SUPREME COURT OF NOVA SCOTIA
Citation: *Moseychuck v. McNeil*, 2018 NSSC 311

Date: 20181206
Docket: SATD 101919
Registry: Antigonish

Between:

Michael Moseychuck

Petitioner

v.

Colina McNeil

Respondent

Costs Decision

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions
Final Written Submissions:	October 25, 2018
Counsel:	Michael Moseychuck, self-represented, Petitioner Mallory Arnott, for the Respondent

By the Court:

Introduction

[1] This is the cost decision arising out of a divorce hearing held on March 22, 2018. That decision was reported in *Moseychuck v. McNeil*, 2018 NSSC 184 ("the decision").

Background

[2] The parties were married on July 16, 1982 and separated on December 16, 2012. At the hearing, the only live corollary issue concerned the application for a division of property brought by the petitioner Mr. Moseychuck. He contended that this should be an equal division, while Ms. McNeil took the opposite position, and argued for an unequal division of assets in her favour, principally due to the unreasonable impoverishment of the matrimonial assets by Mr. Moseychuck as a result of his gambling habit during the course of the parties' marriage. She also argued that her position was justified on the basis of some debts for which she was left responsible when the parties separated.

[3] Over the course of the decision, I concluded that Ms. McNeil had discharged the very heavy onus bearing upon her by demonstrating that an equal division would clearly be unfair or unconscionable.

[4] The decision gave rise to the following disposition:

> 141. … an unequal division of assets is awarded in favour of Ms. McNeil. To offset the $40,000.00 difference which remains in the parties' respective positions after consideration of the factors set out in s. 13 of the *MPA*($105,000.00 - $65,000.00), Ms. McNeil shall provide Mr. Moseychuck with the after tax sum of $20,000.00, which shall represent the balance owed to him by way of a division of assets. This shall be subject to my further comments about the auto loan below.
>
> 142. Mr. Moseychuck will also retain the debt with respect to the 2012 Chevrolet Cruze, for which Ms. McNeil is also liable, and shall indemnify and save her harmless with respect thereto. He testified that it is fully up to date. He provided no statements indicating what remains outstanding. He shall provide an up to date statement within 15 days to counsel for the respondent indicating the current balance. Since both parties remain jointly responsible for it, and Mr. Moseychuck's equalization payment does not reflect what remains owed on the debt, counsel shall pay, out of the equalization payment that I have determined to be the share of the Petitioner, sufficient of these funds to retire the balance of this loan in its entirety. The balance remaining (if any) shall be paid directly to the Petitioner.

> 143. Of course, the order shall also provide for the mandatory division of CPP credits.

[5] Ms. McNeil had argued for the retention by each of the parties of the assets in his or her possession. These consisted principally of pension accumulations and RSP's. My disposition indicated that she was to pay Mr. Moseychuck the sum of $20,000 less any monies that were needed to retire the indebtedness on the vehicle which he retained, for which Ms. McNeil had co-signed approximately 2 months before their separation. The Respondent was therefore substantially successful.

[6] In the course of the decision I made several negative comments with respect to Mr. Moseychuck's credibility as a whole, and some of his actions as taken throughout the course of the marriage and in the immediate aftermath of the parties' separation.

[7] At the conclusion of the decision I invited the parties to make submissions on the issue of costs if they were unable to agree. Apparently, they have not agreed and as such they have each provided me with their respective positions.

[8] Ms. McNeil seeks costs as per the following:

Disbursements:	$ 2,681.63
Costs:	$12,750.00
Total:	**$15,431.63**

[9] Mr. Moseychuck, on the other hand, states as follows:

> Costs are a discretionary matter of the court to determine, most especially in the case of family proceedings. Further, in exercising its discretion the court should look to several factors, including the nature of the litigation and subject matter, its length, complexity, delays occasioned by either or both parties and any behaviour on the respective parts of these parties that has significantly affected the conduct of the proceeding. Further, there is the element of practicality, meaning in plain terms plausibility of a cost award. In other words, is it a realistic outcome, an attainable figure, if you will, as opposed to being merely punitive in nature. (*Costs brief*, p.1)

[10] He also goes on to note at page 2 of his costs submission:

> Next, what might be considered a victory in a conventional civil matter, is not necessarily so in a divorce proceeding. Therefore, costs do not flow from the side which, to adopt the phrase, "does the better of the two parties." Many elements go into the decision-making process from which a decision is rendered. It is not as

> clear as might be the situation in a standard civil case, as to which party has the better case from the outset. Accordingly, litigation, or more particularly, its pursuit by one part, cannot be said to be vexatious or frivolous.

[11] He concludes on the following basis:

> Next, there is the matter of my health and ability to earn income to pay a cost award. I am soon to be place on kidney dialysis. I am simply unable to satisfy any cost award. I have worked hard since my break up to establish m credit and lead a more productive life. I feel my health issues along with any cost penalty could possibly push me into bankruptcy from which at 61, I don't think I could rebound. The Respondent says this is not relevant. What then is the corollary to her position? That an such award be put in place even if it serves merely as punishment or some punitive type measure of damages?
>
> Ultimately, the question is one of justice. Here the Respondent has achieved significant pecuniary advantage in terms of asset division. Her position is that such advantage must necessarily entitle her to more benefits because she has "won". Mine is that in a divorce there are no winners and where both sides have had a serious claim or claims to have adjudicated, they are each responsible for the costs of such adjudication. This is most especially the case, as here, where the party seeking further financial reward has already attained a significant one. When does enough become enough in the divorce process.

[12] His submissions conclude with the request that each party be ordered to bear his or her own costs.

Analysis

[13] The Tariffs contained in the Civil Procedure Rules have been, in their present incarnation, well scoured and analysed. My general discretion with respect to costs is unfettered.

[14] Nonetheless, there is a presumption that the tariffs are applicable, and that reliance upon them will do substantial justice between the parties.

[15] I begin with *Rule 77.01* which sets out the following:

> (1) The court deals with each of the following kinds of costs:
>
> a. Party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
>
> b. Solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;

> c. Fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> d. Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

[16] Rule 77.04 is also available for my consideration:

> 77.04 (1) A part who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
>
> (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
>
> a. The part is notified of a proceeding the party wishes to defend or contest;
>
> b. A claim made by the party is defended or contested.
>
> (3) An order against paying costs may be varied when the circumstances of the party change.
>
> (4) An order against paying costs does not apply to costs under Rule 88 – Abuse of Process, Rule 89 – Contempt, or Rule 90 – Civil Appeal.

[17] This was a divorce proceeding. The matter ultimately proceeded by way of an application in court. The parties' intent to proceed in this manner was reflected in the directive provided by Justice Scaravelli at the pre-trial conference, and the extensive affidavit evidence filed by the parties beforehand. Oral evidence provided by each party consisted of cross examination upon the affidavits each had filed.

[18] Civil procedure rule 77.06 provides the court with the appropriate frame of reference:

> (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of the Rule 77.
>
> (2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.

[19] I therefore turn to Tariff A, which provides as follows:

TARIFF A

Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding

In applying this Schedule the ?length of trial" is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

Amount Involved	Scale 1(-25%)	Scale 2 (Basic)	Scale 3 (+25%)
Less than $25,000	$3,000	$4,000	$5,000
$25,000-$40,000	$4,688	$6,250	$7,813
$40,001-$65,000	$5,138	$7,250	$9,063
$65,001-$90,000	$7,313	$9,750	$12,188
$90,001-$125,000	$9,188	$12,250	$15,313
$125,001-$200,000	$12,563	$16,750	$20,938
$200,001-$300,000	$17,063	$22,750	$28,438
$300,001-$500,000	$26,063	$34,750	$43,438
$500,001-$750,000	$37,313	$49,750	$63,188
$750,001-$1,000,000	$48,563	$64,750	$80,938
more than $1,000,000	The Basic Scale is derived by multiplying the "amount involved" by 6.5%.		

[20] There are a variety of ways in which the "amounts involved" may be calculated in a proceeding. Often, within the family law sphere, one encounters proceedings which do not readily lend themselves to such a calculation. For example, as Justice Fichaud pointed out in *Armoyan v. Armoyan*, 2013 NSCA 136:

> 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...

[21] In *Gagnon vs. Gagnon*, 2012 NSSC 137, Justice Beryl MacDonald summarized the pertinent principles which impact upon cost awards in matrimonial proceedings:

> 2. When deciding whether to award costs the *Civil Procedure Rules* provide guidance as do several decisions, including *Landymore v. Hardy (1992)*, 112 N.S.R. (2d) 410 (T.D.); *Campbell v. Jones et al.* (2001), 197 N.S.R. (2d) 212 (T.D.); *Grant v. Grant* (2000), 200 N.S.R. (2d) 173 (.D.); *Bennet v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.); *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (T.D.): Kennedy-Dowell v. Dowell 2002 CarswellNS 487; Urquhart v. Urquhart (1998), 169 N.S.R. (2d) 134 (T.D.)); *Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.D.). Several principles emerge from the Rules and the case law:
>
> 1. Costs are in the discretion of the Court.
> 2. A successful part 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 an 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 NSFX 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 mush "pa 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 $20,000.00 in order to determine the "amount involved".
10. If the award determined by the tariff does not represent a substantial contribution toward 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 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.

[22] In this case, it is possible to determine an "amount involved" for the purposes of Tariff A. I begin with the observation that Mr. Moseychuck sought an equal division of assets. What Ms. McNeil achieved was an unequal division in her favour requiring her to pay to Mr. Moseychuck $20,000 dollars less the amount needed to repay the balance owing on Mr. Moseychuck's vehicle, for which Ms. McNeil had co-signed.

[23] Neither of the offers to settle which have been made known to me avail either party. Although "coming close", Ms. McNeil's award was less than what she offered to accept beforehand. Mr. Moseychuck's offer was not close.

[24] In paragraph 128 of the decision, I broke down what assets would be involved were I to award an equal division as of the date of separation, as urged by Mr. Moseychuck. I reproduce this chart as follows:

Asset	Debt	Ms. McNeil	Mr. Moseychuck
Matrimonial home		Proceeds divided equally	Proceeds divided equally
2012 Chevrolet Cruze			No proven equity net of loan for which Ms. McNeil cosigned.
RBC RSP			$9,000.00
TFSA		$1,960.86	
DND Pension			$50,626.21 – 35% = $32,907.04 after tax

DND Pension		$328,626.41 – 35% = $213,607.04 after tax	
RBC (Dundee) #4225-C		$18,906.01 – 35% = $12,288.91	
		$227,855.95	$41,907.04

[25] I observe that the difference between the respective amounts noted therein would have been $185,948.91, which would have resulted in an equalization payment to Mr. Moseychuck of $92,974.46. As I noted above, he was awarded $20,000 dollars less the amount needed to pay out the vehicle loan. This amount is still not a known commodity, despite the direction which I provided in the decision that the car loan balance was to be provided by Mr. Moseychuck within 15 days of my decision.

[26] On the other hand, Ms. McNeil is a joint debtor with respect to this loan and presumably would be able to obtain this information from the lender directly upon request. Since the exact amount is not known, I presume she has not made a request to the lender for it either. Under the circumstances, I exercise my discretion and conclude that the amount involved is $73,000 dollars. ($92,974.46 - $20,000.00 = $72,974.46, rounded to $73,000.00)

[27] Scale 2 (the "basic scale") of Tariff A renders the sum of $9,750 dollars. This scale provides the basic, or normative award. I view it as the appropriate frame of reference for this case.

[28] Ms. Arnott has provided an affidavit dealing, *inter alia*, with the disbursements incurred in relation to this file, on Ms. McNeil's behalf. As I review the affidavit, these disbursements total $2,681.63, including the application of HST to the taxable items. I was not provided with sufficient detail to determine what the category "prints" falls into, and the $806.50 charge which is allocated to that category. I disallow this expense, not in the least because $1,013.15 was separately attributed to photocopies. I reduce the total disbursements by $806.50, together with 15% thereof for HST. The total reduction to the disbursements is therefore $927.48 which results in disbursements allowed in the amount of $1,754.15.

[29] Therefore, application of the tariffs would suggest that Ms. McNeil would receive her costs in the amount of:

1. Tariff A, Scale 2 …… $9,750.00 (amount involved $73,000.00)
2. $2,000.00 per diem …….. $2,000.00
3. Costs and disbursements ….. $1,754.15

   Total …… $13,504.15

[30] Added to this, counsel for Ms. McNeil argues, should be an amount to penalize Mr. Moseychuck for essentially post-trial conduct. As the Respondent states, at page 5 of her Costs Brief:

> The post-trial conduct of Mr. Moseychuck must also be considered. As Mr. Moseychuck was a self-represented party, this Honourable Court offered Mr. Moseychuck the opportunity to provide post-hearing submissions in writing. Mr. Moseychuck attempted to use this opportunity to present fresh, additional evidence not put forward at the hearing. As well, Mr. Moseychuck attempted to put forward evidence of events that had occurred after the completion of the hearing. Mr. Moseychuck also put forward argument not supported by evidence put forward at the hearing.
>
> As a result, Ms. McNeil had to provide a response, requesting that these new documents and information be struck from the record and not considered in the ultimate determination in the matter. This came at additional legal cost for Ms. McNeil which should not have had to be incurred. That Mr. Moseychuck did not take the time or effort to understand the rules of procedure and evidence, or retain legal counsel, should not come at the expense of Ms. McNeil. Ms. McNeil is seeking an additional $1,000 in costs for Mr. Moseychuck's post-trial conduct.

[31] Mr. Moseychuck was a self-represented party. I expressed some misgivings when I viewed his evidence, and also with respect to my findings in relation to his conduct during the marriage and in the immediate aftermath of the separation. However, I did not find that the manner in which he conducted himself at trial and/or in the immediate post-trial submissions to be such that it is deserving of censure in the form of an additional costs award against him.

[32] I am prepared to acknowledge that the Petitioner's conduct in the submission of some post-trial evidence did slightly increase Ms. McNeil's overall costs, in that it required a response and post-hearing submissions from her counsel in order to address what she perceived (and with which the court agreed) was an evidentiary irregularity. That said, the irregularity was of limited significance under the circumstances of this case, and I am satisfied that it arose out of genuine

unfamiliarity (on the part of Mr. Moseychuck) both with the rules of evidence and, also with the manner in which such evidence is to be presented to the court.

[33] I have also considered (in tandem with this) Mr. Moseychuck's submissions with respect to his financial circumstances and, when I consider everything holistically, I am of the view that his conduct did not rise to the point where it was deserving of a further financial (costs) sanction.

Conclusion

As such, Ms. McNeil will receive her costs and disbursements in the total amount of $13,504.15.

Gabriel, J.