

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Lilly v Playford*, 2025 NSSC 100

Date: 20250325

Docket: HFD *SFH1201*, No. 67634

Registry: Halifax

Between:

Joseph Lilly

Applicant

v.

Tracy Playford

Respondent

Judge: The Honourable Justice Cindy G. Cormier

Written Submissions: None filed for the Applicant
September 25, 2024, for the Respondent

Counsel: Joseph Lilly, self-represented Applicant
Tracy Playford, self-represented Respondent

By the Court:

1 Introduction

[1] The proceeding which is the subject of this cost application had been ongoing since Mr. Lilly, the father, filed a Notice of Variation Application in July 2023.

[2] The issues to be resolved at trial included: whether there had been a change in circumstances; if child support should be recalculated based on a determination of the father's annual income for child support from all sources, including whether the father's income should be imputed; and depending on my determination, how much should the father pay? Beginning when?

[3] The parties appeared at two court conferences on September 25, 2023, and on October 25, 2023; and at a hearing on December 18, 2023. Written submissions closed on February 12, 2024. A written decision was provided to the parties *Lilly v. Playford*, [2024 NSSC 243](#).

[4] As noted in *Lilly, supra*, at the court conference held on September 25, 2023, the father was directed to file outstanding financial information including but not limited to:

[30] ... paystubs for employment insurance benefits if enrolled; documentation as evidence he is unemployed; information from the recalculation program; his T1 Tax and Benefits returns; his insurance plan; his pension plan; all evidence of his job search information ; anything else on the list of missing disclosure provided to him by the mother, and that his documents should be provided by October 18, 2023.

[31] The mother specified she wanted documentary evidence to support the father's claim that he was unemployed and had made reasonable efforts to obtain employment. The mother also requested the father's T1 Tax and Benefit Returns to clarify what other income from pensions or RRSPs the father may have received. The father stated that he could provide the outstanding financial information by October 25, 2023. As noted above, the mother was seeking to have the father's request to retroactively reduce his income for child support back to February 2023 dismissed.

[5] At paragraph 25 in *Lilly, supra* I summarized the disclosure provided by Mr. Lilly in or around October 2023:

4.4 Ongoing disclosure issues

[43] In or around October 2023 the father filed information related to: his federal pension transfer / liquidation (he filed a document suggesting \$86,306.20 in 2022); his RRSP's investment of \$89,321 / RRSP \$33,966 / \$36,638 after taxes; a letter from Employment Assistance; information from the Maintenance Enforcement Program suggesting that as of October 16, 2023 he had a credit balance; and a number of copies of employment applications. As of August 21, 2024 the father was in arrears of -\$100.

[6] A trial was held on December 18, 2023 between 2:00 pm and 4:00 pm.

2 Issue

[7] What is the appropriate award of costs?

3 Pre-trial motions / motions to strike / filing deadlines / other

[8] The mother sought dismissal of the father's application on the basis that he did not meet the evidentiary threshold. I did not dismiss the matter.

4 Outcome at trial

4.1 Issue #1 Material Change

[9] The mother claimed there was no material change and that the matter should be dismissed.

[10] The father claimed there was a material change due to his leaving his employment in or around February 2023 and due to his qualifying for Income Assistance.

[11] The father failed to file his 2022 income information with the Nova Scotia Recalculation Clerk, and in or around June 2023, his income was increased by 10% from \$62,000 to **\$68,200 for 2022**. The father had moved to Ontario from Nova Scotia, and he suggested his total income for child support of approximately \$62,000 did change to **\$26,304** as of approximately February 2023, as he was no longer employed. The father's total income for 2022 was \$148,319.31. The father earned \$50,168.25 in 2020, \$49,862.50 in 2021; and **\$148,319.32** in 2022. I found there was a change.

[12] I ordered the following at paragraph 64 and 65 of *Lilly, supra*:

...

[64] The father's yearly income for child support is imputed to \$62,000 for the period from February 1, 2023 to June 30, 2023.

Beginning July 1, 2023, the father's yearly income for child support is set at a minimum income of \$68,200 and child support shall be paid using the Ontario tables while the father continues to reside in Ontario;

The imputed income of \$68,200 shall remain in effect until the children are no longer eligible to receive child support, or until a time that the father's yearly income for child support based on his T1 Tax and Benefit Return indicates an income of over \$78,000.00, triggering a variation to the higher amount, or further variation by the Court; and

That the father shall submit his T1 Tax and Benefit Return to the mother by June 1 every year, while the children remain dependent children.

6 Costs

[65] If the parties would like to be heard on costs, the mother, who was the successful litigant, should file her brief within one month of receipt of my advanced copy of the written decision. The father should file any response within two weeks after receiving the mother's brief.

4.2 Issues #2 and #3

[13] I found that the father's lack of "employment income approximating \$68,200 or above" was the result of his "persistence in unremunerative employment" and / or his "unrealistic or unproductive career aspirations" (*Smith v. Helppi*, [2011 NSCA 65](#), Oland, J.A. at paragraph 16). I was satisfied the father was able to earn \$68,200.00 per year based on his history of employment and other evidence before me.

5 Positions and analysis:

[14] What is the appropriate award of costs?

5.1 The Mother's Position

[15] The mother stated that “on the advice of the Court” she had sought legal assistance when filling her brief on the law for trial and she had incurred legal costs of **\$1,150**. She incurred the costs to contest the father’s application to retroactively reduce child support between February 2023 and July 2023 and for a period thereafter. The mother alleged that the father’s application “was neither complete or reasonable” and that despite her requests and the Court’s directions, the father had failed to file the documentary evidence necessary to support his position.

5.2 The Father's Position

[16] The father did not file a response.

6 Law

[17] 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.

6.1 The Armoyan approach

[18] The Armoyan approach was endorsed in the Court of Appeal’s decision in *Armoyan v. Armoyan*, [2013 NSCA 136](#), and like many other cases, it 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”.

...

[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.**

...

[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).

...

(emphasis mine)

6.2 The Father’s Arguments at Trial

[19] In *Lilly, supra* I considered some of the father’s arguments:

4.5 The father’s arguments

[44] The father argued that his 2022 income had been “artificially inflated when he withdrew RRSP income and that he could not pay child support based on his 2022 tax return, especially when he was on employment assistance. The father suggested that previously, when the Court had reduced his income due to employment issues, and he had later advised the mother when he had been re-employed.

[45] The father claimed that he’d had sporadic employment over the previous 10 years. On cross examination the father acknowledged he had been employed by Kings County, and he had not advised the mother that he had resumed employment.

[46] When the father was asked what his plan was if he did not have a job in a month’s time, the father stated that he planned to resume regular child support payments January 1, 2024, presumably based on an income of \$62,000 as

consented to in March 2022. When I asked the father, he stated he would provide his Notices of Assessment for 2020, 2021, 2022 and that he would file a Statement of Income attaching his T1 Tax and Benefit Returns for 2020, 2021, and 2022. The father confirmed that his employment insurance statements indicate he was receiving **\$638.00 weekly (\$33,136)**.

[47] In his post hearing submissions filed on or about February 5, 2024, the father indicated that he “just wished to be left alone. The father stated in part:

...

All I asked for was reasonableness. I asked for an agreement due to circumstances and despite the law which I believe notes something like \$13,000 as being a mark of not paying support at all, I never aid or claimed such. Despite the actual law.

I asked her to just take less.

...

The never making a deal never stops though. Ever.

[20] I agreed with the father’s argument that his 2022 income had been “artificially inflated when he withdrew RRSP income and that he could not pay ongoing child support based on his 2022 tax return”. However, due to the lack of full disclosure and / or because he had a higher income in 2022, I did not agree that the father being unemployed as of February 2023 should result in his child support temporarily aligning with the income he was receiving through employment insurance.

6.3 The Mother’s Arguments at Trial

[21] I summarized the mother’s position in *Lilly, supra*, as follows:

[48] The mother highlighted:

There had been an oversight by the Administrative Recalculation Program providing the father a credit of \$2,081 which was identified as overpayment

– but in reality the mother believed the father actually owed her \$1,888.00

–

I noted that it appeared the parties had come to an agreement on this issue, which was placed on the record at the end of March 2022 and an order was issued in June 2022. **I consider the issue final. (my emphasis)**

[49] The mother filed her trial brief on January 19, 2024, she argued in part:

*The father owed \$1,200.00 in arrears, and he had ceased payments of those arrears on or about July 1, 2023, and she is requesting the amount be paid in full. Based on the Consent Order issued in June 2022, **I will not be revisiting this issue.**

*Although the father filed a Statement of Income, he did not attach the most recent three years of his financial records including his T1 Tax and Benefit Returns; Notices of Assessment; and monthly EI statements;

*After being asked to do so, he did not file: a Statement of Expenses; full tax returns for 2020, 2021, and 2022; proof of all self-employment income; and copies of his most recent Records of Employment;

*That without looking at copies of the father's T1 Tax and Benefit Returns, and other documentation about his expenses, it is difficult to determine what discretionary income the father may have earned while self-employed (under the table earnings);

*Line 150 of the **father's income for 2022 was \$148,319.00** but the father did not increase child support, and he failed to file this information with the Administrative Recalculation Clerk;

*In 2022, the father contributed \$33,966.00 to an RRSP and had a gross deposit to his bank account of \$59,072.00;

*The father has never voluntarily disclosed his annual income; and

*The father became more forthcoming when he was claiming to no longer be employed, and he was seeking to reduce the amount of child support he pays.

[50] The mother argued that if the father had documentary evidence to support his claims, he would have and should have supplied that evidence. Or in the alternative, she suggested there is documentary evidence contrary to the father's claims and the mother asked that I draw an adverse inference based on the father's lack of evidence.

[51] The mother suggested that based on the evidence the father did file, he earned **\$50,168.25 in 2020, \$49,862.50 in 2021; and \$148,319.32 in 2022.** The mother suggested that using the test of reasonableness, I should determine that the father has not done everything he could to pay child support.

[52] She suggested that looking at the evidence based on a balance of probabilities and reasonableness scale, **I should find the father can earn an income, and he can pay child support according to the latest determination made by the Administrative Recalculation Program or more, and that his application should be dismissed.** The mother reminded the Court that previously, when it appeared the father had legitimately lost his job and he was not working, she had not asked for more than she thought he could pay. However, the father failed to advise her immediately when he became employed.

[53] **The mother asked the Court to confirm / impute a higher income to the father of at least \$68,200.00** based on historical data and the facts before the Court. The mother noted that with respect to imputation of income, the Honourable Justice Forgeron in *Standing v MacInnis*, 2022, NSSC 304 quoted from *Parsons v Parsons*, 2011 NSSC 293 at paragraph 21:

The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances. [Smith v. Helpii, 2011 NSCA 65 (CanLii)]

[54] The mother suggested that the father:

is still relatively young (53), in relatively good health, is educated and skilled, with experience in the workforce. It is reasonable for him to be earning an income. it is not reasonable for him to claim he is unable to earn more than he receives from EI. There is no current or historical evidence to support his claim.

Lives in rent-controlled apartment with two other people.

Rents his property claiming \$1800 per month. – no copy of lease or other documentation.

The mother claimed that the **suspension of the increase in the father's income from \$62,000.00 to \$68,200, which was stayed pending the outcome of the father's Variation Application, should be lifted and the father's application dismissed.**

[55] The mother argued that otherwise “not only is the father getting away with not having to pay child support based on his 2022 income (over \$148,000), but he is also avoiding the automatic increase that was designed in the first place to make people file what they are required.” **The mother requested a retroactive adjustment from June 2023 onward, when the child support was scheduled to be revised by the Administrative Recalculation Program based on the father's 2022 income, which was \$148,319.32 or to set his income at \$68,200.00.**

[56] The mother further requested that I impute a minimum income of \$68,200 and adjust child support using the Ontario tables on a go forward basis and that the

imputed income of \$68,200 remain in effect until the children are no longer eligible for child support, or until a time that the Applicant's income reported on his T1 Tax and Benefit Return indicates an income of over \$78,000,00, triggering a variation to the higher amount and that the father be ordered to submit his T1 Tax and Benefit Return by June 1 every year.

[22] In *Lilly, supra*, I referred to certain disclosure issues including the father's failure to disclose reliable evidence about: his true expenses (needs) and his means; whether he had quit his job or been let go; being in hospital for several weeks; suffering from depression and / or anxiety to an extent which would prevent him from earning an income; any pension and or RRSP income.

[23] I also considered the father's income from his home in Nova Scotia:

[40] ...the father suggested he had "sunk everything he had left" into a "crappy house" in NS to be "close to my kids and hopefully work something more reasonable out" with the mother. The father confirmed that since on or about December 8, 2023, he had been renting out the house. He claimed he had just started renting it for \$1,600 or \$1,800 per month "with the management fee."

[24] Regarding the father's plans to resume child support payments at the previous payment level, I found he did not provide sufficient evidence of his reported job searches. Overall, the father did not provide the Court with sufficient reliable evidence about his changes of employment and / or with updated documentary evidence which would provide a clear picture of his entire financial situation as requested by the Court.

[25] The mother had requested:

The mother requested a retroactive adjustment from June 2023 onward, when the child support was scheduled to be revised by the Administrative Recalculation Program based on the father's 2022 income, which was \$148,319.32 **or to set his income at \$68,200.00.**

I did not base child support on his line 150 total income of \$148,319.32, and therefore the father had some success.

[26] I ordered at paragraph 64 and 65 of *Lilly, supra*:

The father's yearly income for child support is imputed to \$62,000 for the period from February 1, 2023 to June 30, 2023.

Beginning July 1, 2023, the father's yearly income for child support is set at a minimum income of \$68,200 and child support shall be paid using the Ontario tables while the father continues to reside in Ontario;

The imputed income of \$68,200 shall remain in effect until the children are no longer eligible to receive child support, or until a time that the father's yearly income for child support based on his T1 Tax and Benefit Return indicates an income of over \$78,000.00, triggering a variation to the higher amount, or further variation by the Court; and

That the father shall submit his T1 Tax and Benefit Return to the mother by June 1 every year, while the children remain dependent children.

6 Costs

[65] If the parties would like to be heard on costs, the mother, who was the successful litigant should file her brief within one month of receipt of my advanced copy of the written decision. The father should file any response within two weeks after receiving the mother's brief.

6.4 Party and party costs

[27] I have reviewed Civil Procedure Rule 77, and I have considered the written submissions filed by Ms. Playford. Mr. Lilly did not file any written submissions.

I find Tariff C applies to the half day hearing, of more than 1 hour but less than a ½ day, with a range of costs of \$750.00 - \$1000.00.

[28] I am satisfied that according to Rules 77.07(1); **an award of \$1,000.00 in costs against Mr. Lilly would do justice between the parties.** Mr. Lilly is ordered to pay Ms. Playford party and party costs of **\$1,000.00 at \$200.00 per month beginning May 1, 2025** until the cost award is paid in full.

[29] I am satisfied that the amount as ordered does justice between the parties when considering the following factors:

1. reasonable legal fees, positions of the parties, conduct, failure to disclose and / or take necessary steps;
2. comparing the reasonableness of the father's and the mother's trial positions;
3. comparing the proposed tariff award to the actual legal fees and expenses; and
4. The success realized by Mr. Lilly and Ms. Playford.

7 The Order

[30] The court will prepare the order.

Cindy G. Cormier, J.