

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Clements v. Boutilier, 2014 NSSC 32

Date: 20140124

Docket: SFHMCA-086892

Registry: Halifax

Between:

Taryn Elizabeth Clements

Applicant

v.

Terrance Allan Boutilier

Respondent

Judge:

The Honourable Justice Mona M. Lynch

Heard:

By Way of Written Submissions filed December 6, 2013
by the Applicant and December 12, 2013 by the
Respondent in Halifax, Nova Scotia

Counsel:

Janice E. Beaton, Q.C. for the Applicant
Charles A. Ellis, for the Respondent

By the Court:

[1] This matter came before the court for a hearing on the issues of retroactive and prospective child support, both table and section 7 expenses. Ms. Clements seeks an award of costs.

[2] Ms. Clements was successful in her application. The order required Mr. Boutilier to pay retroactive child support, both table and section 7. Mr. Boutilier sought an order that section 7 expenses be equally shared but the court ordered proportionate sharing.

[3] The parties had signed a Separation Agreement that required the exchange of Income Tax Returns and Notices of Assessment on a yearly basis and required the child support to be adjusted yearly based on the new information. Neither party provided the yearly financial information to the other party. The failure of Ms. Clements to provide her updated financial information would have had little to no bearing on the child support. The failure of Mr. Boutilier to provide updated financial information resulted in Mr. Boutilier paying less child support than would have been required under the Separation Agreement or the *Child*

Maintenance Guidelines. The Separation Agreement also contained a provision that any legal fees required to obtain production of the Income Tax Returns and Notices of Assessment should be paid by the non-complying party to the requesting party. Following the Separation Agreement would have resulted in much the same result as the court order.

[4] The court accepted the evidence of Ms. Clements that she requested Mr. Boutilier's financial information but it was not provided. Mr. Boutilier did not provide his full financial information as directed by a Notice to Disclose and an Order from the court in the form of a Conference Memorandum.

[5] Mr. Boutilier rejected two written offers to settle that were more favourable than the decision of the court, one in February 2013 and one in April 2013.

[6] In **Armoyan v. Armoyan**, 2013 NSCA 136, Fichaud, J.A. reviewed the award of costs in family matters and reiterates that the recovery of costs should represent a substantial contribution which is more than fifty percent and less than one hundred percent of a lawyer's reasonable bill (para 16). He contrasts the use of the Tariff under the Rules with a lump sum award and finds: the use of the

tariffs delivers the benefit of predictability by limiting the use of subjective discretion (para 17); some cases bear no resemblance to the tariffs' assumptions (para 18); and when subjectivity exceeds a critical level the tariff may be more distracting than useful and the judge should channel his/her discretion to the principled calculation of a lump sum (para 18).

[7] In the present case the use of tariff would result in an award of costs of between \$3,000.00 and \$5,000.00 under Tariff A. Rule 77.07 permits an adjustment to the costs based on certain factors. In this case there were two written settlement offers turned down by Mr. Boutilier that would have lead to a more favourable result for him and less legal fees for Ms. Clements. There was also Mr. Boutilier's failure to disclose, upon Ms. Clements request, his obligation under the Separation Agreement and the direction and order of the court. Using the basic scale of \$4,000.00 with \$3,000.00 for the adjustments for failing to accept the offers, failing to follow the Separation Agreement and failing to disclose his financial information, results in a costs award under Tariff A of \$7,158.86 including disbursements.

[8] The Separation Agreement signed by Mr. Boutilier would require him to pay all of the legal expenses to obtain the financial disclosure that he was obligated to provide under the Agreement. He did not fully comply until a week before the hearing of the application. The Separation Agreement between the parties contains the formula for child support, exchange of tax information and adjustment of the child support. Despite his agreement to do this, Mr. Boutilier fought the application made by Ms. Clements to require him to fulfill the obligations under the Agreement. The total legal bill provided in the costs' submission of Ms. Clements is \$10,594.93, of which 80% or \$8,475.94 is attributable to child support.

[9] Following **Armoyan**, when considering a lump sum, I would consider the total legal bill, the conduct of Mr. Boutilier by failing to disclose his financial information and the unaccepted written settlement offers. In **Armoyan**, Fichaud, J.A. awarded 80% of the base sum after the settlement offer. In this case the first settlement offer was made relatively early in the proceeding, February 2013, leaving a base amount after that of \$9,767.50 and 80% of which is \$7,814.00. In **Armoyan**, Fichaud, J.A. awarded 60% of the amount prior to the settlement offer.

Here 60% of 827.43 = \$496.46 and 80% of that is \$397.16 The total cost award would be \$8,211.16.

[10] As Fichaud, J.A. reminds us in **Armoyan**, the overall mandate is to “do justice between the parties” (para 10 and CPR 77.02(1)). Mr. Boutilier asks that I award costs in the amount of \$4,158.86. Ms. Clements asks for \$8,500.00. Based on all of the factors, I award costs to Ms. Clements in the amount of \$8,000.00, inclusive of disbursements.

J.