

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Strecko v. Strecko, 2014 NSSC 45

Date: 20140205

Docket: 1201-063118
(SFHD 061583)

Registry: Halifax

Between:

Jane Wagner Strecko

Petitioner

and

Brian Frank Strecko

Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Counsel: M. Jean Beeler, Q.C., counsel for Ms. Strecko
B. Lynn Reiersen, Q.C., counsel for Mr. Strecko

By the Court:

Introduction (Costs Decision)

[1] This is a ruling on costs after the Court's decision, reported at 2013 NSSC 49 following a hearing in November 2012. The application related primarily to the Petitioner's ongoing entitlement to and quantum of spousal support and to child support.

[2] Written submissions on costs were received.

General Principles Governing Costs

[3] The governing Civil Procedure Rule on costs is now 77. This Rule incorporates the tariffs mandated by the *Costs and Fees Act*, R.S.N.S. 1989, c.104 when applying an amount involved assessment to determine costs payable by a party. Justice Dellapinna in *Tamlyn v. Wilcox*, 2010 NSSC 363 reviewed the transition from the 1972 Rules to the new Rules. His commentary is a helpful guide in tracing the changes.

[4] Justice B. MacDonald of this court summarized the applicable principles when assessing costs in *L. (N.D.) v. L. (M.S.)*, 2010 NSSC 159 and more recently in *Gagnon v. Gagnon*, 2012 NSSC 137. She stated the following at paragraph 3 in *L. (N.D.)*:

- 3 Several principles emerge from the Rules and the case law.
 1. Costs are in the discretion of the Court.
 2. A successful party is generally entitled to a cost award.
 3. A decision not to award costs must be for a "very good reason" and be based on principle.
 4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to a otherwise successful party or to reduce a cost award.
 5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".
 6. The ability of a party to pay a cost award is a factor that can be considered; but as noted by Judge Dyer in *M.C.Q. v. P.L.T.* 2005 NSFC 27: "Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *Muir v. Lipon*, 2004 BCSC 65]."
 7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
 8. In the first analysis the "amount involved", required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial

proceedings may complicate or preclude the determination of the "amount involved".

9. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of \$20,000 in order to determine the "amount involved".

10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.

11. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.

12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties position at trial and the ultimate decision of the court.

[5] Arriving at a costs assessment in matrimonial 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.

[6] It is settled that costs can be granted in matrimonial matters. Justice Williams in *Grant v. Grant* [2002] N.S.J. No. 14 at paragraph 3 reviews the Rules and the considerations for the court when considering an award of costs. In particular, he references the factors outlined in former Rule 63.04(1) and (2).

[7] In *Grant*, Justice Williams was considering costs flowing from a proceeding that included numerous applications and interlocutory notices over four years. There was also a trial and a pre-trial. He found that the conduct of the wife had unnecessarily lengthened the matter and that the proceedings contained many unproven allegations and untrue assertions. These were significant factors Justice Williams considered when he awarded costs of \$12,000 and \$2,250 for disbursements. I agree with Justice Williams in *Grant*, who stated at paragraph 42 that an "amount involved" analysis has limited applicability in complex, multi-issue matrimonial proceedings.

[8] As stated at paragraph 13 in *Grant*, Justice Williams observes that divorce and family law proceeding "often involve a multitude of separate and inter-related problems". The result is that determination of success is also more complex.

[9] In *Shurson v. Shurson*, 2007 NSSC 270, Justice Legere-Sers was considering costs in the context of an offer to settle. The case report does not detail the particulars of the outcome. She ordered \$10,000 in costs.

[10] In *Conrad v. Bremner*, 2006 NSSC 99, Justice MacDonald was dealing with costs following a trial and once again the case involved an offer to settle as provided by former Rule 41.09(a). The case also involved discoveries, pre-trial court appearances and a two day hearing. Justice MacDonald awarded party and party costs of \$5,000.00.

[11] In *O'Neil v. O'Neil*, 2013 NSSC 64 Justice Beaton ordered the parties to bear their own costs. The parties had exchanged offers to settle that were very close to the Court's ruling on the quantum of spousal support ultimately ordered. Both parties were partially successful and no costs were ordered.

[12] Justice Goodfellow in *Gardiner v. Gardiner*, 2007 NSSC 282 declined to order costs. Justice Goodfellow conducted an interim hearing that lasted one half day, other proceedings occurred over the following year. Citing Mr. Gardiner's financial difficulties as a partial reason for the delay in having matters concluded and the mixed success of the parties, he directed that each party bear their own costs.

[13] Of particular interest is that Justice Gass found a failure to timely disclose on the part of the Petitioner. She also assessed the relative "success" of the parties and the presence or absence of offers to settle. Justice Gass ordered costs to the Respondent in the amount of \$3,031.00 plus \$2,000 towards disbursements.

[14] Justice Coady in *Ghosn [2006] N.S.J. No. 272* assessed costs against the husband after finding that his non-disclosure and obstruction increased the wife's legal costs. He found that the tariffs were not drafted with family law in mind. He awarded a lump sum of \$10,000 plus 75% of the wife's disbursements. Ms. Ghosn's conduct was found to be aimed at frustrating Mr. Ghosn's application to vary. He was found to have misled both Ms. Ghosn and the Court. Ms. Ghosn was found to have pursued 15 avenues to obtain financial information Mr. Ghosn refused to provide. In addition, Ms. Ghosn made two offers to settle.

[15] I have ordered costs in a number of cases.

[16] In *Robar v. Arseneau*, 2010 NSSC 175, I ordered costs of \$5,138 inclusive of HST and disbursements to be paid at a rate of \$150 per month. In that case, the Applicant's case to set aside the parties' separation agreement was dismissed and Ms. Robar was found to have been unreasonable. She was also found to have rejected offers to settle. The matter required court time on two days. I applied scale 1 of Tariff "A". The amount involved was within the \$40,001-\$65,000 range. Ms. Robar was subject to significant financial hardship at the time. This was a factor weighing against a higher costs award.

[17] The case of *Provost v. Marsden*, 2009 NSSC 365 involved an assessment of child support obligations. I applied Tariff "A", there being a decision following a half day hearing. The amount involved was in the \$40,001-\$65,000 range. Success on the issues was mixed but Mr. Marsden was found to have been the more successful party. This case also involved an offer to settle. Costs totalling \$3,000 inclusive of HST and disbursements were ordered (2010 NSSC 423 (cost decision)).

[18] The case of *R. (A.) v. R.(G.)*, 2010 NSSC 377 resulted in a costs award of \$3,000 inclusive of HST and disbursements. The hearing concerned the parenting arrangement for the parties' two children. The conduct of the Applicant was found to have been aggravating. The amount involved was \$20,000, this representing the amount involved when a full day of court time is consumed (2010 NSSC 424 (cost decision)).

Position of the Parties

[19] Ms. Reiersen, on behalf of Mr. Strecko explains her client's claim for costs as follows:

Mr. Strecko submits that this is a case in which it is very difficult to determine the "amount involved" and therefore the general rule of thumb of \$20,000.00 per day of trial should be used to calculate the amount involved. Based on 2 ½ days of trial, this equals an "amount involved" of \$50,000.00. This does not take into account the time required for discovery examinations. The basic scale (scale 2) of Tariff A for this amount is \$7,250, however Mr. Strecko argues that scale 3 is the appropriate scale upon which to determine costs, given his reasonable offer to settle and Ms. Strecko's unreasonable conduct during the litigation. The base amount under scale 3 is \$9,063.00. An additional \$5,000.00 must be added to

either of these amounts to reflect the 2 ½ days of trial, calculated at \$2,000.00 per day of trial.

[20] Ms. Beeler argues that success for the parties was mixed and the parties should bear their own costs. She says that Mr. Strecko's spousal support offer, dated September 14, 2012 was revoked. It is also argued *inter alia* that Mr. Strecko's argument in favour of an immediate termination of child support was not accepted; that Mr. Strecko's income was found to be higher than he represented and establishing this fact required significant resources; that the issue of ongoing and retroactive child support was resolved with mixed success for both parties.

[21] It is submitted on behalf of Mr. Strecko that his actual legal costs amounted to approximately \$20,000.

[22] Ms. Reierson interprets the Court's decision on behalf of Mr. Strecko as more favourable to Mr. Strecko than to Ms. Strecko. It is submitted that an offer to settle made by Mr. Strecko was more favourable to Ms. Strecko than the Court's decision.

[23] Specifically, it is argued that the child support issue as resolved by the Court, was less favourable than an offer to settle made by Mr. Strecko. It is argued in summary that Mr. Strecko's September 14, 2012 offer was "\$26,250.00 net of tax less on spousal support" but "\$32,277.00 greater in child support".

[24] Further, it should be noted that Rule 77.07 provides that tariff costs may be increased or decreased after considering enumerated factors.

[25] Rule 77.08 provides for a lump sum of costs in cases where a tariff amount is not appropriate.

[26] Justice Jollimore in *Moore v. Moore*, 2013 NSSC 281 at paragraph 14 addressed the applicability of tariff C to applications in the Family Division:

[14] Initial guidance in determining costs is the tariff of costs and fees. The proceeding before me was a variation application. Formally, Tariff C applies to applications. As I said in *MacLean v. Boylan*, 2011 NSSC 406 at paragraph 30, applications in the Family Division are, in practice, trials. Rule 77's Tariffs have not changed from the Tariffs of Rule 63 of the Nova Scotia Civil Procedure Rules (1972). Despite the distinction between an action and application created in our

current Rules, the Tariffs have not been revised. My view has not changed since I decided *MacLean v. Boylan*, 2011 NSSC 406: I don't intend to give effect to the current Rules and their incorporation of the pre-existing Tariffs where this routinely results in lesser awards of costs for the majority of proceedings in the Family Division, such as corollary relief applications, variation applications and applications under the Maintenance and Custody Act or the Matrimonial Property Act. In these situations I intend to apply Tariff A as has been done by others in the Family Division: Justice Gass' decision in *Hopkie*, 2010 NSSC 345 and Justice MacDonald in *Kozma*, 2013 NSSC 20.

[27] Our Court of Appeal recently reviewed the law governing awards of costs in family proceedings in *Armoyan v. Armoyan*, 2013 NSCA 136.

[28] Fichaud, J. on behalf of the Court summarized how costs should be quantified beginning at paragraph 9:

[9] Justice Campbell did not quantify costs for Ms. Armoyan. So there is no issue of appellate deference to the trial judge's exercise of discretion on quantification. The Court of Appeal is calculating costs at first instance for both the forum conveniens proceeding in the Family Division and the two appeals in this Court.

[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.

[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 specify the circumstances when the Court should depart from tariff costs for a lump sum.

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. [emphasis added]

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

[20] Justices of the Family Division have stated that trial-like hearings in matrimonial matters are more appropriate for Tariff A than Tariff C: *Hopkie*, 2010 NSSC 345, para 7, per Gass, J.; *MacLean v. Boylan*, 2011 NSSC 406, paras 29-30, per Jollimore, J.; *Kozma v. Kozma*, 2013 NSSC 20, para 2, per MacDonald, J.; *Robinson v. Robinson*, 2009 NSSC 409, para 10, per Campbell, J..

[21] The forum conveniens proceeding was brought by Ms. Armoyan’s “Notice of Motion” that, as Mr. Armoyan’s counsel points out, literally would engage Tariff C. But the proceeding ripened with the features of a complex trial that spanned ten days of hearing over eleven months. It was not remotely equivalent to a conventional chambers motion, and its natural home would be Tariff A.

[22] But this proceeding had no “amount involved” within Tariff A. The issue was whether the Courts of Nova Scotia or Florida would take jurisdiction. That matter involved broad consideration of comparative comity, fairness and efficiency in the administration of justice. The “amounts” are for the separate matrimonial proceedings in Florida and this province. 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).

[29] Commenting on the impact offers to settle can have on an award, Justice Fichaud stated the following at paragraph 27:

[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.

[30] Ultimately, Justice Fichaud found a lump sum award of costs as the most appropriate mechanism for determining costs.

[31] The Court awarded costs of \$306,000 including disbursements.

Conclusion

[32] I am satisfied the success of the parties is mixed. Mr. Strecko did not achieve the outcome he sought on the issue of spousal support, although he was successful on the child support issue. Ms. Strecko conversely had some success with her argument on spousal support. The outcomes were significant achievements for each party.

[33] Therefore, each party is ordered to bear their own costs.

ACJ.