Mr. Isnor offered to settle with him having primary care and final decision-making with Ms. Boutilier paying child support of $279.74.

[47] The mother requested Mr. Isnor pay the set-off child support both prospectively and retroactively:

1. On May 11, 2023, the mother offered to settle with Mr. Isnor beginning to pay set-off child support of $728 per month, based on an income of $117,000, and Ms. Boutilier's income of $30,000, and no retroactive payment of child support by Mr. Isnor. On May 25, 2023, Mr. Isnor responded suggesting that if Ms. Boutilier sought retroactive child support, he would seek retroactive reimbursement of section 7 expenses, including expenses related to activities and uninsured medical costs.

2. On November 28, 2023, the mother offered to settle with Mr. Isnor paying the set-off of $341, based on an income of $70,000 and her income imputed at $30,000.

[48] I granted $671.59 per month in prospective child support. The mother was substantially successful. I also granted a retroactive support award of approximately $14,762.00, retroactive to October 1, 2020. The mother was substantially successful. I attribute **55% of the trial time** to the issue of

prospective and retroactive child support – which depended on my decision on primary and / or shared care.

4.8 Payment of special expenses or extraordinary expenses

[49] The father agreed to pay for the child's special or extraordinary expenses including extracurricular activities and any required equipment and private services such as speech pathology, counseling, and tutoring services. The Court was not required to decide the issue.

5 Positions and analysis

[50] What is the appropriate award of costs?

5.1 Position of the mother

[51] In her brief dated September 27, 2024, Ms. Boutilier clarified that she was not seeking solicitor-client costs, but she was seeking party and party costs in the form of a lump sum costs award equal to 60% of her legal expenses incurred on or before May 11, 2023, and 80% of her expenses incurred after that point. In the alternative, she sought party and party costs via Tariff A.

[52] The mother claims she was charged legal fees of $29,900 exclusive of expenses and HST "or about $36,234." That:

1. a total of $6,960 exclusive of expenses and HST or about $8,000 inclusive were incurred on or before her settlement offer of May 11, 2023.

[53] Given the substantial non-monetary component in the proceeding, the mother sought a lump sum award in the amount of 60% of her fees before May 11, 2023 and 80% of her fees incurred after that date, as follows: 60% of $8,000 + 80% of $28,234 = $4,800 + $22,587 = $27,387.00. (I found the mother to have been successful in relation to issues taking up 80% of trial time).

[54] I have found the mother was only 80% successful. Therefore, the mother would not be entitled to $27,387. The starting point would therefore be **$21,909.60**, inclusive of disbursements, if I accepted her arguments. Then I would consider Mr. Isnor's arguments.

[55] Or in the alternative, the mother asks that I consider costs under Tariff A, scale 2, considering 3 days of trial time, and a rule of thumb of $20,000 per day for an award of $13,250 + 25% = $16,562. Or using a rule of thumb of $30,000, an award of $15,750 + 25% = $19,687.50 – including an increase of 25% pursuant to Rule 77.07. For reasons I expand on further below, in this case, I am not prepared to rely on the rule of thumb method by using $20,000 per day or $30,000 per day.

5.2 Position of the father

[56] The father argued the parties should bear their own costs or, in the alternative, that Mr. Isnor should pay $10,250 based on the "rule of thumb" approach in *L.* (*N.D.*) v. *L.* (*M.S*), 2010 NSSC 159 and that the amount involved should be calculated as follows: $20,000 per day of trial x 2 days of trial = $40,000 under Tariff A basic scale of $10,250.

[57] The father also argued that this case was similar to the case of *O'Reilly* v. *Purgin*, 2022 NSSC 240 when Justice Jollimore stated at paragraph 4:

> one principled reason costs should be denied in custody cases is because a child's best interests are at issue and fear of a costs award might deter a parent from pursuing matters that are relevant to the child's best interests. Money should not overshadow the child's best interests.

He argued that in this case, the father had legitimate reasons to take the matter to court, as he was pursuing matters that were relevant to the child's best interests.

[58] I agree that in October 2022 both parties had legitimate concerns and questions related to parenting and decision-making, however, the most relevant concerns were largely mitigated by the end of 2022, with only minor issues needing to be addressed by me after hearing evidence in 2024.

[59] On the other hand, the father's continued claims that the parties had similar financial means and / or financial resources continued to create inequities and

cause conflict between the parties. The issue of child support is what required a greater degree of intervention by the Court.

6 Law:

[60] Civil Procedure Rule 77.03(3) provides that, "Costs of a proceeding follow the result." Costs are in my discretion. A decision not to award costs must be principled.

[61] In *C.M.(P.) v. C.M.,* 2021 NSSC 96, Muise J. noted that the Court in *Irwin v. Irwin*, 2020 NSSC 27, at paragraph 11, stated:

> Arriving at a **costs assessment in family matters is difficult given the often-mixed outcome and the need to consider the impact of an onerous costs award on the families; and the children in particular**. The need for the court to exercise its discretion and to move away from a strict application of the tariffs is often present. (emphasis mine)

[62] Muise J went on to state in part about *Irwin,*:

> …
>
> [16] In that case, the Court **did stray from the tariffs to do justice** between the parties.
>
> …
>
> [18] It differed from the case at hand in that it involved a three-day hearing and five pre-trial appearances, and "Ms. Irwin prolonged the proceeding".
>
> [19] The hearing of evidence over three days brought in the applicability of Tariff A, rather than Tariff C, despite it being a variation application. The Court referred to the comments on that point in **Moore v. Moore**, 2013 NSSC 281, at paragraph 14, and in **Armoyan**, *supra*, at paragraph 20.
>
> [20] Ms. Irwin prolonging the proceedings militated in favour of augmented costs.
>
> [21] Tariff A costs of $21,000 were requested.

> [22] However, at paragraphs 19 and 20, the Court concluded and stated:
>
> > [19] I am satisfied a costs award in the amount of $7,000 inclusive of HST and disbursements is appropriate. This is on the low end of the range.
> >
> > [20] The Court is influenced by a desire to balance the need for a costs award in favour of Mr. Irwin with the desirability of minimizing hardship to Ms. Irwin. **A costs award must be meaningful for the successful party and also serve as a deterrent to those accessing the Courts to ensure litigation is not initiated with a view to pursuing claims without merit and the costs award should reflect as much as is appropriate the factors enumerated in Rule 77.07(2) *supra***.
>
> [23] In the case at hand there was no hearing of oral evidence or submissions. The parties submitted affidavits and written submissions only. They then appeared by telephone for an oral decision and a follow-up status review. In these circumstances, Tariff C remains the applicable Tariff. Tariff A would not be an appropriate tariff to apply. (emphasis mine)

[63] In this case, I do not have any evidence to suggest a cost award will bring any hardship on Mr. Isnor and / or interfere with his ability to continue to cover necessary expenses for the child. The parties presented evidence over two days, but they did so after pursuing significant discovery of each party's financial means.

[64] Given Mr. Isnor's evidence at trial regarding his skills and the likely remuneration available for those skills, I found he underreported his income and / or was underemployed and / or pursuing a business which was not profitable. Although I also imputed income to the mother, I did not find the discrepancy in her reported / claimed income to be as significant as the discrepancy for the father.

6.1 The Armoyan approach / Solicitor and Client Costs

[65] The Armoyan approach, which was endorsed in the Court of Appeal's decision in *Armoyan* v. *Armoyan,* 2013 NSCA 136, like many other cases recognizes the unique nature of family law disputes. The Court of Appeal found in part:

> [10] The Court's overall mandate, under Rule 77.02(1), is to "do justice between the parties".
>
> [11] **Solicitor and client costs are engaged in "rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation**". Williamson v. Williams, 1998 NSCA 195, [1998] N.S.J. 498, per Freeman, J.A.. This Court **rejected most of Mr. Armoyan's submissions on the merits. But there has been no litigation misconduct in the Nova Scotia proceedings that would support an award of solicitor and client costs**. So these are party and party costs.

The mother has clarified she is not seeking solicitor and client costs, and I am confirming that I am not awarding them in this case.

6.2 Party and Party Costs

[66] The Court of Appeal in *Armoyan, supra* went on to say:

> …
>
> [12] **Rule 77.06 says that, unless ordered otherwise, party and party costs are quantified according to the tariffs, reproduced in Rule 77**. **These are costs of a trial or an application in court under Tariff A**, a motion or application in chambers under Tariff C (see also Rule 77.05), and an appeal under Tariff B. Tariff B prescribes appeal costs of 40% trial costs "unless a different amount is set by the Nova Scotia Court of Appeal".
>
> [13] **By Rule 77.07(1), 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 or not the offer was made formally under Rule 10,** and the parties' conduct that affected the speed or expense of the proceeding.
>
> [14] **Rule 77.08 permits the court to award lump sum costs**. The Rule does not specify the circumstances when the Court should depart from tariff costs for a lump sum.

Because the amount involved is not easily discernable in this case, I am not willing to rely on the Tariffs and / or I am not willing to use the Rule of Thumb method.

6.3 Tariff or Lump Sum?

[67] And again, in *Armoyan, supra* the Court of Appeal stated:

> …
>
> **Tariff or Lump Sum?**
>
> [15] **The tariffs are the norm**, and there **must be a reason to consider a lump sum.**
>
> [16] The basic principle is that a costs award should afford **substantial contribution to the party's reasonable fees and expenses.** In Williamson, while discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from Landymore v. Hardy (1992), 112 N.S.R. (2d) 410:
>
> > The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
> >
> > "… the recovery of costs should represent a **substantial contribution towards the parties' reasonable expenses** in presenting or defending the proceeding, but should not amount to a complete indemnity."
>
> Justice Freeman continued:
>
> > 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**.

[17] 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.

[18] But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. **A Tariff A case may have no "amount involved", other important issues being at stake**. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. **There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense**. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity – e.g. to define an artificial "amount involved" as Justice Freeman noted in Williamson – that the tariffs aim to avoid. **When this subjectivity exceeds a critical level, the tariff may be more distracting than useful.** Then 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**.

[19] In my view, this is such a case for a lump sum award. I say this for the following reasons.

…

[22] But this proceeding **had no "amount involved" within Tariff A.** … In Williamson Justice Freeman noted that the **artificiality of a notional "amount involved" supported the use of a lump sum award: Any attempt to adjust the amount involved to factor in the special circumstances of the present appeal to arrive at a more just result would require the arbitrary determination of a fictitious "amount involved" bearing no real relationship to the matters in issue**.

[23] Rule 77.07(2)(e) permits an adjustment based on "conduct of a party affecting the speed or expense of the proceeding". The **supervening criterion is that the costs award "do justice between the parties" under Rule 77.02(1).**

…

[27] **Rule 77.07(2)(b) permits the adjustment of a costs award based on an unaccepted written settlement offer, whether made formally under Rule 10 "or otherwise".** Rule 59.39(7) excludes Rules 10.05 to 10.10 (formal offers to settle in the Supreme Court - General Division) from family proceedings. **But Rule 77.07(2)(b) is not excluded, and unaccepted offers of settlement may impact costs in family proceedings**: e.g. Fermin v. Yang, 2009 NSSC 222, para 3, # 12, per MacDonald, J.. I agree with Justice Campbell's sentiments in Kennedy-Dowell v. Dowell (2002), 209 N.S.R. (2d) 392 (S.C.), under the former Rules:

> [12] In my opinion**, the reasonableness of both the trial position and the bargaining position (including the timing of concessions made) is a very important factor in deciding whether an order for costs should be made.** This is especially true in family law matters because the parties are often of limited resources and can often face legal fees after a trial which make the process uneconomical and devastating to the family including children. **Family law disputes are capable of out of court resolution in many cases and the policy of the court regarding costs should promote compromise and reasonableness in the negotiating process**. For that reason, **the court should measure each party's bargaining position against the court's adjudication to measure the reasonableness of each position.** … To similar effect - Justice Campbell's comments in Robinson, paras 13-15.

…

[29] The propriety of a lump sum award may be tested by **comparing the proposed tariff award to the actual legal fees and expenses.** Mr. Armoyan's calculation under the tariffs is $117,714.64. Even after the adjustments that I will discuss later, Ms. Armoyan's legal fees and disbursements exceed $450,000 for the Nova Scotia forum conveniens proceeding and both appeals. A recovery of about **27% does not approach the "substantial contribution"** that Justice Freeman contemplated in Williamson.

[30] In my view, a lump sum is appropriate.

Amount of Lump Sum

…

[37] As noted in Williamson, with which I agree, generally speaking the **"substantial contribution" should exceed fifty percent of the appropriate base sum**, but should not approach the full indemnity of a solicitor and client award. The **percentage should vary, in a principled manner, according to the circumstances of the case**. Considering Mr. Armoyan's conduct, as discussed, and the **rejected settlement offer** of October 2011, a substantial contribution here should represent: (a) 66% of the $100,000 base sum before the settlement offer of October 2011 for the forum conveniens proceeding in the Family Division (i.e. $66,000); plus (b) 80% of the $200,000 base sum after that settlement offer for the forum conveniens proceeding in the Family Division (i.e. $160,000); plus (c) 80%

> of the $100,000 base sum in the Court of Appeal for both appeals (i.e. $80,000). This totals $306,000, including disbursements.
>
> (my emphasis throughout)

6.4 The Amount Involved

[68] The "Amount Involved" in this litigation is not easily discernable. The issues of decision-making and parenting are clearly non-monetary. The amount of prospective child support due and payable could vary over time, and I was not prepared to use the child support award to determine the "Amount Involved." No spousal support was sought despite the young age of the child.

6.5 Scale 1, 2 or 3 of Tariff A / or complexity and importance of the proceeding

[69] In *KG* v. *HG*, 2021 NSSC 142, the Honourable Justice Theresa Forgeron found in part as follows:

> …
>
> [15] I order the father to pay the mother costs of $40,882 inclusive of disbursements. There is no principled reason why the mother, as the successful party, should be deprived of an award that amounts to a substantial indemnity of her reasonable legal fees. I will now explain my reasons by referencing the following topics: **amount involved, reasonable legal fees, settlement offers, conduct, unnecessary steps, and lump sum calculation**.
>
> …
>
> Amount Involved
>
> [17] Tariff A requires a determination of the amount involved. In this case, the **amount involved is not easily ascertained for two reasons.** First, child support was ordered retroactively and prospectively. **Prospective child support is not amenable to quantification because it can be increased or decreased based on changing circumstances, such as the payor's income. Second, the most significant litigated issue concerned parenting and the father's concurrent alienation claim. Neither of these issues are monetary ones.**

> [18] In his submissions, the father urges me to equate $20,000 for each day of trial based on the rule of thumb discussed in ***Gomez v. Ahren,*** *supra*. The mother objects based on the comments of Fichaud, JA in ***Armoyan v. Armoyan***, *supra,* and my decision of ***Illingworth v. Illingworth,*** *supra*.
>
> [19] I agree with the mother's position. Fichaud, JA did not employ a rule of thumb when calculating costs in ***Armoyan v Armoyan,*** *supra.* Further, I note that the rule of thumb was rejected in ***Veinot v Veinot Estate,*** 1998 NSCA 164, wherein **Pugsley, J.A. held that the rule of thumb employed by the trial judge was not "an appropriate yardstick." Rather, it was, in his view, "an arbitrary classification which in most cases, except by happenstance, would be of little relevance. …."**.
>
> [20] **Further, the rule of thumb is dated. The initial rule of thumb equated every day of trial to $15,000**: ***Urquhart v. Urquhart*** [1998], N.S.J. No. 310 relying on ***Venoit v Venoit*** [1998], SBW No. 4053. Nine years later, it was increased by Lynch, J. in ***Jachimowicz v. Jachimowicz***, 2007 NSSC 303 to $20,000 per day. Fourteen years have since past. If a rule of thumb is to be used, it should be updated to $30,000 per day. **I find, however, that such arbitrary assignments do not assist in the principled calculation mandated by Rule 77 and endorsed by Fichaud, JA in *Armoyan v. Armoyan*, *supra***.
>
> [21] **Instead, according to the tariffs, I am to assess the proceeding's complexity and importance when determining the amount involved in a non-monetary case. In this case, the parenting issues were both complex and important. Complexity was proven by the following**:
>
> • Evidence was obtained from two experts - a parental capacity assessor and a psychiatrist. Further evidence was admitted from two other psychologists, two counsellors, police officers, a coach, the parties, family members, and the protection file of the Minister of Community Services.
>
> …
>
> [22] **Further, I find that the litigated issues were important because both issues related to the children. The most contentious issue concerned the parenting plan** while the second issue related to child support.
>
> [23] **Despite finding that the proceeding was both complex and important, I remain unable to quantify the amount involved**. Contrary to the father's submission, **a principled calculation is not derived by employing a rule of thumb.** I therefore must circumvent the tariffs and channel my discretion in arriving at a **principled calculation of a lump sum based on the successful party's reasonable legal fees and other relevant factors**. (emphasis mine)

[70] When there is a substantial non-monetary issue involved, or if it is difficult to determine a final amount involved, **the amount involved is determined having**

regard to the complexity of the proceeding and the importance of the issues.

The issues in this case were extremely important. They involved the welfare of a child. I also found the issues to be complex as both parties identified as neurodivergent and as having previously struggled to parent and to co-parent their child, who was diagnosed as neurodivergent in or around the summer of 2022.

[71] The child's Psychoeducational Assessment Report, including recommendations, was entered as evidence by consent of the parties. There matter was complicated by legitimate historical concerns related to both parents' abilities to parent and / or abilities to co-parent and / or abilities to put the child's best interests before their own. The Minister of Community Services – Child Protection had previously investigated both parents, interviewed the child, and had provided services to the parents and the child.

[72] In *Wintrup* v. *Adams*, 2023 NSCA 19, the Honourable Justice Anne S. Derrick upheld the Honourable Justice Samuel Moreau's cost award outlined in his File Endorsement dated November 30, 2021. The Court of Appeal stated in part about costs:

> …
>
> [111] The appellant had **proposed the parties each bear their own costs** or in the alternative, that costs should be awarded according to Tariff "A" under the *Civil*

> *Procedure Rules* rather than a lump sum. The Tariff amount proposed by the appellant was $24,750.
>
> [112] The **respondent sought a lump sum costs award of $84,919**, arguing that costs calculated under the Tariff would not adequately compensate him, the successful party. He noted his legal fees totalled $96,611.24.
>
> [113] Both parties offered a rationale for their respective positions.
>
> [114] The trial judge made the $55,000 lump sum costs award on the basis of finding:
>
> > The trial took four days with extensive pre- and post-trial filings and "several voluminous exhibits".
> >
> > The respondent was the successful party on the issues of spousal support, the money surreptitiously taken by the appellant from the inheritance account, and the date of separation.
> >
> > The appellant **failed to articulate the required "very good reason" (referring to *Gagnon v. Gagnon*, 2012 NSSC 137) for the parties bearing their own costs or a reason to support the suggestion that a costs award was inappropriate**.
> >
> > Awarding costs is at the court's discretion.
> >
> > An **award of costs calculated in accordance with the Tariff would not do justice between the parties.**
> >
> > The father has not satisfied me that there is a "very good reason" for each party bearing their own costs or a reason to support the suggestion that a costs award is inappropriate.

[73] In *Wintrup, supra*, the Court of Appeal considered whether the trial judge had failed to consider the conduct of the respondent, including the following:

> …
>
> [120] The appellant says the respondent's actions prior to trial (**such as, failing to answer interrogatories; late or incomplete disclosure**) and during the trial (unnecessary cross-examination of a property appraiser where the trial judge accepted the valuation for the properties) **created delay and increased the length of the proceedings**. ***Civil Procedure Rule* 77.07 indicates these considerations should be taken into account in awarding costs.**
>
> [121] The trial judge was **well aware of the conduct of both parties over the four years between the appellant's original Petition for Divorce and the divorce trial.** There was no requirement for him to provide a detailed analysis of

> how he factored their conduct into his assessment of an appropriate costs award. (emphasis mine).

I have taken into consideration both parties' arguments with respect to delays in providing disclosure and / or concerns related to either party providing incomplete and / or redacted disclosure.

[74] The Nova Scotia Court of Appeal in *Wintrup, supra,* considered whether failure by the trial judge to calculate the tariff/departing from the tariff would warrant appellate review. The Court of Appeal determined:

> …
>
> [122] The trial judge had the Tariff amount proposed by the appellant—$24,750. **He concluded it would not do justice between the parties. As a result, he decided on a lump sum.** He was entitled to depart from the Tariff on this basis. As this Court held in *Armoyan v. Armoyan*, "The basic principle is that a **costs award should afford substantial contribution to the party's reasonable fees and expenses…"** (2013 NSCA 136 at paragraph 16) *Armoyan* also stands for the principle that: "**The propriety of a lump sum award may be tested by comparing the proposed tariff award to the actual legal fees and expenses**". The respondent indicated his legals fees totaled nearly $97,000.
>
> [123] The appellant argues the "amount involved" in this case for calculating the Tariff should be limited to the $200,000 she withdrew from the inheritance account. Using this metric the appellant says the trial judge should have been looking at a costs range of $20,563 to $28,938.
>
> [124] This is not a tenable position. There was no dispute between the parties that the case **involved complex issues, some of which were non-monetary**, such as the date of separation. **The trial judge acknowledged the complexity of the case and properly took it into account in determining a lump sum was necessary to do justice between the parties.**
>
> …
>
> [133] The appellant was ordered to pay the costs to the respondent in 90, not 60 days. Judges in family matters typically allow time for the payment of costs. **This forbearance is well within the bounds of judicial discretion.** The trial judge here chose to afford the appellant a grace period. Doing so is representative of his fair and even-handed approach. The appellant has no basis for complaint.

> Conclusion
>
> [134] The trial judge exercised his discretion to award $55,000 in costs in a principled fashion after applying the relevant legal principles and considering the relevant factors. He settled on a costs amount that he found did justice between the parties. There is no basis for appellate intervention. I would dismiss the Costs appeal. (emphasis mine)

7 Conclusion

[75] I have reviewed Civil Procedure Rule 77 and the case law referenced by each party, and I have considered the arguments submitted by each party.

[76] The mother claimed she was charged legal fees of $29,900 exclusive of expenses and HST "or about $36,234." The father suggested the mother's evidence related to her legal fees was insufficient – that some information was redacted. **The mother shall provide clear evidence of her legal fees to the father prior to submitting any costs order for me to endorse**.

[77] As noted above, the mother sought a lump sum award in the amount of 60% of her legal fees and disbursements incurred before May 11, 2023 and 80% of her legal fees and disbursements incurred after that date [60% of $8,000 + 80% of $28,234 = $4,800 + $22,587 = $27,387.00.] (I found the mother to have been successful in relation to issues which took up 80% of trial time – and therefore I am prepared to award the mother a lump sum award of **$21,909.60.**)

[78] I am satisfied that the amount as ordered does justice between the parties when considering the following factors, while not limiting myself to the following factors:

1. The extent and complexity of the proceedings and fees involved;
2. The most important non-monetary issues in the dispute;
3. The offers to settle made by both the mother and the father in advance of trial; and
4. The overall success realized by the mother.

[79] I was not willing to rely on the rule of thumb approach to determine the "Amount Involved" in this case. I preferred to make a lump sum award, and I relied on Rule 77.07(1) and the use of my discretion (considering the importance of the issues and complexity) to raise or lower the lump sum award amount, applying factors such as those listed in Rule 77.07(2), including:

> an unaccepted written **settlement offer, whether or not the offer was made formally under Rule 10,…**.

[80] I am satisfied that according to Rules 77.07(1); 77.07(2) and 77.08, the lump sum award of **$21,909.60** will do justice between the parties.

[81] The father is ordered to pay the mother party and party costs of **$21,909.60**.

8 Directions:

[82] As noted above in paragraph 72, the mother shall provide clear evidence of her legal fees to the father prior to submitting any costs order for me to endorse.

[83] The mother's legal counsel shall prepare the Order.

Cindy G. Cormier, J.