

SUPREME COURT OF NOVA SCOTIA

FAMILY DIVISION

Citation: Gouthro v. Gouthro, 2018 NSSC 21

Date: 2018-01-25

Docket: *Sydney* No. 1206-6910

Registry: Sydney

Between:

Brenda Lee Gouthro

Applicant

v.

Martin Gouthro

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Cost Submissions: October 13, 2017
December 7, 2017

Decision: January 29, 2018

Counsel: Damien Barry, counsel for the Applicant
Darlene MacRury, counsel for the Respondent

By the Court:

Introduction

[1] Virtually all issues surrounding the parties' separation and divorce were the subject of a lengthy trial held over several days in 2016 and 2017. An oral decision was rendered on September 18, 2017, followed by a written decision on December 7, 2017. In my decision, I invited counsel to provide written submissions on costs absent an agreement. Ms. Gouthro filed her costs submissions on October 13, 2017 while Mr. Gouthro filed his on December 8, 2017. Both parties seek substantial costs against the other.

Issue

[2] **Should costs be awarded to either party?**

[3] *Position of Ms. Gouthro*

[4] Ms. Gouthro seeks costs of \$26,313 against Mr. Gouthro for various reasons including the following:

- Ms. Gouthro was the successful party on issues involving parenting, unequal division of assets, imputation of income, and retroactive and prospective child support.
- Numerous reasonable offers to settle were rejected by Mr. Gouthro.
- Mr. Gouthro unnecessarily lengthened the proceeding by his failure to disclose and by his inappropriate conduct.
- This court made negative findings against Mr. Gouthro including findings which held that he was not credible, and that he was evasive, strategic, vague, inconsistent in his evidence, and cavalier with his disclosure obligation.
- Ms. Gouthro was forced to seek interim relief because Mr. Gouthro claimed a shared parenting arrangement where one did not exist in an effort to avoid paying child support.
- Ms. Gouthro's legal account includes fees and disbursements of \$34,285.92.

[5] *Position of Mr. Gouthro*

[6] Mr. Gouthro seeks costs of \$20,000 against Ms. Gouthro for several reasons, which include the following:

- Ms. Gouthro did not make an offer to settle within the meaning of the Rules.

- Without prejudice settlement proposals were exchanged. Ms. Gouthro's settlement proposals suggested that Ms. Gouthro retain all matrimonial assets valued over \$400,000 while Mr. Gouthro would retain the business assets which had no equity.
- Mr. Gouthro received a better outcome from the court than he would have received had he accepted Ms. Gouthro's settlement proposal.
- Ms. Gouthro assumed an inflexible approach throughout the negotiations and trial. Mr. Gouthro's only option was to litigate in such circumstances.
- Mr. Gouthro did his best to supply relevant financial disclosure.
- Mr. Gouthro has little income or property. He has no ability to respond to a cost award.

[7] *Law*

[8] Rule 77 governs awards of costs in matters before the Supreme Court of Nova Scotia. In the leading case of **Armoyan v. Armoyan**, 2013 NSCA 136, Fichaud, J.A., reviewed principles that are to be applied when determining costs. The following relevant points stem from that decision:

- The court's overall mandate is to "do justice between the parties": para. 10
- 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": para. 11.
- Unless otherwise ordered, party and party costs are quantified according to the tariffs. The court has discretion to raise or lower the tariff costs applying listed factors, which include unaccepted written settlement offers, and the conduct of the parties insofar as it affects the speed or expense of the proceeding: paras. 12 and 13.
- The Rule permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14 and 15.
- The basic principle is that a cost award should afford a substantial contribution to the parties' reasonable fees and expenses which means not a complete indemnity, but rather more than 50 and less than 100% of a lawyer's reasonable bill for services: para. 16.
- 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. Some cases, however, bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion may assume trial functions; a case may have no "amount involved"; efforts may be 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 work load that is far disproportionate to the court time by which costs are assessed under the tariffs; there may be rejected settlement offers, formal or informal, that would have saved everyone significant expense: paras. 17 and 18.

- When subjectivity exceeds a critical level, the tariffs may be more distracting than useful. In such a situation, it is more realistic to circumvent the tariffs and channel that discretion directly to the calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law: para. 18.

[9] In **Armoyan v. Armoyan**, *supra*, the Court of Appeal held that a lump sum was more appropriate in that the proceeding ripened with features of a complex trial that consumed 10 days of hearing over 11 months; the matter was not remotely equivalent to a conventional chambers motion; there was no amount involved; the conduct of Mr. Armoyan affected both the speed and expense of the proceeding; and a lump sum award was necessary to do justice between the parties.

[10] In calculating the appropriate lump sum, the Court of Appeal employed percentages based upon the rejected settlement offer. The Court of Appeal applied a percentage rate of 66%, as representative of the substantial contribution for legal fees and disbursements incurred before the settlement offer, and 80% after the settlement offer. \$306,000, which included disbursements, was awarded in total.

[11] In **Cameron v. Cameron**, 2014 NSSC 325, this court discussed the costs implications associated with non-disclosure. Costs consequences arise because incomplete disclosure unreasonably lengthens litigation and negatively impacts on the integrity of the litigation process, which is particularly repugnant in the family law setting.

[12] *Decision*

[13] After reviewing the submissions of the parties, the law, and the evidence, I have determined that Mr. Gouthro must pay costs of \$14,000 to Ms. Gouthro for the following reasons:

- The amount involved is difficult to tabulate because the contested issues included parenting, the imputation of income and the payment of prospective child support.
- Ms. Gouthro's legal account does not provide a time breakdown. It is difficult to conduct a reasonable analysis in such circumstances.
- Ms. Gouthro was the more successful party on the issues of parenting, unequal division and child support.
- Mr. Gouthro was the successful party on the issue of spousal support.

- The informal settlement offers do not mirror the financial outcome granted in my decision.
- Mr. Gouthro's failure to disclose resulted in obstructionism, impeded settlement, and negatively affected the integrity of the litigation process.
- Mr. Gouthro's failure to provide timely and complete disclosure also prolonged the proceeding. The case assumed a complexity and an increase in work load that was disproportionate to the issues being addressed, primarily because of Mr. Gouthro's litigation conduct.
- The divorce trial was conducted over seven days, not all of which were full days. There were also other court appearances, some of which generated additional costs awards. I will not duplicate costs for such appearances.
- This award will do justice between the parties in the circumstances of this case.

Conclusion

[14] Mr. Gouthro must pay costs of \$14,000 inclusive of disbursements to Ms. Gouthro which is payable forthwith. Mr. Barry is to draft the order.

Forgeron, J.