**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Illingworth v. MacIntyre*, 2024 NSSC 164

**Date:** 20240604
**Docket:** 1201-071561
**Registry:** Halifax

**Between:**

Douglas James Illingworth

Petitioner

and

Patricia Blaire MacIntyre

Respondent

**Judge:** Justice Lawrence I. O'Neil

**Heard:** February 28 and March 1, 2023, in Halifax, Nova Scotia

**Counsel:** Douglas Illingworth, Self-Represented
Hannah Rubenstein, Counsel for Patricia MacIntyre

**By the Court:**

## Introduction

[1] This is a costs decision.

[2] The background to this litigation is put forth in a written decision, *Illingworth v. MacIntyre*, 2023 NSSC 105 and the oral decision delivered on March 1, 2023. Mr. Illingworth's submissions on costs were received April 29th, 2024.

## 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* when applying an amount involved assessment to determine costs payable by a party. The Rule provides *inter alia*:

> **General discretion (party and party costs)**
>
> 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.
> . . . . .
>
> **Assessment of costs under tariff at end of proceeding**
>
> 77.06 (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 this Rule 77.
> . . . . .
>
> **Increasing or decreasing tariff amount**
>
> 77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> (a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

(c) an offer of contribution;

(d) a payment into court;

(e) conduct of a party affecting the speed or expense of the proceeding;

(f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

(g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

[4] Justice B. MacDonald, then of this court, summarized the applicable principles when assessing costs in *L. (N.D.) v. L. (M.S.)*, 2010 NSSC 159 and 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 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 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] 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.

[6] Arriving at a costs assessment in family matters is difficult given the often-

mixed outcome and the need to consider the impact of an onerous costs award on the families; and 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.

[7] As noted, Rule 77.07 provides that tariff costs may be increased or decreased after considering enumerated factors.

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

[9] 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.

[10] 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)).

[11] In *Godin v. Godin*, 2014 NSSC 46, I ordered costs of more than $28,000 following a five-day hearing and after having increased the scale by 50% to reflect Ms. Godin's *mal fides* in the conduct of the proceeding.

[12] In *Darlington v. Moore*, 2016 NSSC 84, I ordered costs of $50,000 against Mr. Moore. Mr. Moore appealed resolution of the substantive issues. He was unsuccessful and additional costs of $20,000 were awarded against him. Clearly cost awards can be substantial.

[13] Our Court of Appeal reviewed the law governing awards of costs in family proceedings in *Armoyan v. Armoyan*, 2013 NSCA 136. It is helpful to incorporate the court's discussion of the basis upon which costs are ordered and the meaning and effect of Rule 77. 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, signaling 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 v. 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 Aamount 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).

[14] Ms. Rubenstein, on behalf of Ms. MacIntyre, seeks costs of $11,818 as a contribution to her total costs of $21,195.58 inclusive of Ms. MacIntyre's fees, taxes and disbursements.

[15] The requested costs award is calculated by her on the basis of an amount involved using an amount involved multiplier of $20,000 for each of the two (2) days of trial and the application of scale 3 (+25%) referenced in R77.07(2).

[16] On behalf of Ms. MacIntyre, it is claimed she was the successful party.

[17] Mr. Illingworth, a self-represented litigant, asserts the costs claim by Ms. MacIntyre is excessive. He says the outcome was mixed and the decisions of the Court were nuanced, and aspects of the Court's decisions were, in fact, favourable for him.

[18] He argues the intervention of the Court was made necessary by Ms. MacIntyre's refusal to align his child support obligation with his income.

[19] Ms. McIntyre says the change in circumstances relied upon by the Court was based on Mr. Illingworth's poor behaviour. She says the Court did not grant the change in decision-making authority sought by Mr. Illingworth and accepted Ms. MacIntyre's limits on communication.

[20] Further, she says the Court accepted Ms. MacIntyre's preferred language about access to the children for Mr. Illingworth when Ms. MacIntyre was visiting Cape Breton.

[21] She says the Court did not reduce child support arrears.

[22] She argues Mr. Illingworth engaged in unreasonable and vexatious behaviour and he rejected two (2) offers to settle on terms more favourable to him.

[23] Mr. Illingworth's arguments and concerns were not without merit on all issues. The Court's decisions in response to the numerous issues to be resolved was in some cases mixed. However, the most significant factor which explains the need for this litigation was Mr. Illingworth's rigid thought process and resistance to accepting the legal principles the Court is required to apply.

[24] The strained relationship between the parties and mistrust of each other was another. Each party must accept some responsibility for that reality having developed.

[25] Most recently, in *Bennett v. Pettipas* (2023 NSSC 322), I ordered a costs award valued at $22,500 in favour of Mr. Bennett following a two (2) day hearing and summation on a third day.

[26] I found Mr. Bennett the more successful party. His counsel sought a costs award of $36,154 reflecting fees of $55,621.87.

[27] In that case, Mr. Bennett was the more successful party. Significantly, the Court found Ms. Pettipas "attempted to mislead the Court and offered others [witnesses] to give evidence in support of that objective" (para 28)..

[28] Herein, I am satisfied a costs award of $6,000 in favour of Ms. MacIntyre inclusive of taxes and disbursements appropriately reflects the principles governing costs awards.

[29] This shall be paid at the rate of $150 each month on the 1st day of each month. This obligation shall commence on the 1st day of the month following the month in which Mr. Illingworth makes his final payment on the child support arrears as required by clause 10 of the Court's variation order dated March 2023.

O'Neil, J.