SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Armoyan v. Armoyan,* 2014 NSSC 143

Date: 201400502
Docket:1201-065036
Registry: Halifax

Between:

Lisa Armoyan

Applicant

v.

Vrege Armoyan

Respondent

Revised Decision:	The missing docket number has been added and this decision replaces the previously distributed decision.
Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	March 13 and 14, 2014, in Halifax, Nova Scotia
Written Decision:	May 2, 2014
Counsel:	Mary Jane McGinty and Christine J. Doucet, for the applicant, Lisa Armoyan Gordon Kelly and Stacey O'Neill, for the respondent, Vrege Armoyan

By the Court:

[1] **Introduction**

[2] Lisa and Vrege Armoyan are divorced spouses who remain locked in contentious family law proceedings concerning the following two matters:

- Litigation pursuant to the *Interjurisdictional Support Orders Act,* which is scheduled for seven days in May 2014. In that proceeding, Ms. Armoyan registered a foreign support order for enforcement. In response, Mr. Armoyan filed an application to set aside that registration. Ms. Armoyan is contesting Mr. Armoyan's application.

- Litigation pursuant to the *Matrimonial Property Act,* which is scheduled for 30 days in September, October, and November 2014. Mr. Armoyan commenced the *MPA* application to enforce the provisions of a marriage contract. In response, Ms. Armoyan seeks to set aside the contract; she seeks a division of assets and debts in conformity with the legislation.

[3] In the course of these proceedings, Ms. Armoyan filed two motions. She seeks an order for security for costs and an order for suit costs. These motions were heard on March 13 and 14, 2014. The parties filed extensive evidence in support of their positions. Each was cross examined. Their lengthy written memorandums were augmented by oral submissions. The court adjourned to render a written decision.

[4] **Issues**

[5] The following issues will be determined in this decision:

- Should an order for security for costs be granted?

- Should an order for suit costs be granted?

[6] **Analysis**

[7] **Should an order for security for costs be granted?**

[8] *Position of Ms. Armoyan*

[9] Ms. Armoyan seeks an order for security for costs in the amount of $500,000 for a number of reasons, including the following:

- Mr. Armoyan is in default of two orders for costs, and a third has not yet been quantified.

- Mr. Armoyan moved assets of substantial value out of the jurisdiction, and he encumbered other assets which remain in Nova Scotia. Mr. Armoyan is making himself judgement proof.

- Mr. Armoyan is making the litigation, the enforcement of the orders for costs, and the enforcement of the order for child and spousal support, as difficult as possible.

- The undue difficulty in collecting the present order for costs does not arise solely because of Mr. Armoyan's lack of means as shown by the fact that the court order was granted on October 26, 2012, long before Mr. Armoyan moved his RRSPs and encumbered all of his chattels of value. Mr. Armoyan's motive is blatantly obvious, and his actions deliberate.

- Mr. Armoyan continues to live the lifestyle of a wealthy man.

- Mr. Armoyan's evidence is nothing more than a blanket, and empty assertion of impecuniosity, insufficient to prove the claim. Mr. Armoyan did not demonstrate an inability to finance an order for security for costs.

[10] *Position of Mr. Armoyan*

[11] Mr. Armoyan vehemently contests the motion for a number of reasons, including the following:

- The court lacks jurisdiction to issue an order for security for costs in the *ISO* application because Ms. Armoyan is not the respondent. Further, she is arguably not the respondent in the *MPA* proceeding, given her application to set aside the marriage contract.

- He lacks the means to pay such an order. Mr. Armoyan states that he has minimal sources of income, has been unable to work since the parties' separation, and has made poor investment decisions. He states that he lost millions of dollars, and the small balance remaining is no longer accessible.

- A review of all of the circumstances confirms that an order for security for costs should not be granted. The circumstances relevant to fairness dictate a refusal of the motion.

- The *MPA* proceeding is at a fresh stage. Mr. Armoyan has complied with all directives outlined in the date assignment conference memorandum. There is no actual evidence that Mr. Armoyan is impeding or causing difficulty in respect of this application. The Florida action has no bearing on the *MPA* proceeding.

- The nature of the claim and the response brought forward likewise support a denial of the motion. Mr. Armoyan is requesting a determination of the parties' respective property rights upon marriage breakdown, inclusive of a contract previously signed, and for which Ms. Armoyan had independent legal advice.

- If an order for security for costs was granted, Mr. Armoyan would not be able to proceed with the hearing. This effectively would result in a stay or a dismissal. Such a result would lead to an injustice in that the property rights of the parties would not be litigated.

- The preservation order, dated January 15, 2014, provides a temporary remedy in the *MPA* proceeding. Mr. Armoyan has not sought to set aside, or vary the preservation order. This order remains in place to preserve all remaining assets of Mr. Armoyan in Nova Scotia, thus benefiting Ms. Armoyan.

- It is difficult to calculate the appropriate amount of costs, even if such an order was an appropriate remedy. Although 30 trial days have been assigned, they may not be required. Further, settlement offers will likely impact on the cost award. Many factors, as yet unquantified, will also affect the cost award. Speculation must be avoided.

[12] Mr. Armoyan therefore seeks a dismissal of the motion for security for costs in the specific circumstances of this case.

[13] *The Rule*

[14] Rule 45 sets out the court's authority to issue an order for security for costs. It states as follows:

> 45.01 (1) This Rule provides a remedy for a party who defends or contests a claim and will experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.
>
> 2) A party against whom a claim is made may make a motion for security for costs, in accordance with this Rule.
>
> Grounds for ordering security
>
> 45.02 (1) A judge may order a party who makes a claim to put up security for the potential award of costs in favour of the party against whom the claim is made, if all of the following are established:
>
> (a) the party who makes a motion for the order has filed a notice by which the claim is defended or contested;
>
> (b) the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party;
>
> (c) the undue difficulty does not arise only from the lack of means of the party making the claim;
>
> (d) in all the circumstances, it is unfair for the claim to continue without an order for security for costs.

(2) The judge who determines whether the difficulty of realization would be undue must consider whether the amount of the potential costs would justify the expense of realizing on the judgment for costs, such as the expense of reciprocal enforcement in a jurisdiction where the party making the claim has assets.

(3) Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:

(a) the party making the claim is ordinarily resident outside Nova Scotia;

(b) the party claimed against has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere;

(c) the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;

(d) the party making the claim fails to designate an address for delivery or fails to maintain the address as required by Rule 31 - Notice.

(4) A judge may also order security for costs in either of the following circumstances:

(a) the security is authorized by legislation;

(b) the same claim is made by the same party in another proceeding, and it is defended or contested by the party seeking security for costs on the same basis as in the proceeding in which security for costs is sought.

Terms of order

45.03 (1) An order for security for costs must require the party making the claim to give security of a kind described in the order, in an amount equal to or lower than that estimated for the potential award of costs, by a date stated in the order.

(2) The judge may require any kind of security, including payment of money into court.

> (3) A judge who requires payment into court may fix a deadline for paying the entire amount, or permit the paying party to make the payment in installments.
>
> Stay and dismissal
>
> 45.04 (1) An order for security for costs stays the proceeding, or that part of the proceeding for which the security is due, until the security is given or the claim is dismissed.
>
> (2) An order for security for costs to be paid by installments stays the proceeding until the first installment is made or the claim is dismissed.
>
> (3) A party who obtains an order for security for costs may make a motion for dismissal of the claim if the party ordered to provide security fails to do so as ordered.

[15] Before analysing the preconditions for an order for security for costs, I will first address Mr. Armoyan's preliminary objection based upon the court's lack of jurisdiction to grant an order to an applicant.

[16] *Preliminary Objection on Jurisdiction*

[17] I reject Mr. Armoyan's submission that Ms. Armoyan is not entitled to apply for an order for security for costs because she is an applicant in the *ISO* proceeding, and is arguably, an applicant in the *MPA* litigation in that she is seeking to set aside the marriage contract. Mr. Armoyan's reasoning on this issue is faulty.

[18] Rule 45 does not restrict plaintiffs or applicants from applying for an order for security for costs. Rule 45 does not employ the words "plaintiff", "applicant", "defendant", or "respondent". Instead, Rule 45 "provides a remedy for a party who defends or contests a claim ...".

[19] "Party" is not defined in Rule 94. However, the definition of the word "party" in the *Dictionary of Canadian Law*, 3d ed, includes "A person by or against whom a legal suit is brought". Thus, the remedial provisions of Rule 45 are not restricted to defendants or respondents, but are available to a party who defends or contests a claim. Claim is defined in Rule 94.10 as including "a cause of action and the remedy sought."

[20] Even under the old rules, the court did not restrict security for costs in the manner suggested by Mr. Armoyan. In **Lienaux v. 2301072 Nova Scotia Ltd**, 2007 NSCA 66, Cromwell, J.A., as he then was, notes as follows at paras. 15 to 17:

> 15 Rule 42, which authorizes orders for security for costs, is not, on its face, restricted to orders for security against plaintiffs. The opening words of the Rule indicate that "[t]he court may order security for costs to be given in a proceeding whenever it deems it just ...". It is true that the specific examples listed in 42.01(1)(a) through (i) relate to security against a plaintiff. But the opening words of the Rule make it clear that these are not exhaustive: the examples are said not to limit the generality of the opening words permitting security to be ordered whenever just. However, it is not necessary for the purposes of this appeal to finally decide whether security may be ordered against a defendant under Rule 42.01.
>
> 16 The applicant in an interlocutory application is a plaintiff for the purposes of Rule 42 and, therefore, liable to post security if so ordered. This follows from the definitions of "plaintiff" and "proceeding" set out in the Judicature Act, R.S.N.S. 1989, c. 240, which definitions also apply to the Civil Procedure Rules. The relevant provisions of the Judicature Act are these:
>
> 2 In this Act, and the Rules, .
>
> ...
>
> (f) "plaintiff" includes every person asking any relief or declaration against any other person in any proceeding;
>
> (g) "proceeding" means any civil or criminal action, suit, cause or matter, or any interlocutory application therein, ...
>
> (Emphasis added)
>
> 17 The appellants were applicants in an interlocutory application and the judge's order respecting security for costs related only to interlocutory applications brought or intended to be brought by them. It follows, in my view, that even if Rule 42 only permits security for costs orders to be made against plaintiffs, security could be ordered here: the Rule authorizes such orders against the appellants when they are applicants on interlocutory applications. While the power to make such an order is one that will be used rarely and with great circumspection, the judge did not err in exercising it here.

[21] Similarly in the case before me, Ms. Armoyan is not precluded from making a claim for an order for security of costs in either the *ISO* or *MPA* proceedings for the following reasons:

- The *ISO* hearing in May 2014 is contested. Ms. Armoyan objects to Mr. Armoyan's claim to set aside the registration of the Florida support order for enforcement purposes. Ms. Armoyan is responding to a claim made by Mr. Armoyan. Had Mr. Armoyan not filed an application to set aside the registration, the seven day hearing would not occur. Ms. Armoyan's circumstances are captured by Rule 45; she is entitled to apply for an order for security for costs against Mr. Armoyan.

- Ms. Armoyan is also responding to the *MPA* claim initiated by Mr. Armoyan for a division of assets based upon the provisions of a marriage contract. In addition, she is an applicant in that she is seeking to displace the provisions of the marriage contract with relief compatible with the provision of the *Act*. Ms. Armoyan circumstances are captured by Rule 45; she is entitled to apply for an order for security for costs against Mr. Armoyan.

[22] *Disputed Criteria*

[23] I will now examine the disputed criteria. Mr. Armoyan focuses on two points in his submissions. He contends that any undue difficulty that is present arises because of his lack of means. Second, he contends that fairness circumstances favour the refusal of an order for security for costs. In resolving this dispute, I must analyse the evidence and the interconnected provisions of Rule 45.02(1)(b), and (c) and Rule 45.02(3)(b), together with Rule 45.02(1)(d).

[24] *Rebuttable Presumption and Lack of Means*

[25] The rebuttable presumption, stated in Rule 45.02(3), is triggered because Mr. Armoyan did not pay the cost award in the amount of $306,000 as ordered by the Nova Scotia Court of Appeal in its decision reported at 2013 NSCA 136, and its judgement dated November 29, 2013. Further, Mr. Armoyan did not pay the

cost award in the amount of $1,201,217.47 for attorney fees, nor the $273,375 for forensic accounting fees and costs, as ordered in the Florida proceedings, and as stated at p. 28 of the Final Judgment of Dissolution of Marriage dated October 26, 2012.

[26] Mr. Armoyan did not provide clear, convincing, and cogent evidence to rebut this presumption. First, Mr. Armoyan did not prove that he had "minimal sources of income" and "was unable to work for the most part since the parties' separation" [para. 53 of his pre-motion brief]. Mr. Armoyan's personal income, as reported in Canadian returns, shows the following line 150 income, for the two years which were produced:

2011 - $1,426,049.17
2012 - $1,141,404.15.

[27] Although Mr. Armoyan did not produce his 2013 income tax return, he did provide a copy of two, T4RSPs which showed income which will ultimately be included as line 150 income in the amount of $1,120,101.40 and $15,000, for a total of $1,135,101.40. Mr. Armoyan also earned investment income in 2013 which will likewise be included in his line 150 income.

[28] Mr. Armoyan did not produce his 2009 and 2010 income tax returns. He thus did not prove his assertion for each of these years.

[29] Based upon the Canadian income tax documents, Mr. Armoyan did not prove minimal income.

[30] Mr. Armoyan further did not prove his assertion that he was unable to work since the parties' separation. The evidence did not meet the test set out in **MacGillivary v. Ross,** 2008 NSSC 339. Mr. Armoyan attempted to meet the legal test through medical notes that were entered as evidence in an indirect fashion. Attached as exhibit "C", to Mr. Armoyan's affidavit marked exhibit "8", was another affidavit of Mr. Armoyan, sworn on December 23, 2011. Attached to that affidavit, as exhibits "B" and "C", were notes from a family physician and another doctor. These notes did not remotely satisfy the standards set out in Rule 55.04. Mr. Armoyan did not prove his assertion by these medical notes. Neither did Mr. Armoyan prove his assertion of an inability to work through his own evidence.

Mr. Armoyan continued to travel internationally throughout this period. Lifestyle decisions were strategically and shrewdly made. Mr. Armoyan's assertion of an inability to work was not proven by clear, convincing, and cogent evidence.

[31] Mr. Armoyan did not prove "a lack of means": [paras. 52 to 54 of his pre-motion brief]. Based upon a rough tabulation of Mr. Armoyan's statement of property figures, he possessed assets worth about $40 million dollars at the time of separation. The evidence confirms that Mr. Armoyan strategically moved the vast majority of these assets from the jurisdiction post separation, while other assets were sold to relatives. This was confirmed in the evidence before me and in the Nova Scotia Court of Appeal decision, at para. 107. Mr. Armoyan pledged most of the remaining chattels within the jurisdiction after the Nova Scotia Court of Appeal decision issued in September 2013. Mr. Armoyan stated that he did so because it was important that he protect himself. Mr. Armoyan has attempted to make himself insolvent in this jurisdiction.

[32] Despite this strategy, Mr. Armoyan has not proven by clear, convincing, and cogent evidence that he lacks the means to pay a security for cost award. More is required than "a blanket and empty assertion of impecuniosity": **May Ocean v. Economical Mutual Insurance Co.**, 2011 NSSC 408, per Smith, A.C.J. at paras. 31 and 46; and **Armoyan v. Armoyan**, 2014 NSSC 117, Wood, J. at para. 20.

[33] For example, Mr. Armoyan supplied limited details as to the alleged $2 million charitable donation gifted to the displaced Armenian Christians living in Lebanon. Mr. Armoyan could not remember the surname of the clergy, or even the name of the parish, where the alleged donations were transferred. Mr. Armoyan supplied no proof of the alleged transfers. Mr. Armoyan's statement that a clergy member and the Byblos Bank reached an arrangement that permitted direct withdrawals from Mr. Armoyan's bank account was not substantiated. Further, the suggestion that Mr. Armoyan lost $13 million in a bad business deal in Syria was likewise not supported by independent evidence.

[34] Rather than proving a depletion of assets, the evidence confirmed that Mr. Armoyan shrewdly removed the majority of his assets from the jurisdiction during the course of the Florida and Nova Scotia litigation, and then encumbered remaining chattels after the Nova Scotia Court of Appeal decision was rendered. This conduct does not equate to proof that the assets no longer exist.

[35] Further, Mr. Armoyan has not proven that he has no access to the trusts which he states he established, for Ms. Armoyan and the children, which have a combined value of $10.9 million, according to Mr. Armoyan. Mr. Armoyan states that these trusts are composed of funds which are situate in the Byblos Bank in Lebanon. Bald assertions are insufficient to prove the statements made.

[36] Finally, Mr. Armoyan has not proven that he lacks the capacity to raise security: **Ocean v. Economical Mutual Insurance Co**, ***supra*** at paras. 31 and 46; and **Sable Mary Seismic Inc. v. Geophysical Services Inc.**, 2011 NSCA 40 (C.A.) at paras. 17 and 20. There was no evidence to suggest Mr. Armoyan made any such attempts.

[37] In summary, Mr. Armoyan did not produce clear, convincing, and cogent evidence to rebut the presumption arising from Rule 45.02(3)(b). He did not prove a lack of income, a lack of means, or an inability to raise the money to post security. Mr. Armoyan is not an impoverished or impecunious litigant. Mr. Armoyan is a resourceful, shrewd and strategic businessman who is more than capable of finding a solution to any impediment which he created in his cash flow position post separation.

[38] *Unfairness Principles*

[39] This section of the rule requires the court to conduct a "circumstantial inquiry into fairness": **Ellph.com Solutions Inc. v. Aliant Inc**., 2011 NSSC 316 at para. 21, per Moir, J., and as affirmed on appeal at **Aliant Inc. v. Ellph.com Solutions Inc**., 2012 NSCA 89.

[40] In **Armoyan v. Armoyan**, ***supra***, Wood, J. stated the following three instructive points flowing from the **Aliant** case, and in reference to *Rule 45.02(1)(d)*, as follows:

> 17 In Aliant, the plaintiff conceded that the first three criteria in Rule 45.02(1) were met, leaving only the assessment of fairness for the court to consider. There are a number of comments in that decision which are instructive. The first is that the evidentiary onus is on the moving party to show that continuation without requiring security would be unfair (para. 64). In addition, the comparative financial positions of the parties is an legitimate

> circumstance to be considered (para. 93). Each case is different and the analysis and outcome of a motion for security for costs will be very fact specific (para. 101).

[41] After conducting a circumstantial inquiry into fairness, I conclude that Ms. Armoyan has proven that continuing the *ISO and MPA* proceedings without an order for security for costs would be unfair. The following reasons support this conclusion:

- The Nova Scotia Court of Appeal discussed Ms. Armoyan's untenable financial circumstances because of the conduct of Mr. Armoyan at paras. 285, 287 and 288 of its decision reported at 2013 NSCA 99, which state, in part, as follows:

> 285...Ms. Armoyan has accumulated staggering legal accounts, responding to Mr. Armoyan's initiatives, while Mr. Armoyan has defaulted in his court-ordered reimbursement of her costs after his initiatives were rejected. Meanwhile, the stays and delays that accompanied his Florida initiatives have well served Mr. Armoyan, who has used the time to avoid support payments, convey assets to relatives and move tens of millions of dollars from Nova Scotia to the Middle East. . . .
>
> 287 Mr. Armoyan now says that Florida's slate should be wiped clean, and everyone should start again in Nova Scotia, like hitting a mulligan off the first tee. Mr. Armoyan has the multi-million dollar capital to pay for this. Ms. Armoyan is in financial tatters, with no resources for a replay.
>
> 288 Had Mr. Armoyan complied with his Florida court-ordered interim support payments and with the Florida Court's orders that he reimburse Ms. Armoyan's costs, then the significance of this factor might recede somewhat. But that is not his position. Having bled Ms. Armoyan financially with litigious shenanigans, he seeks to disregard the resultant costs awards against him and the Interim Support Order, then take advantage of the financial disparity in a fresh proceeding.

- Ms. Armoyan's financial circumstances have not improved since the court's decision. She continues to be an impoverished and impecunious litigant. Mr. Armoyan is her sole means of support. Mr. Armoyan refuses

to comply with the maintenance order from the Florida Court. Although Mr. Armoyan does provide some money to Ms. Armoyan and the children, such payments are at his discretion, and are consistently and substantially less than ordered. Further, Mr. Armoyan refuses to make payments to the Florida maintenance enforcement authority. This decision causes further delays as cheques cannot be processed in a timely fashion by Ms. Armoyan's bank. Ms. Armoyan relies upon credit to meet her family's needs and to process her legal claims.

- Mr. Armoyan was in control of virtually all of the sizeable assets accumulated during the parties' lengthy marriage. Mr. Armoyan has transferred the vast majority of these assets out of the jurisdiction in an attempt to protect his own interests. He has encumbered the other assets remaining within the jurisdiction.

- Mr. Armoyan owes staggering amounts in unpaid costs awards and for maintenance arrears. There is little hope that Mr. Armoyan will voluntarily respond favourably to a further cost award at the conclusion of either the *ISO* or *MPA* proceeding, if Ms. Armoyan is successful.

- The preservation order granted by virtue of this court's decision, reported at 2014 NSSC 30, provides no financial security to Ms. Armoyan because Mr. Armoyan has few unencumbered assets left within the jurisdiction.

- A suit cost order does not stand in substitution of a security for cost order. Suit costs are a separate award and are based upon different principles. Further the amount which has been awarded in the suit cost motion is minimal in the context of this case.

[42] The views of the parties on the proper interpretation to be afforded to Rule 45.04 are significantly different. It is not necessary for this court to resolve that issue in the context of this decision. In any event, Mr. Armoyan's interpretation that the *MPA* litigation will not proceed, absent his participation, does not impact on the security for costs decision.

[43] Mr. Armoyan must make a decision. He can either post the security for costs, or he can face the consequences which flow from his refusal to do so.

[44] In summary, Ms. Armoyan has proven that it would unfair, in all of the circumstances of this case, to proceed with the *ISO* and *MPA* litigation without an order for security for costs. This conclusion is undertaken with the greatest of caution and confined to the principles enunciated in Rule 45.

[45] *Terms of Order: Rule 45.03*

[46] At this stage, I must determine the appropriate quantum of the security and the timing of the payment. In establishing quantum, I must estimate the potential costs at trial. As noted by Wood, J. in **Armoyan v. Armoyan, *supra***, such a task can be challenging because "[c]osts following trial are discretionary and intended to take account of the complexity of the issues, the conduct of the parties and offers to settle." Ms. Armoyan seeks $500,000 as security for costs. Mr. Armoyan balks at this suggestion.

[47] I find that an order for security for costs in the amount of $500,000 is appropriate for the following reasons:

- The *ISO* application is scheduled for 7 days; the *MPA* application is scheduled for 30 days. In the affidavit of Ms. LeBlanc, I am told that Ms. McGinty's hourly rate is $350 and Ms. Doucet's hourly rate is $300. It is reasonable, in the context of this case, for Ms. Armoyan to have two counsel. I note that Mr. Armoyan is represented by two counsel. Legal fees alone for the scheduled hearings will be in the range of $192,400. This does not take into account the many hours of preparation that will be required to ensure trial readiness on the multitude of issues identified, including the forensic accounting and valuation issues.

- The issues are complex. The Date Assignment Conference identified, on a preliminary basis, the issues to be litigated. The *MPA* issues are listed on p. 2, as follows:

> **V. <u>Issues to be determined:</u>**
>
> ***A. MPA proceeding: 1201-65036***

All issues cannot yet be identified because financial disclosure is not complete.

Impact of section 22:
Where was the last common habitual residence of the parties?
What is the law of the last common habitual residence?

Impact of section 29:
Is the issue *res judicata* ?
Should the marriage contract dated March 1, 2008 be confirmed, set aside or varied?

Issues surrounding classification and exemptions:
Classification of corporate assets
Reasonable personal effects
Trust for children
AR due from children to Mr. Armoyan

Valuation Issues:
Valuation of corporate assets
Valuation of matrimonial home

Type of claims being advanced:
Potential section 13 claim if corporate assets are declared business assets
Potential section 18 claim if corporate assets are declared business assets

Evidence issues:
Computer cloning information, including res judicata

Costs:
Sought by each party

Other:
Past performance of marriage contract provisions by Mr. Armoyan, and in particular to third parties at the request of Ms. Armoyan.

[48] The *ISO* issues are listed on pp. 2 and 3, as follows:

B. ISO proceeding: SFHISOA 080027, REMO/RESO#: 60829

> Whether the decision of the Nova Scotia Court of Appeal is determinative of Mr. Armoyan's applications to set aside registration of a support order made outside of Canada?
>
> Whether the defences to enforcement raised in Mr. Armoyan's prior submissions continue to apply, including:
>
> > a) Whether Mr. Armoyan had proper notice or a reasonable opportunity to be heard the proceeding in which the Florida court order(s) were made;
> >
> > b) Whether the Florida court order(s) is contrary to public policy in the Nova Scotia; and
> >
> > c) Whether the Florida Court had jurisdiction to make the Florida court order(s).
>
> Which Florida court order(s) is Ms. Armoyan seeking to register?
>
> Are costs assessed in Florida capable of being enforced pursuant to ISO legislation, and if so, in what percentage given global cost award originating in Florida.

▸ The amount involved in the *ISO* proceeding is significant. Maintenance arrears, as of October 26, 2012, were set by the Florida court at $441,105, for child maintenance; and $261,962 for spousal maintenance. Total maintenance arrears of $703,067 are outstanding as of October, 2012, together with arrears which have accumulated since that time. Mr. Armoyan states that he generally pays $10,000 per month towards the $25,000 monthly maintenance order, together with payment of some third party medical and educational obligations stipulated in the order. Mr. Armoyan states that he pays other money to the children which should also be included as maintenance payments. Ms. Armoyan disputes some of his calculations. Had Mr. Armoyan followed the payment direction of the Florida order, there would be no dispute as to arrears. Mr. Armoyan chose not to pay support as ordered; he did not direct payments to the applicable maintenance enforcement agency. He did so at his own peril. For the purposes of the arrears calculation, assuming, without deciding, that Mr. Armoyan was in arrears $15,000 per month, an additional $285,000 is outstanding for the intervening 19 month period. Thus, total maintenance

arrears are $988,067, as of May, 2014. Assigning this figure as the amount involved, costs for arrears alone, under Tariff A, would arguably amount to $64,750. The amount involved, however, should also include the enforcement of ongoing maintenance of $25,000 per month, together with the third party payments, such as medical expenses. Five years of maintenance payments would increase the amount involved by another $1.5 million, for a total amount of $2,488,067. Such would arguably equate to a cost award of $161,724.35 under Tariff A.

- The amount involved under the *MPA* proceeding has the potential of reaching approximately $20 million, about one-half of the total assets stated in Mr. Armoyan's statement of property. This would result in Tariff A costs of $1,300,000. This figure could also be significantly less if assets are removed from their presumptive classification as matrimonial assets, or if the issue of the marriage contract is found in favour of Mr. Armoyan. If the assets which Mr. Armoyan classified as business were removed, the remaining assets presumptively subject to division total approximately $14 million. The total amount in such circumstances would be $7 million, and according to Tariff A, costs would equal $455,000.

[49] In the context of this complex proceeding, given the estimates above, and without even addressing disbursements, or other adjustments permissible under Rule 77, the requested sum of $500,000 as security is readily supported.

[50] In reaching my decision, I have not factored conduct or potential settlement offers. I acknowledge that Mr. Armoyan has been compliant with all procedural requirements listed in the Date Assignment Conference Memo in respect of the *ISO* and *MPA* litigation. I will have no knowledge of settlement offers until the applications are concluded. Therefore, the issues of conduct and settlement offers have had a neutral effect on my security for costs decision.

[51] I must now specify the payment schedule. Mr. Armoyan must pay the $500,000 security for costs into court based upon the following schedule:

- The sum of $100,000 no later than May 12, 2014, in respect of the *ISO* proceeding;

- The sum of $400,000 no later than June 2, 2014, in respect of the *MPA* proceeding.

[52] Should Mr. Armoyan chose not to post the security as ordered, Ms. Armoyan may make an *inter partes* application, on abbreviated notice, of two days, for relief.

[53] ***Should an order for suit costs be granted?***

[54] *Position of the Parties*

[55] Ms. Armoyan seeks suit costs of approximately $76,000. In support of her position, Ms. Armoyan states that she is impecunious; that she established a *prima facia* case; and that her circumstances raise issues of public importance.

[56] In contesting the motion, Mr. Armoyan argues that the court lacks jurisdiction to grant the order in the absence of an express rule. In the alternative, Mr. Armoyan submits that Ms. Armoyan has not proved either a likelihood of success in her *MPA* claim, or that her claims will not be advanced without an award of suit costs. Mr. Armoyan also argues that a reasoned quantification of suit costs is impossible because the evidentiary foundation is lacking. Vague terminology is not proof. Finally, he states that the evidence of the office administrator does not assist Ms. Armoyan's claim for the various and detailed reasons outlined in his pre-motion brief.

[57] Both parties presented their case on the assumption that suit costs can only be awarded for disbursements. This decision is made in keeping with that joint submission.

[58] *Jurisdiction*

[59] I reject Mr. Armoyan's argument that the court lacks jurisdiction to grant the requested order because the rules do not specifically reference suit costs, in contrast to former rule 57.29. The court's jurisdiction to award suit costs is implicit in rule 77.02. Rule 77.02 states as follows:

> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

[60] Further, in **British Columbia (Minister of Forests) v. Okanagan Indian Band Council**, 2003 SCC 71, LeBel, J. reviewed the court's inherent jurisdiction to order interim costs: paras. 19, 22, and 35. Albeit addressing costs in a different context, the Supreme Court of Canada nevertheless commented on the applicability of suit costs in the family law setting, at para. 33, which states as follows:

> 33 As Macdonald J. recognized in Organ, supra, at p. 215, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases. In McDonald v. McDonald (1998), 163 D.L.R. (4th) 527 (Alta. C.A.), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her position (para. 18). This was because husbands usually controlled all the matrimonial property. Since the wife had "no means to pay lawyers, her side of the litigation would not be advanced, and this position was patently unfair" (para. 20). Interim costs will still be granted in family cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward. See, e.g., Woloschuk v. Von Amerongen, [1999] A.J. No. 463 (QL), 1999 ABQB 306, where the Alberta Court of Queen's Bench ordered a lump sum payment of $10,000 to the mother in a custody action by way of interim costs, finding that the father's financial position was "significantly better than that of the [mother] in terms of funding this protracted lawsuit" (para. 16); and Roberts v. Aasen, [1999] O.J. No. 1969 (QL) (S.C.J.), also a custody case, where the court held that the father was unlikely to succeed at trial and that the mother lacked the resources to pay her legal fees and disbursements, and ordered the father to pay $15,000 as interim costs. Orkin, supra, at p. 2-23, observes that in the modern context "the raison d'tre [sic] of such awards is to assist the financially needy party pending the trial; they are made where the spouse is without resources and would otherwise be unable to obtain relief in court" (citations omitted).

[61] In summary, this court has the authority to grant suit costs based upon Rule 77 and its inherent jurisdiction.

[62] *Applicable Test*

[63] In **Okanagan**, the Supreme Court of Canada identified a three part test which must be met before an award of interim costs can be granted at para. 36. These conditions are as follows:

- The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case.

- The claimant must establish a *prima facia* case of sufficient merit to warrant pursuit.

- There must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where the extraordinary exercise of its power is appropriate.

[64] This test is similar to the twofold test set out in **S.(L.K.) v. T.(D.M.C.)**, 2007 NSCA 87, para. 32, wherein the Nova Scotia Court of Appeal resolved the issue of suit costs in the context of a provincial Family Court proceeding.

[65] I have reviewed the evidence and submissions. The burden of proof rests with Ms. Armoyan. She has satisfied the burden. I base this conclusion upon the following findings:

- Ms. Armoyan is impecunious. She is not employed. She relies financially upon Mr. Armoyan who consistently flaunts his obligation to pay spousal and child support in the amount ordered by the Florida courts. Ms. Armoyan is heavily in debt. The only substantial assets which she owns or controls are unpaid judgments from Mr. Armoyan. She is an impoverished and impecunious litigant. The fact that her current counsel has funded much of the litigation in the past without payment, does not support a denial of the motion. Ms. Armoyan proved the first criteria.

- Ms. Armoyan has established a *prima facia* case of sufficient merit in the *ISO* proceeding. Ms. Armoyan is contesting Mr. Armoyan's application to set aside the registration of the Florida support order. The Nova Scotia Court of Appeal confirmed Florida's jurisdiction to adjudicate the maintenance issues. Further, *obiter* statements in the appeal judgment likewise support Ms. Armoyan's *ISO* claim. In such circumstances, there is no doubt that a *prima facia* case of sufficient merit has been proven.

- Ms. Armoyan has also established a *prima facia* case of sufficient merit in the *MPA* proceeding. This court acknowledges that the Florida order made a ruling in Ms. Armoyan's favour in respect of the marriage contract, thus establishing a *prima facia* case.

- The special circumstances or public interest criteria has also been proven in that many of the factors reviewed by the Supreme Court of Canada in **Okanagan** are present in this case. For example, Mr. Armoyan is in control of virtually all of the assets. Ms. Armoyan is at a severe disadvantage. Ms. Armoyan's financial position is compromised. This creates a danger that a meritorious legal argument will not be advanced absent the payment of suit costs.

[66] *Quantification of Suit Costs*

[67] Suit costs are an appropriate remedy in this case. Quantification becomes problematic because Ms. Armoyan did not supply the court with the type of evidence that is generally expected in a motion for suit costs, such as estimates from third party professionals. A pragmatic approach must be taken. Such an approach recognizes that a 30 day *MPA* proceeding, in which the classification and valuation of significant assets are at stake, will result in the charging of many disbursements. The court is also cognizant that substantial disbursements were incurred in the past, although some of these disbursements need not be duplicated in the future, including counsel's extensive travel costs to Florida. Communication with international clients need not be in person. In the circumstances, I order Mr. Armoyan to pay Ms. Armoyan suit costs in the amount of $25,000 on or before June 2, 2014. These funds must only be used for disbursements. At her suggestion, Ms. Armoyan must provide an accounting of the disbursement for these funds.

[68] **Conclusion**

[69] Ms. Armoyan's motions are granted. An order for security for costs in the amount of $500,000 payable in two installments, and an order for suit costs in the amount of $25,000 will issue.

[70] If either party wishes to be heard on the issue of costs, submissions are to be provided no later than May 12, 2014, with reply written submissions no later than May 16, 2014. Ms. McGinty is to prepare and circulate the order.

Forgeron, J.