

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Hillier vs Hillier*, 2024 NSSC 48

Date: 20240216

Docket: 1203-003848

Registry: Bridgewater

Between:

Tresina Ellen Hillier

Applicant

v.

David Wayne Hillier

Respondent

Decision on Costs

Judge: The Honourable Justice Aleta Cromwell

Cost Submissions: November 15 and November 16, 2023, in Bridgewater, Nova Scotia

Decision: February 16, 2024

Counsel: Kate Naugler for the Applicant
Rubin Dexter for the Respondent

By the Court:

Introduction

[1] Tresina Ellen Hillier, says as the more successful party, she is entitled to costs from David Wayne Hillier. She asks that I order Mr. Hillier, to pay her costs of \$15,312.50 based on Tariff A for a one-day hearing. She says two formal settlement offers were extended to Mr. Hillier and any tariff award of costs should be increased by 25% to reflect the settlement offers which were fair and made in good faith.

[2] Mr. Hillier says that he was the more successful party and costs should be payable to him of \$11,750 based on Tariff A for a one-day hearing. Alternatively, he says if a lump sum cost award were determined to be more appropriate, a substantial contribution would be 60% of his legal fees, totalling a cost award of \$10,000. Finally, if it were to be determined that success was divided between the parties, it would do justice between the parties that each bear their own costs.

Issues

[3] The following issues will be addressed:

- What was the “amount involved”?

- Who was the more successful party?
- What is the appropriate costs award?

Background

[4] Ms. Hillier sought to terminate spousal support effective December 31, 2022, following her retirement. Alternatively, she sought to vary the spousal support provisions set out in the Consent Corollary Relief Order to reduce her spousal support obligations and add a termination date.

[5] Mr. Hillier did not agree there was a material change in circumstances and opposed the termination of spousal support as well as any reduction of spousal support payable by Ms. Hillier.

[6] The variation hearing was held on May 29 and June 2, 2023.

[7] On October 4, 2023, I provided my written decision, cited as *Hillier v. Hillier*, 2023 NSSC 316. In that decision, I found the following:

- There was a material change in circumstances occasioned by Ms. Hillier's voluntary retirement effective December 31, 2022.

- Ms. Hillier’s obligation to pay the “top-up” payment for 2022 of \$36,888.00, accrued prior to her retirement and was owed to Mr. Hillier.
- Any additional “top-up” payments were terminated as Ms. Hillier’s income was no longer variable.
- Mr. Hillier demonstrated the need for ongoing spousal support from Ms. Hillier.
- Ms. Hillier had a continuing but limited ability to pay spousal support to Mr. Hillier.
- Effective January 1, 2023, spousal support would be reduced from \$4,000.00 to \$1,000.00 a month.
- Spousal support payments would terminate effective April 30, 2025.

[8] I invited costs submissions following my decision. On November 15, 2023, Mr. Hillier filed his costs submissions and Ms. Hillier filed her costs submissions on November 16, 2023.

Law and Analysis

[9] Nova Scotia Civil Procedure Rule 77 governs the awarding of costs and provide wide discretion to the court when awarding costs, including party and party costs. Party and party costs are intended to compensate the other party for the expenses of litigation. (Rule 77.01(a) and 77.02(1)).

[10] Party and party costs are to be fixed by the judge in accordance with the tariffs. Tariff A is used in an application unless the judge orders otherwise. (Rule 77.06(1) and (2)).

[11] Rule 77.07 provides for the increase or decrease of costs in accordance with the tariff depending on several factors including “the amount claimed in relation to the amount recovered” and “a written offer of settlement, whether made formally under Rule 10 -Settlement or otherwise, that is not accepted”. (Rule 77.07 (1) and (2)(a) and (b)).

[12] Rule 77.10 provides that an award of party and party costs includes necessary and reasonable disbursements.

[13] The Rules provide a mechanism to determine the “amount involved” where the main issue is a monetary claim which is allowed in whole or in part. The “amount involved” is determined having regard to (i) the amount allowed, (ii) the complexity of the proceeding, and (iii) the importance of the issues.

[14] When applying Tariff A, the “length of trial” is to be fixed by the Trial Judge. The length of trial is an additional factor with \$2,000.00 added for each day of trial.

[15] Rule 10 addresses settlement offers and costs. Rule 10.03 allows for the consideration of a written offer of settlement made formally or otherwise when determining costs. Rule 10.05 also contains specific provisions that apply to formal offers to settle and include the particulars that must be contained in any formal offer to settle. (Rule 10.05(3)(c)).

[16] Rule 10.09 provides for determining costs if a formal offer is not accepted and provides for the discretion to increase costs by certain percentages depending on when the formal offer to settle was made.

[17] Case law was provided by counsel for the parties including *Armoyan v. Armoyan*, 2013 NSCA 136, which provides the principles that should be considered when determining costs. Additional case law referenced by the parties were *C.M(P) v. C.M.*, 2021 NSSC 96; *Williamson v. Williamson*, 1998 NSCA 195; and *Davis v. Davis*, 2022 NSSC 334.

[18] Ms. Hillier sought termination of spousal support on the date of her retirement or alternatively that her spousal support obligation be reduced from

\$4,000 per month to \$954 per month based on her means post-retirement. She sought termination of spousal support after one further periodic payment representing 24 months of spousal support at the low range. Further, she agreed to the payment of the “top-up” in 2022 of \$36,888.00. The total amount claimed by Ms. Hillier was zero or alternatively \$59,784.00.

What was the “amount involved”?

[19] The main issue was a monetary claim which was allowed in part reducing Ms. Hillier’s spousal support obligations from \$4,000.00 per month to \$1,000.00 per month, terminating the “top-up” payment and terminating spousal support effective April 30, 2025. The “top-up” payment for 2022 of \$36,888.00 was owed from Ms. Hillier to Mr. Hillier.

[20] I disagree with Ms. Hillier’s suggestion that the amount involved was \$120,888.00 representing the difference between the spousal support order of \$4,000.00 per month and the judgement of the court of \$1,000.00 per month. She suggested using the difference of \$3,000.00 per month multiplied by the duration of spousal support to April 30, 2025, a period of 28 months.

[21] I prefer the submissions of Mr. Hillier in this regard and agree that the amount involved, was \$64,888.00 reflective of the “top-up” payment of \$36,888.00 plus spousal support for a further 24 months at \$1,000.00 per month.

[22] Therefore, I find the amount involved was \$64,888.00.

Who was the more successful party?

[23] Each party has argued that they were more successful than the other at the hearing.

[24] Although neither party was wholly successful on all issues, in my view, Ms. Hillier was more successful overall and entitled to costs. I say this for the following reasons:

- Ms. Hillier demonstrated a material change in circumstances occasioned by her retirement.
- Although the “top-up” payment of \$36,888.00 was found to have accrued in 2022 prior to Ms. Hillier’s retirement and was owed to Mr. Hillier, any ongoing requirement to pay a “top-up” was terminated.
- Ms. Hillier’s spousal support obligation was significantly reduced from \$4,000.00 to \$1,000.00 per month.

- A termination date of April 30, 2025, for spousal support payments was provided.

What is the appropriate cost award?

[25] Although the hearing was scheduled for two days, I have set the trial time at one day. I have excluded the time necessary to address the motion to strike brought by Mr. Hillier, heard at the commencement of the hearing.

[26] The amount involved was \$64,888.00. The hearing was not complex nor were the issues of particular importance except to these parties. In my view, Scale 2, as suggested by both parties is appropriate, in all the circumstances.

[27] Ms. Hillier has suggested that she made two notable *formal* settlement offers to Mr. Hillier on May 17, 2023, and May 26, 2023. She suggests the settlement offers were reasonable, and she obtained a “favourable judgment”. She asks for the tariff costs to be increased by 25% in accordance with Rule 10.09(2)(d) as the offer was made after the finish date.

[28] The offer provided by Ms. Hillier on May 17, 2023, provided for spousal support to terminate effective May 31, 2023, with one final periodic payment of spousal support representing two years of spousal support in the amount of \$954

per month (total periodic payment of \$22,896.00). The “top-up” payment for 2022 of \$36,888.00 to be paid with no costs payable by either party.

[29] The offer provided by Ms. Hillier on May 26, 2023, was like the previous offer and differed only in the amount of the periodic payment. That offer included two equal periodic payments representing spousal support for two years in the amount of \$1,113.00 per month (total periodic payments of \$26,712.00).

[30] In my view, a “favourable judgment” was not obtained by Ms. Hillier in accordance with Rule 10.09. No formal offer to settle was provided in accordance with Rule 10.05. Two with prejudice letters were provided by Ms. Hillier. Furthermore, the last offer was provided the Friday prior to the commencement of the hearing on Monday, May 29, 2023. The offer was not provided at least one week before trial. Finally, the judgment given was better for Mr. Hillier, than the offer provided by Ms. Hillier. Spousal support continued for a further 28 months and did not terminate on May 31, 2023.

[31] Although I have found that there was no formal offer to settle, clearly there were two written offers to settle made by Ms. Hillier. Offers to settle are but one factor to be considered when exercising my discretion to increase or decrease a cost award using the tariff.

[32] After consideration of Rule 77.07 (2) and the offer to settle and the amount claimed by Ms. Hillier, I decline to exercise my discretion to increase the tariff amount. In my view, after considering the submissions of counsel, cost principles and case authorities provided, a one-day hearing using Tariff A, Scale 2 based on an “amount involved” of \$64,888.00 will do justice between the parties.¹

Conclusion

[33] Mr. Hillier will pay costs to Ms. Hillier of \$9,250.00 payable by no later than April 1, 2024.

[34] Counsel for Ms. Hillier will draft the necessary order.

Cromwell, J.

¹ The “amount involved” was between \$40,001-\$65,000 on Scale 2 (Basic) reflective of costs of \$7,250 plus \$2,000 for a one-day hearing.