



**SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE**

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FAX COVER SHEET

Date: November 15, 2010

TO:

FAX NO.:

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FROM: The Honourable Madam Justice Spies

TOTAL PAGES (INCLUDING COVER PAGE): 22

MESSAGE:

Murphy v. Murphy

Please see Endorsement on Costs of today's date in the above noted matter attached.

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CITATION: Murphy v. Murphy, 2010 ONSC 6204

COURT FILE NO.: 06-FD-322641FIS

DATE: 20101115

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SHELLEY LEIGH MURPHY, Applicant

AND:

TIMOTHY LAURENT MURPHY, Respondent

BEFORE: Justice Spics

COUNSEL: *Edwin Flak*, for the Applicant

Gary Joseph, for the Respondent

HEARD: In Writing

ENDORSEMENT ON COSTS

Introduction

[1] Ms. Murphy, the Applicant, and Mr. Murphy, the Respondent, are embroiled in a lengthy arbitration before Mr. Malcolm C. Kronby, which began on October 5, 2009. The issues include what are the best custody and access arrangements for their twelve year old daughter, child and spousal support, section 7 expenses and equalization.

[2] On May 12, 2010, the Respondent served the Applicant with a motion, returnable on May 20, 2010, in this court, to remove Mr. Kronby as arbitrator for the parties' proceedings. The Applicant opposed this motion.

[3] On May 20, 2010, the parties appeared before Perell J. who adjourned the recusal motion to June 14, 2010, to allow it to be heard on a long-motions day and reserved costs to the judge hearing the motion. Perell J. also ordered that Mr. Kronby should be able to rule on his own recusal first and directed the parties to proceed as such.

[4] On June 7, 2010, Mr. Kronby declined to recuse himself. At 1:00 p.m. on June 9, 2010, Mr. Kronby served the parties with an affidavit he had sworn to be considered by this court on the recusal motion. At 6:42 p.m. on the same day, the Respondent served the Applicant with a notice of withdrawal of his recusal motion. Since this was after 4:00 p.m., it took effect June 10, 2010. Notwithstanding receipt of the notice of withdrawal, the Applicant finalized and served additional recusal-motion materials on the Respondent on June 10, 2010.

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[5] On June 14, 2010, no judge was available to hear this matter and Mr. Joseph was advised by Mr. Cameron of the Family Law Office that the matter would not be heard. It came before me on June 15, 2010, apparently because Mr. Flak persuaded Mr. Cameron to put the matter on my list. Mr. Flak sought costs thrown away of the withdrawn motion but had not prepared a Costs Outline, although he had the time to prepare a factum that partially dealt with costs and finalize a further affidavit of the Applicant sworn on June 9th, that in part explains her position on costs. Mr. Flak did bring a bill of costs to court that set out what appeared to be a summary of his firm's dockets with respect to the Respondent's motion. In his reply factum Mr. Flak submits that his bill of costs was in court "despite not needing to be delivered that day, according to convention." I do not know what convention he is referring to. Counsel should attend court and be prepared to argue costs at the end of the argument of a motion, whether the decision is reserved or not. When a claim for costs of this magnitude is made, a Costs Outline should be served on opposing counsel in advance where possible.

[6] Mr. Joseph requested an adjournment with costs as he needed time to review Mr. Flak's bill of costs and required the firm's dockets, particularly as the recusal motion had already been argued before Mr. Kronby on materials filed before him. Mr. Joseph was concerned about how Mr. Flak had allocated the time between the two motions. He also took the position that he needed time to prepare a responding affidavit to the June 9th affidavit of the Applicant. To make some use of the court time, I heard the submissions of Mr. Flak and then adjourned the matter and ordered the parties to exchange certain materials in the interim.

[7] The parties filed their materials as per my order and I heard the balance of their oral submissions on September 2, 2010. As well on that date I heard costs submissions with respect to a motion I heard on August 31, 2010, which determined where the parties' daughter would attend school starting the following week, for her seventh grade.

Positions of the Parties-The Recusal Motion

[8] The parties agree that the Respondent is responsible to pay the Applicant for the costs of the withdrawn motion. They are, however, in disagreement as to the quantum of costs that should be awarded to the Applicant.

Position of the Applicant

[9] The Applicant asks that the Respondent pay her costs of the withdrawn motion on a full recovery basis in the amount of \$79,650.33, all inclusive. Mr. Flak submits that the Respondent's failure to accept the Applicant's offer to settle, provided the day after the Respondent served his motion, entitles her to recovery of her full costs. In addition, the Applicant argues that the Respondent acted in bad faith, or at least unreasonably, both in his conduct of the case to this point and by making what the Applicant alleges are serious misrepresentations in his affidavits filed in support of his recusal motion.

[10] In the alternative, in her reply factum, the Applicant suggests that the Respondent pay the Applicant reduced costs of at least \$77,530.33 all inclusive. The Applicant suggests that this reduced amount gives credit to the Respondent for concerns raised in his responding factum but does not provide any breakdown of what the reduction of \$2,120.00 corresponds to. The

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Applicant's third position is that the Respondent pay \$50,000, plus GST, for the Applicant's costs, which is the amount that was proposed by the Applicant on June 15, 2010, in an attempt to reach a settlement on the costs motion.

[11] The Applicant argues that her costs are reasonable given the seriousness and importance of the Respondent's motion and the implications a successful motion would have had on the arbitration process. The thrust of the Applicant's position is summarized in her June 9th affidavit. She claims that her lawyers required a vast amount of effort and costs and that she was delivering all of the material to:

show the Court evidence of the ordeal Tim's behaviour and motion put me through. I had to oppose Tim's motion with all of my slim resources because, for one, if Tim's motion, succeeded, I would almost certainly lack means to pursue over two million dollars in claims before another arbitrator. I was fighting for my financial life.

Position of the Respondent

[12] In his factum, the Respondent requests an order that the costs of the withdrawn motion and the costs of the arbitration as a whole be dealt with by the court appointed arbitrator in the case. I am not at all clear what jurisdiction I have to make such an order. In any event, in my view as the recusal motion was brought in this court and withdrawn, this court should determine the issue of costs, consistent with *Family Law Rule* 24(10).

[13] Dealing with the merits of the claim for costs, the position of the Respondent is that the amount sought by the Applicant is outrageous and excessive, and not proportional to the issue on the motion. The Respondent does concede that some costs must be paid by him to the Applicant by virtue of the withdrawal of his motion, however, suggests that \$10,000¹ is appropriate. The Respondent does not take the position that the Applicant did not do better than her offer to settle but he does refute the Applicant's allegations of bad faith and misconduct and argues that his motion was proper and was geared at intervening in the arbitral process which was "entirely off the rails."

[14] The Respondent also argues that the Applicant acted unreasonably in responding to the recusal motion by raising a number of issues that were irrelevant to that motion. He also takes issue with the number of lawyers the Applicant had working on the file and some of the work that was billed for. Also, the Respondent argues that the Applicant should not be awarded costs for any work done after the notice of withdrawal was served.

¹ At para. 1(b) of the Respondent's factum an amount of \$10,000 is suggested, which is consistent with the affidavit of the Respondent sworn July 30, 2010 at para. 5. I have therefore assumed the reference in para. 2 of the factum to an amount of \$1,500 is in error.

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The Law

[15] Although not strictly governed by Rule 12(3) of the *Family Law Rules*, which provides for the withdrawal of all or part of an application, answer or reply, in my view, the provisions of that rule should govern the withdrawal of a motion by analogy pursuant to Rule 1(7). My conclusion in this regard is reinforced by Rule 14(16) which provides that a party making a motion may withdraw it in the same way as an application or answer is withdrawn under Rule 12. Accordingly, it is clear that the Respondent shall pay the costs of the Applicant in relation to the withdrawn motion up to the date of the withdrawal, unless the court orders or the parties agree otherwise. As already stated, the Respondent concedes that, by virtue of the withdrawal of his motion for recusal of the arbitrator, costs must be paid to the Applicant.

[16] Costs in Ontario family law cases are governed by Family Law Rule 24. However, the discretion to award costs under s. 131 of the *Courts of Justice Act*, as circumscribed by the *Family Law Rules*, continues to apply to family law proceedings: *M.(A.C.) v. M.(D.)* (2003), 67 O.R. (3d) 181, [2003] O.J. No. 3707 at para. 40 (C.A.). Additionally, the factors listed in Rule 57.01 of the *Rules of Civil Procedure* continue to apply to family proceedings pursuant to Family Law Rule 1(7): *Khan v. Yakub*, [2008] O.J. No. 4286 at para. 26 (S.C.).

[17] Family Law Rule 24(4) provides that a successful party who has acted unreasonably may be deprived of all or part of their costs. Rule 24(5) sets out how the court should decide whether a party has behaved reasonably or not. Family Law Rule 24(11) provides a list of factors for the court to consider when setting the amount of costs including: the importance, complexity or difficulty of the issues; the reasonableness or unreasonableness of each party's behaviour in the case; the lawyer's rates; the time properly spent on the case, including conversations between the lawyer and the party or witnesses; drafting documents and correspondence; attempts to settle; preparation, hearing, argument, and preparation and signature of the order; expenses properly paid or payable; and any other relevant matter.

[18] In addition to considering all of the factors set out above and the factors set out in Rule 57.01 of the *Rules of Civil Procedure*, I must also consider the principle that fixing the quantum of costs is not a mechanical exercise of calculating hours times rates. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 at para. 26 (C.A.). In doing so, I must stand back from the fee produced by the raw calculation and assess the reasonableness of the counsel fee from the perspective of the losing party: *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638, [2005] O.J. No. 160 at para. 8 (C.A.).

Analysis-The Recusal Motion

[19] There are a number of issues that I will consider in assessing the appropriate quantum of costs to award to the Applicant for the costs of the withdrawn motion:

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(A.) Is the Applicant entitled to full recovery of her costs?

This requires a consideration of the offer to settle served by the Applicant on the Respondent and whether or not the Applicant has persuaded me that the Respondent has acted in bad faith. It also requires consideration of whether or not full indemnity costs should be recoverable following a withdrawal of a motion. If the Applicant is not entitled to full recovery of her costs, what proportion of the Applicant's costs should be recoverable in all of the circumstances?

(B.) What quantum of costs is the Applicant entitled to?

This requires a consideration of the allegations made by the Respondent that the Applicant acted unreasonably by including irrelevant material, driving up her costs, and an assessment of the reasonableness of the costs claimed, having regard to the Respondent's allegations that the Applicant's claim for costs is excessive and not proportionate because of the hourly rates claimed, the use of multiple lawyers and staff, and the fact Applicant's counsel continued to work on materials for the motion after the Respondent served his notice of withdrawal. In considering quantum, the fact that the Respondent has not submitted his own bill of costs to permit for comparison of the time spent by his counsel preparing for the motion must also be considered.

A. Is the Applicant entitled to full recovery of her costs?

(i) The Applicant's offer to settle

[20] On May 13, 2010, the day after being served with the motion to remove Mr. Kronby as arbitrator, the Applicant provided the Respondent with an offer to settle the motion. When this matter was first argued on June 15, 2010, Mr. Flak advised that he had just realized that he had failed to sign the offer. By the time the matter was argued on September 2, 2010, Mr. Flak had filed an affidavit from his law clerk who deposed that the offer delivered to Mr. Joseph's office was executed by both the client and counsel. Mr. Joseph did not file reply evidence on this point and although he maintained that the offer he was served with was not signed by counsel, he did not suggest that that should be a reason to disregard it. Had he wanted to take that position he would have had an obligation to reply to this further affidavit filed by Mr. Flak. I, therefore, have assumed that the offer met the requirements of Rule 18(4).

[21] Although I note the cover letter from Mr. Flak is dated May 14, 2010, according to the affidavit of his law clerk, the offer to settle was served by fax at 12:53 p.m. on May 13, 2010, which is consistent with the transmission information. It contained the following terms:

- If the Respondent accepted the offer by 4:00 p.m. on May 14, 2010, the motion would be dismissed without costs.
- The Respondent could accept the offer until ten seconds after the commencement of the argument of the motion but only on the basis that Mr. Murphy pay the Applicant's costs for the motion in an amount set by the court on May 20, 2010, within 48 hours of the court's ruling.

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[22] Mr. Joseph did not argue that this offer effectively expired as of May 20, 2010, although some argument on the motion was heard on that date by Perell J. In my view, a fair reading of the offer is that it would remain open for acceptance until ten seconds after the hearing of the motion on the merits, which would have been on June 15, 2010, had there not already been a withdrawal of the offer. I, therefore, find the offer did not expire prior to withdrawal of the motion.

[23] The cost consequences of making an offer to settle are governed by Rule 18(14). All of the preconditions of the subsection are clearly met in this case save I must consider whether or not the Applicant obtained an order that is as favourable as or more favourable than the offer. Although no order resulted from the withdrawal of the motion, in my view the issue is whether or not the withdrawal of the motion, with the court fixing costs payable within 48 hours, is a result that is as favourable or more favourable than the offer.

[24] In considering the offer, it is relevant that the Respondent was only provided with approximately 27 hours in which to consider the offer and accept the term that provides for the motion to be dismissed without costs. Although I appreciate that there was not a lot of time, given the motion was only served about a week before the hearing of the motion, in my view that was not sufficient time for the Respondent to consider the offer. This is important because this was the only real compromise made by the offer.

[25] Considering the balance of the offer after May 14, 2010, the offer provides that costs are to be fixed by the court but does not specify whether or not the Applicant intended to ask for costs on a full recovery basis or only some proportion of full indemnity costs. That made for some uncertainty for the Respondent in accepting the offer. However, given the *Family Law Rules* only use the terms "costs on a full recovery" or just "costs," in my view, the offer should be considered on the basis that costs on a full recovery basis were not being requested. As it has not been argued that the Applicant should be denied costs, then it can be said that this aspect of the offer is at least as favourable as the position the Applicant is in now.

[26] However, I must consider the fact that any costs order would not likely have required the Respondent to pay the costs within 48 hours of the court's ruling unless the court had found that the Respondent had acted in bad faith, in which case Rule 24(8) would have required the court to order that the Respondent pay the costs immediately. In this case, for the reasons that follow, I have not found that the Respondent acted in bad faith. As such, I must assume that any order for costs would not have been payable immediately or within 48 hours and to that extent the Applicant was not more successful with the withdrawal than had the offer been accepted.

[27] Although the timing of the payment of costs could be seen as a relatively minor matter, and pursuant to Rule 18(16) I am still able to consider the written offer to settle, in my view it is significant that the offer for the period after May 14, 2010, did not reflect any compromise on the part of the Applicant. In the context of a civil proceeding, the Court of Appeal, in *Celanese Canada Inc. v. Canadian National Railway Co.*, [2005] O.J. No. 1122, held that for a plaintiff to be entitled to the presumptive award of costs on a substantial indemnity basis, the offer to settle had to reflect a real element of compromise (at paras. 36-37). A similar conclusion was reached by Rutherford J. in a family law case: *R.K. v. M.B.*, [2000] O.J. No. 4121 at para. 7 (S.C.).

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[28] Parties in family law proceedings are encouraged and expected to exchange offers to settle in advance of the hearing of motions and, of course, trials. If it were sufficient for a party to serve an offer simply providing that an entire motion be dismissed with costs to be fixed by the court, in my view that would usually not reflect a serious attempt to resolve a matter. In this case the Applicant's offer reflected the fact that there was really no way to compromise to settle the motion. Had the motion proceeded, there would have been one of two outcomes: Mr. Kronby would have been compelled to recuse himself, or not. This means however, that absent bad faith, the Respondent should not be faulted for not accepting the offer or serving his own offer to settle: see *Cornaz v. Cornaz-Nikyuluw*, [2005] O.J. No. 5609 at para. 7 (S.C.).

[29] For these reasons, I have decided that the offer to settle in this case does not entitle the Applicant to full recovery of her costs.

(ii) Did the Respondent act in bad faith?

[30] Pursuant to Rule 24(8), if the Applicant has persuaded me that the Respondent has acted in bad faith then I must decide costs on a full recovery basis and order the Respondent to pay them immediately. Mr. Flak relies on the decision of Justice Perkins in *C.S. v. M.S.*, [2007] O.J. No. 2164 at paras. 16-17 (S.C.), where he explained that:

“bad faith” is the representation that one's actions are directed toward a particular goal while one's secret, actual goal is ...something that is harmful to the other persons affected....At some point, a person could be found to be acting in bad faith when their litigation conduct has run the costs up so high that they must be taken to know their behaviour is causing the other party major financial harm without justification.

[31] Mr. Flak also relies upon the decision of *Ontario (Director, Family Responsibility) v. Grant*, [2003] O.J. No. 1931 at paras. 6, 8, and 10 (S.C.), for the proposition that conduct that is intended to deceive or mislead can establish bad faith.

[32] The Applicant alleges that the Respondent's motion was brought for an ulterior motive, namely to derail the arbitration. Mr. Flak relies on the reasons for dismissal of the recusal motion by Mr. Kronby, who states that if Mr. Murphy perceived circumstances that might give rise to a reasonable apprehension of bias, he must have known about these for months as his affidavit on the motion refers to matters at the hearings in October 2009 and January 2010. The last arbitration hearing date before the recusal motion was brought was on January 15, 2010. Mr. Flak submits that this delay was deliberate and that this motion was really an attempt to derail the arbitration which was scheduled to continue on June 8, 2010.

[33] In a responding affidavit sworn July 30, 2010, the Respondent denies all of the allegations of the Applicant in both her affidavit of June 9, 2010, as well as her affidavit of May 18, 2010. In particular, the Respondent denies that he delayed in bringing the motion and states that time was needed to review the transcripts, obtain advice and determine whether or not he had sufficient grounds to proceed with the motion. In a letter to Mr. Flak dated June 3, 2010, attached as an exhibit, Mr. Joseph advised that he received instructions to proceed with a recusal motion at the end of March 2010, and that throughout April, research including review of

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legislation was done and the transcripts, which they did not receive until April 5, 2010, were reviewed. He went on to say "due to the volume of materials, and work that needed to be done, it took time to prepare the materials... We notified your office about our intentions as the grounds were finalized (and prior [to] the completion of our motion material)."

[34] Although the relief sought in the motion was obviously intended to compel Mr. Kronby to recuse himself, Mr. Flak has not satisfied me that the delay in bringing the motion was for some ulterior motive. Although it can be argued that the timing was suspicious, I do not have sufficient evidence to support the conclusion that the delay was deliberate or that the motion was brought for an improper purpose. The Respondent has explained in his affidavit why the motion was brought when it was. Although Mr. Flak has filed evidence that his firm had the transcripts on February 16, 2010, that does not mean that the evidence of the Respondent as to when Mr. Joseph obtained the transcripts is not true. There is, therefore, an explanation for the timing of when the motion was brought. Furthermore, the decision to bring such a motion is a drastic step given the nature of the motion and was so in this case, particularly after Perell J. directed the Respondent to first bring the motion before Mr. Kronby. I do not accept Mr. Flak's submission that it was too late by then to abandon what he characterized as a very serious attack on the arbitrator. As an experienced counsel, I find it hard to believe that Mr. Joseph would have recommended the bringing of such a motion if he did not believe it could succeed, given the obvious risk of alienating the arbitrator if the motion failed.

[35] Mr. Joseph submitted in oral argument that, in fact, the arbitration was going well for the Respondent and gave me a number of examples. I did not consider these submissions as they are not in the evidence. That said, Mr. Flak has not persuaded me of any reason for the Respondent to try to derail the arbitration except his general allegation that the Applicant has slim financial resources and had the arbitration been derailed it would have been a financial disaster for her. On the evidence, I could not conclude that that was the Respondent's motive in bringing the motion. In fact, the Respondent alleges that the Applicant is responsible for the delay of the arbitration and deposes that the motion was brought because he believes the arbitral process is "entirely off the rails" and needs the intervention of this court. That would suggest the Respondent is not immune to the costs of these proceedings.

[36] I have also considered the timing of the withdrawal of the recusal motion to see if this suggests an ulterior motive. The Respondent withdrew his motion four days prior to the scheduled hearing of the motion. Mr. Joseph submits that this timing is not suspicious in that the notice was served two days after Mr. Kronby denied the Respondent's motion that Mr. Kronby recuse himself and a few hours after Mr. Kronby advised counsel that he intended to file evidence on the hearing of the motion and provided his affidavit. This was a significant event that required further consideration on the part of the Respondent and I have no reason to assume that this was not the impetus for the withdrawal of the recusal motion. This is not a situation where, for no apparent reason, counsel merely gets cold feet and chooses to withdraw a motion. I, therefore, am not satisfied that the motion was brought for an ulterior purpose.

[37] The Applicant also alleges that the Respondent misrepresented portions of the transcripts in his supporting affidavit for the motion for recusal. In her affidavit of June 9, 2010, there is a chart that is over 16 pages long taking issue with the Respondent's references to transcripts in his supporting affidavits; alleging misrepresentation, omissions, distortions, misquotes and wrongly

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paraphrased passages. She also gives examples of alleged historical non-disclosure by the Respondent and what she alleges are "deceptive statements in sworn documents." Included in her exhibits are documents such as the party's financial statements, the agreement of purchase and sale of the matrimonial home, and all previous affidavits, endorsement, orders and arbitral awards. According to the Applicant's affidavit, this material was filed so that the court would gain some appreciation of the magnitude of the work product which Mr. Kronby had to deal with and to show the court evidence of the "ordeal" the Respondent had put the Applicant through. Most of the Respondent's conduct that is complained of is outside of the scope of the recusal motion, but is relied upon in support of the Applicant's position that the Respondent has already compounded her legal costs by

chronically non-disclosing information. Tim's motion to remove Mr. Kronby was latest attempt to intimidate me by his much greater means relative to mine. If successful, it would derail the arbitral proceeding and leave me without the financial ability to go forward.

Needless to say, the material was unnecessarily voluminous and, in my view, apart from the chart dealing with the transcript references to the arbitration proceedings, much of it was totally irrelevant to the recusal motion. I will return to the significance of the Applicant's irrelevant allegations of non-disclosure and other issues when I consider the reasonableness of her conduct.

[38] In his responding affidavit sworn July 30, 2010, the Respondent sets out his own 21 page chart responding to the Applicant's allegations that he mischaracterized what has gone on before Mr. Kronby.

[39] If this motion had been argued and decided on the merits, I would no doubt be able to consider the conduct of the parties as it relates to the conduct of the recusal motion. In order to consider Mr. Flak's submissions with respect to the transcripts and the merits of the motion, I would have had to permit argument on the merits of the motion, or at least on the accuracy of the ninety or so transcript references. The cost to do so would have been out of all proportion to the task of fixing costs. I made it clear to counsel on June 15th that I was not going to hear the merits of the motion that was withdrawn in order to decide the question of costs of the withdrawal of that motion. As it was, several hours were spent dealing with costs on June 15th and again on September 2, 2010.

[40] For these reasons, I am not satisfied that the Respondent has acted in bad faith in bringing the recusal motion and withdrawing the motion and so this is not a basis upon which I should award the Applicant her costs on a full indemnity basis. However, this conclusion does not preclude me from considering if the conduct of the Respondent was unreasonable within the meaning of Rule 24(11)(b) and whether his behaviour has caused the costs of this motion to exceed what would ordinarily be expected.

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(iii) What is the effect of the withdrawal of the motion?

[41] As already stated, if I consider this matter by analogy to Rule 12(3), unless this court orders otherwise, the Respondent shall pay the costs of the Applicant up to the date of the withdrawal of the motion. It is significant that unlike Rules 18(14) and 24(8), this rule does not mandate full recovery costs. That said, given the discretionary nature of costs, I could order full recovery costs as a matter of my discretion; see *M.(A.C.) v. M.(D.)*, *supra* at para. 40.

[42] In this regard, as Mr. Flak submits, I can also consider the civil authorities, where the courts have found that solicitor and client costs may be appropriate in certain cases where motions are abandoned: see, for example, *Yang v. Mao*, [1995] O.J. No. 1323 at para. 37 (Ct. J. (Gen. Div.)). In that case, Winkler J. (as he then was) considered Rule 37.09 (3) of the *Rules of Civil Procedure* and concluded that the court has discretion to award costs on a substantial indemnity basis where a motion is abandoned – in that case, a motion for an injunction. Winkler J. held that substantial indemnity costs should be awarded, although the facts are quite different from the case at bar. Part of the court's reasoning was that with injunctions, the opposing party is put to the expense of replying, often on an emergency basis, only to have the motion withdrawn when responding materials are served, in which case "the only means by which the court may punish such an abuse is by an award of solicitor and client costs": at para. 39. Although no findings of fact were made, Winkler J. noted that it was in the face of the opposing party's materials and the prospect of cross-examination that resulted in the plaintiffs withdrawing their motion.

[43] The only case that was brought to my attention, dealing with costs in a family matter following the withdrawal of a motion, is the decision of Justice Shaw: *Petit v. Petit*, [2007] O.J. No. 2213 at para. 3 (S.C.). He was of the view that the fee claimed of \$14,000 "would produce a result that was contrary to the fundamental objective of access to justice" at para. 14 and awarded costs in the amount of \$3,500 plus disbursements.

[44] Justice Aston in *Sims-Howarth v. Bitcliffe*, [2000] O.J. No. 330 (S.C.) at paras. 3-4, stated that, in his view, the concept in the civil rules of the two traditional scales of costs – namely what are now called partial indemnity costs and substantial indemnity costs – are no longer the appropriate way to quantify costs under the *Family Law Rules*. Instead, the court must fix the amount at some figure between a nominal sum and full recovery, having regard to the factors set out in Rule 24(11). Although it is true that the *Family Law Rules* do not refer to partial and substantial indemnity costs, and, therefore, the court is not bound to consider those scales in fixing costs in a family proceeding, in my view consideration of at least what would be considered a reasonable partial indemnity award for costs can be of assistance in certain cases. It is still the norm for counsel in family proceedings to set out the hourly rates charged to their client and what they propose would be a reasonable partial indemnity rate. In fact, I note that in a case decided later that same year, *Osmar v. Osmar*, [2000] O.J. No. 2504 (S.C.), Justice Aston awarded costs on a partial indemnity basis up to the time an offer to settle was served and recovery "that approaches full recovery" for the costs incurred thereafter, which he later quantified at 85% of the total costs claimed, because the wife's offer did not trigger the automatic costs consequences of Rule 18(14).

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[45] In my view, in this case it would not be fair or reasonable for the Applicant to be limited to partial indemnity costs and I find the reasoning in *Yang, supra* applicable. This was not a motion that was driven by an urgent need to obtain interim relief such as child support. This was a motion that the Respondent chose to bring, and although I have not found that he acted in bad faith in doing so, he knew that the motion raised a serious issue and that the Applicant would incur substantial costs to resist the motion. Although on the one hand, it could be argued that the Applicant would not have recovered full indemnity costs had the motion been argued and dismissed, given my conclusions on the offer and bad faith, in my view as a matter of fairness, the Applicant should receive a generous award of the costs that she could reasonably have been expected to incur from the time Mr. Joseph advised that such a motion would be brought to the time the notice of withdrawal was received by Mr. Flak. In these circumstances, in my view the Applicant should be entitled to substantial indemnity of her costs which, in my view, would be in the range of 80% of the amount charged. This, of course, is subject to a review of what is reasonable, including the argument made by the Respondent that the conduct of the Applicant was unreasonable in defending the motion.

B. What quantum of costs is the Applicant entitled to?

[46] Both parties, in their costs submissions, have argued that my decision on costs should be impacted by the misconduct they have alleged against the other party.

(i) Did the Respondent act unreasonably?

[47] Having found that I am not satisfied that the timing of the motion and withdrawal was for an improper purpose, I could not conclude that this conduct was unreasonable. However, I will consider the timing of the motion when I consider the reasonableness of the costs of the Applicant claimed, recognizing that the Applicant had considerably less time to prepare for the original return of the motion than the Respondent did. Apart from that, in my view, the alleged delay on the part of the Respondent in bringing the motion and withdrawing the motion is not relevant to the quantification of costs.

(ii) Did the Applicant act unreasonably?

[48] As for the reasonableness of the conduct of the Applicant, Mr. Joseph submits that irrelevant information was included in the Applicant's affidavits and factum. Although the Applicant's affidavit of May 18, 2010, was filed for the argument of the recusal motion on the merits, it sets out a summary of the background of this litigation from the perspective of the Applicant including references to settlement discussions, equalization claims, spousal support and the custody, access and child support issues including a chart with respect to claims for retroactive support. Mr. Joseph submits this was clearly designed to convey a negative impression of the Respondent to the court. In fact, of the 49 paragraphs in the affidavit, only a few relate to the recusal issue. Although there is an allegation that the recusal motion was brought "in a desperate attempt to derail the arbitration to avoid the consequences of the exposure of his [the Respondent's] misconduct," in my view that was not a response to the recusal motion on the merits. The issue was whether or not Mr. Kronby should be compelled to

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recuse himself. The fact that the Applicant deposes that there was insufficient time to fully respond to the merits of the recusal motion does not justify filing an affidavit that is largely not responsive or relevant.

[49] As for the affidavit sworn on June 9, 2010, it sets out in 15 pages the alleged misrepresentations from the transcripts by the Respondent which is responsive to the recusal motion but still includes four pages setting out "Some Examples of Tim's History of Incomplete and Late Disclosure." In fact, this theme is even repeated in the factum suggesting that the failure to make disclosure could somehow justify costs on a fully recovery basis for the withdrawn motion, which clearly is not correct.

[50] When a court considers whether a party's conduct is unreasonable in fixing costs of a motion, it is the conduct with respect to the motion that is to be considered, not all of the conduct of the party to the time of the hearing of the motion. Understandably, the Respondent has felt compelled to respond to these various allegations, which has unnecessarily increased his costs.

[51] Accordingly, I accept Mr. Joseph's submission that a great deal of information that is not relevant to a consideration of the merits of the recusal motion was included in the Applicant's affidavits. Whether or not there had been any issues with respect to disclosure or child support could only have been included to colour the record. The Applicant should not be awarded costs for the preparation of material that was intended to colour the record, was not germane to the motion and unnecessarily increased the complexity of the issues, notwithstanding her view that the Respondent's behaviour has been an "ordeal."

[52] Mr. Flak submits that the work that was undertaken conformed to the Applicant's instructions, and in fact in his bill of costs, the summary for May 13, 2010 states that: "Client emphasizes that case cannot continue if motion succeeds and we are to spare no effort." I accept that was the Applicant's position; however, "spare no effort" does not mean "waste my money." As a senior, experienced family law counsel, Mr. Flak had a duty to advise the Applicant not to waste her financial resources on preparing irrelevant materials for the court and incurring costs that she would not recover for this work. As a very significant amount of the Applicant's material was directed to irrelevant issues, there must be a very substantial deduction for that time spent as well as the cost of copying these voluminous materials.

[53] The Respondent also asks that I consider that the Applicant alleged contempt that was not proven and that the Respondent had lied in his affidavits. As already stated, I am not prepared to consider whether or not there were, in fact, misrepresentations. That could only have been determined had the recusal motion been argued on the merits.

(iii) The Applicant continued to work on the motion after it was withdrawn

[54] The Respondent also takes issue with the actions of the Applicant in filing additional motion materials after his notice of withdrawal was served, at least to the extent this material was finalized after receipt by Mr. Flak of the notice of withdrawal.

[55] Mr. Flak submitted that he needed to finalize the June 9th affidavit of the Applicant on the night of June 9th so that the court "could appreciate the nature of the misrepresentations Tim made in sworn materials." This submission makes it clear, as did Mr. Flak's initial oral

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submissions to me, that he wanted to argue at least this aspect of the merits of the motion. It should have been obvious to Mr. Flak, however, that to argue even just the issue of the accuracy of the transcript references would consume unnecessary costs. Although service of the notice of withdrawal was not effective until June 10th, in my view, once it was *received* on the evening of June 9th, Mr. Flak and his colleagues should have immediately stopped docketing time to the merits of the motion and should have focused instead on preparing for the Applicant's claim for costs. The fact the notice was not effective until June 10th did not give Mr. Flak and his staff a licence to continue to docket to dealing with the merits of the motion. To the extent they did so, those costs will not be recoverable.

[56] The Applicant's bill of costs provides for motion-related billings on June 9th, 10th and 11th. There is no distinction in the June 9th billings for work completed prior to, and after receipt of the notice of withdrawal. The time spent on that day totals \$4,491 of the total amount claimed. In my view there must be a deduction for the time spent on the 9th, although not too significant given that the notice of withdrawal was not received until early evening. However, a further \$5,213 was spent on June 10th and \$3,915 on June 11th for a total of \$9,039. There should have been no time docketed on the 10th or 11th unless it related to the claim for costs. I have reviewed the dockets on those days and none refer to work specifically on the claim for costs save for work on the factum prepared for the attendance on June 15, 2010, which is 11 pages long, and some research on the issue of bad faith. Clearly spending over \$9,000 on the issue of costs is excessive and there must be a substantial reduction of the time spent. I note the bill of costs ends with the time on June 11th and does not include any of the work after that date, which based on the earlier dockets I expect resulted in further substantial charges to the client. I am prepared however, to consider attendance costs although, had Mr. Flak prepared a Costs Outline in advance of the attendance before me, a second attendance might not have been needed.

(iv) Respondent's failure to submit a Costs Outline for the motion to remove the Arbitrator

[57] The Respondent alleges that the Applicant's claim for costs is excessive and not proportionate to the amount of work reasonably required given the nature of the motion. However, the Respondent has not provided the court with a Costs Outline for his counsel's motion preparation for comparison purposes.

[58] In his reply factum Mr. Flak submits that Mr. Joseph's dockets would disclose the start time for the preparation of the motion and would likely reveal that the Respondent was preparing for a very long time and chose to serve his material only the week before the motion to ambush the Applicant. As this submission was made in the reply factum, I have not drawn this adverse inference from the fact I do not have Mr. Joseph's dockets.

[59] There is some authority to support the proposition that, although an unsuccessful party is not required to reveal information about costs, the failure to do so may impair that party's ability to make any meaningful submissions on costs: *Hauge v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660 at para. 15 (S.C.); *Anderson v. St. Jude Medical, Inc.*, [2006] O.J. No. 508 at para. 27 (Div. Ct.) and *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2003] O.J. No. 990 at para. 10 (S.C.). In fact, a failure to reveal this information has previously been used as a factor

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in finding that such information, if disclosed, would not assist the non-disclosing party in showing that the time or amounts claimed by the other side's lawyers are unreasonable: *Dean v. Mister Transmission (International) Ltd.*, [2009] O.J. No. 992 at para. 13 (S.C.).

[60] While this is only a factor for consideration, and not determinative in my overall analysis on costs, I do infer that the Respondent's failure to disclose his own costs of preparing the motion suggests that this information would not support his position that the time spent by Mr. Flak's firm is excessive. This is consistent with Mr. Joseph's letter to Mr. Flak dated June 3, 2010, I have already referred to, where Mr. Joseph referred to the volume of materials, and work that needed to be done, that took time to prepare the materials. However, even if I assume that Mr. Joseph in fact charged an amount to his client that is comparable to what is claimed by Mr. Flak, that in my view would not support the Applicant's claim for costs given my conclusion, as set out below, that the costs claimed are excessive. Whether or not both counsel have charged their clients excessive amounts for the recusal motion is not evidence of what the *reasonable* expectation of a party should be with respect to costs in a case like this. The court must not condone excessive claims for costs as that would condone the conduct of counsel and the parties that leads to such excessive claims. In this regard I agree with the comments of D.S. Ferguson J. in *Khan v. Yakub*, [2008] O.J. No. 4286 at para. 32 (S.C.) that to legitimize the amounts charged to the Applicant for this motion by her counsel is "unthinkable."

(v) The reasonableness of the Applicant's costs

[61] While the issues outlined above are relevant to my determination of the quantum of costs to award the Applicant, the core of my analysis centers on the reasonableness of the Applicant's costs to respond to the Respondent's withdrawn motion for the recusal of the arbitrator.

[62] I will first consider what hourly rates would be reasonable. Mr. Joseph submits that the Costs Grid should be taken into account and that Mr. Flak's office did not do so. All of the hourly rates claimed are on a full indemnity basis and they are as follows: Mr. Flak (1986 call) \$530; Leonardo Mongillo (2003 call) \$315; Amit Dor (2002 call) \$305; Frank Perriccioli, senior law clerk, \$180; Michelle Gonsalves, senior law clerk, \$145; Anthony Di Battista, law student, \$150; and Erica Blackbird, law clerk, \$100. Although three other names appear in the dockets, they are not referenced in the bill of costs and so I assume no time is claimed for them.

[63] These hourly rates are all above the grid for substantial indemnity costs. They are however, actual rates charged to the client and I note are within the range of the rates charged by Mr. Joseph and Mr. Stangarone, as set out in the bill of costs provided by Mr. Stangarone for the school motion. Although I appreciate this is a family law matter where the Costs Grid never applied and that it no longer applies in civil matters, it is still a helpful "guidepost," although I must consider the fact that it is somewhat out of date: *Feng v. Phillips*, [2006] O.J. No. 1708 at paras. 36-39 (S.C.). With that in mind, I would not say that the hourly rates on a full indemnity basis are unreasonable, although the rates claimed for Mr. Mongillo and Mr. Dor and the senior law clerks are high. In any event, as I have decided not to award costs on a full indemnity basis, the hourly rates must be reduced.

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[64] The Applicant is seeking \$79,650.33 in costs to respond to the withdrawn motion. Based on the breakdown of the time as set out in Mr. Flak's bill of costs, approximately 236 lawyer/staff hours were spent on the withdrawn motion for the recusal of the arbitrator, as follows:

Event	Approximate Time (hours)	Lawyer/Staff Cost
Work in contemplation of the Respondent's pending motion	4	\$2,120.00
Preparation of motion material by Applicant responding to Respondent's motion, preparation of factum, preparation of Offer to Settle motion	119.1	\$35,967.00
Prepare for and attend at the May 20, 2010 motion before Perell J.	31.8	\$11,417.00
Recusal motion before M. Kronby (10% of costs allocated to this claim for costs)	11.1	\$3,410.40
Preparation of supplementary materials for court motion returnable June 14, 2010	70.4	\$20,419.50
TOTAL	236.4 hours	\$73,333.90 w/o GST

[65] Mr. Flak advises that the claim for costs does not include costs for preparation for and attendance before me, preparation of the factum,² and the affidavit of his law clerk.³

[66] In considering the factors in Rule 24(11), I accept the submission of the Applicant that the recusal motion raised an issue that she needed to vigorously defend and that a lot was at stake. This was also something the Respondent should have expected given the relief sought. I have also considered the fact that the Applicant took issue with the Respondent's description of approximately 90 excerpts from the transcripts and her position that his description of what he said happened during the hearing was intentionally and strategically used to misrepresent to the court what happened. Mr. Flak submits that the necessary transcript review relating to correcting

² This appears to be incorrect as there are dockets for the factum that I presume is the one filed for the June 15th appearance before me.

³ I presume the one dealing with the issue of whether the offer to settle was signed.

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the distortions of evidence proved to be an enormous and expensive job and that this necessitated the lengthy supplementary affidavit of the Applicant sworn on June 9, 2010. I accept this submission as well although in my view the job was not as expensive as he suggests. The thrust of the recusal motion was the Respondent's complaints about how Mr. Kronby was conducting the arbitration and a concern about the relationship between Mr. Kronby and Mr. Flak based on things said by each of them on the record of the arbitration. The fact remains, however, that the only material filed that was truly responsive to the recusal motion was the chart in the Applicant's June 9, 2010 affidavit setting out her position of what the nine days of transcript in fact stated or demonstrated. I have already referred to the fact that the Applicant increased the complexity of the issues by arguing the case as a whole. As a very significant amount of the material the Applicant prepared was directed to these irrelevant issues, there must be a substantial deduction for that time spent as well as the cost of copying these voluminous materials. I should add however, that even considering all of the material that was prepared, I cannot fathom that the time would total anywhere near the 236 hours of time that is claimed.

[67] On the question of overlap, between May 20, 2010 and June 7, 2010, when the recusal motion was heard by Mr. Kronby, Mr. Flak's office prepared affidavit material that would be used on the motion before Mr. Kronby and this court. Mr. Flak has submitted that the costs related to the motion before Mr. Kronby were carefully segregated from the costs for the motion before the court and that he has only claimed 10% of the costs related to the two affidavits sworn on June 3rd in the claim for costs before this court because of this overlap. I accept that Mr. Flak is not double counting, and that his claim for costs does not include the costs that the Applicant has claimed for the recusal motion heard by Mr. Kronby, which are approximately \$30,000. However, this means that Mr. Flak has charged his client the staggering sum of \$110,000 for the withdrawn recusal motion and the recusal motion heard by Mr. Kronby. Even taking into account the fact that the material filed by the Applicant included a considerable amount of irrelevant material, I do not understand how the combined costs could be so high, particularly given that the two motions raised essentially the same issues.

[68] Mr. Joseph submits that, of the 25 entries on the Applicant's bill of costs, only two had one lawyer performing a task on the Applicant's file. The remaining 23 days had between two and six people working on the file in one day. It is also submitted that there is significant overlap in the work performed by the staff and lawyers at Mr. Flak's office. In particular, it is noted that costs are claimed for various people performing the same or similar tasks on more than one occasion. A detailed list is then set out which I have considered.

[69] With respect to this assertion, I must consider the fact that Mr. Flak had very little time to respond to the original return date of the motion. As Mr. Flak submits, the fact the Applicant only had eight days before the original return date of the motion, should weigh against the Respondent in my analysis of costs and should also increase the reasonableness of the amount spent by the Applicant to respond to the motion that had been weeks in the making. Mr. Flak submits that multiple lawyers and clerks – a division of labour, was required to cope with the voluminous material in that short period. I agree with this submission to some extent. Mr. Joseph cannot seek to justify his delay in bringing the motion by reference to the amount of work that he needed to do over a period of several weeks and then complain about the fact Mr. Flak devoted considerable staff to respond to the motion in the few days he had to do so. However, given that just over 120 hours was spent responding to the original return of the motion, I do not understand

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why the original response did not include the chart dealing with the transcripts. Had Mr. Flak focused on what was relevant, that clearly could have been completed and included with the May 18th affidavit of the Applicant, particularly given the number of staff he decided to devote to the case.

[70] Furthermore, once the matter was heard by Justice Perell and adjourned, Mr. Flak should have been able to deal with it more efficiently. I do not have to consider the costs incurred on the motion before Mr. Kronby, as he will determine those costs, but there was now some time to finalize preparations for the return of the motion before this court. Although delegation to junior counsel in a case like this is to be encouraged, if too many lawyers are involved there will no doubt be unnecessary duplication. Although in the context of a consideration of full recovery costs, the comments of Wildman J. in *Sepisahvili v. Sepiashvili*, 2001 CarswellOnt 3459 at para. 20 (S.C.), are relevant here:

A client is not entitled to direct vast resources to litigation and expect full reimbursement. When the rules use the term "full recovery costs", there is an implied qualification that the costs incurred must be reasonable. *There must be some assessment of the most effective use of resources to present the case, and some attempt to approach the matter in a cost-effective manner.* (emphasis mine)

[71] Even if a bill of costs accurately reflects the amount of time spent on a matter, such time may not be justifiable; *Boucher, supra* at para. 29. In *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222, [1998] O.J. No. 2897 at para. 91, Morden A.C.J.O. speaking for the Court of Appeal stated:

I do not view it to be the court's function when fixing costs to second-guess successful counsel on the amount of time that should or could have been spent to achieve the same result, *unless the time spent is so grossly excessive as to be obvious overkill.* (emphasis mine)

[72] In the same vein, Justice Killeen in *Pagnotta v. Brown*, [2002] O.J. No. 3033 at paras. 24-25 (S.C.), stated:

...if lawyers wish to expend such grossly inordinate amounts of billable hours on relatively routine cases, they may feel free to do so, subject to their client's approval, but they cannot expect judges to encourage such inefficient expenditures of time when their costs are to be fixed following upon a trial.

...judges...have a duty to fix or assess costs at reasonable amounts and, in this process, they have a duty to make sure that the hours spent can be reasonably justified.

[73] Mr. Joseph submits that costs should be deemed excessive where they make litigation inaccessible as a method of dispute resolution and where they are disproportionate to the value of legal work necessary to represent a client in a dispute. *Buchanan v. Geotel Communications Corp.*, [2002] O.J. No. 3063 at paras. 10-11 (S.C.).

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[74] Although the *Family Law Rules* have not been amended to reference the principle of proportionality, I have considered this principle as well. Accessibility to the court is of critical importance in all family law cases. Furthermore, there are often children who are being held ransom by the litigation process while their parents expend thousands of dollars in fighting each other; money that would be much better spent on the care and education of the children. This certainly appears to be one of those cases.

[75] Mr. Flak relies on *Cimmaster Inc. v. Piccione (c.o.b. Manufacturing Technologies Co.)*, 2010 ONSC 846, [2010] O.J. No. 456 at para. 19, where D.K. Gray J. stated:

Proportionality should not result in reduced costs where the unsuccessful party has forced a long and expensive trial. It is cold comfort to the successful party, who has been forced to expend many thousands of dollars and many days and hours fighting a claim that is ultimately defeated, only to be told that it should obtain a reduced amount of costs based on some notional concept of proportionality. *In my view...the concept of proportionality appropriately applies where a successful party has over-resourced a case having regard to what is at stake*, but it should not result in a reduction of the costs otherwise payable in these circumstances. (emphasis mine)

[76] All of these cases essentially say the same thing; I must consider whether or not Mr. Flak over-resourced the Applicant's defence of this recusal motion having regard to what was at stake. In addition, I must consider the fact that a significant amount of the material that he prepared was not responsive to the recusal motion and in my view included only to colour the record. In doing so, I do not propose to do a detailed analysis of the dockets day by day. In light of the direction in *Boucher*, that would be unnecessary and in any event, even with detailed dockets, it would be difficult if not impossible to do. The essential question is what is reasonable, taking into account all of the relevant factors.

[77] Each case turns on its own facts, but it is important to consider that the amount of costs claimed in this case for the withdrawn recusal motion, in my experience, is on par with costs awards for trials in this court. A comparison of a couple of other cases illustrates this point:

- *Paranavitana v. Nanayakkara*, [2010] O.J. No. 1566 (S.C.) full indemnity costs ordered for a lengthy custody trial in the amount of \$72,000.
- *Cimmaster, supra*: costs of \$67,446 awarded. Proceedings involved a 6-day trial with claims and counterclaims arising out of a sale of goods.

[78] In fact costs for a trial in the family court costs awarded are often significantly less than the amount claimed in this case, see for example *Spears v. Spears*, 2010 ONSC 4882 (CanLII), where I awarded \$40,000 in costs after a hotly contested six day trial dealing with custody, access and support issues, *Farrar v. Farrar*, [2002] O.J. No. 152 (S.C.), where fees claimed for a five day trial were reduced from \$70,727 to \$25,000.

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[79] In deciding what is fair and reasonable in this case, I am mindful that the expectation of the parties concerning the quantum of a costs award and the Court of Appeal's guidance in *Boucher* of the chilling effect of excessively high bills of costs which exceed any fair and reasonable expectation of parties: *Boucher, supra* at para. 38. In this case, as I have already stated, the costs claimed are grossly excessive and even if the Respondent has paid a comparable sum, such a claim cannot be endorsed by this court. The material prepared was largely irrelevant and the time spent by counsel and staff was well out of proportion to the claim for costs even though the issue to be argued was of critical importance to the Applicant.

[80] Although as I have stated I am prepared to award the Applicant a generous amount for her costs of the withdrawn recusal motion. Having considered all of the relevant factors, and the reductions needed to reflect the wasted time on irrelevant issues, the unnecessary duplication by the use of many lawyers and staff, particularly after May 20, 2010 resulting in excessive time expended, and the fact I have decided not to award full indemnity costs, in my view a reasonable and generous amount for fees, including the preparation of materials for costs and the attendances before me is \$25,000, inclusive of GST. As for the disbursements claimed, I intend to reduce some of the photocopying charges and the considerable fees paid to serve all of the material on June 11th. I find that the sum of \$2,000 inclusive of GST is reasonable for disbursements.

Analysis – The School Motion

[81] The Respondent seeks costs of this motion on a partial indemnity basis in the amount of \$7,510.84 which includes HST; \$6,448.80 for fees and \$838.34 for disbursements. Mr. Mongillo, from Mr. Flak's office, who argued this issue, submitted that the Applicant achieved some success on the motion with respect to the issue of the parties' daughter continuing to attend the Turning Pointe Academy. He complained about some duplication on two particular days when Mr. Stangarone docketed twice each time and submitted that costs in the amount of \$1,500 be awarded. He raised no issue with the disbursements claimed.

[82] In my view the Respondent was clearly the successful party on this motion and my term that he provide reasonable assistance to the Applicant for their daughter's travel to her dance classes after school, during those weeks when she is residing with her mother, does not undermine this success. The only issue then is the reasonableness of the claim for costs. The hourly rates on a full indemnity basis of Mr. Joseph and others who worked on this motion are lower than the rates Mr. Flak charges the Applicant. The partial indemnity rates claimed are 60% of the full indemnity rates which in my view is reasonable. The bulk of the time on the motion was by Mr. Stangarone, a 2005 call and so the work was properly delegated to keep costs down. The only issue I see is that both Mr. Joseph and Mr. Stangarone docketed for the attendance on the motion before me. I note that Mr. Flak had Mr. Mongillo with him although I do not know if he charged the client for his time. I do not have any information from Mr. Mongillo as to what the Applicant was charged for this motion and so the same adverse inference that I was asked to draw on the withdrawn motion applies, although in this case I have considered that the time spent by Mr. Flak's firm was likely comparable.

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[83] I agree with Mr. Mongillo that the issue was not complex and that it was very important to both parties. I do not accept his submission that it is relevant that this was a custody matter or that the Applicant acted reasonably and that the Respondent did not. In fact, I found that the conduct of the Applicant in renting an apartment to secure a place for their daughter at the school she prefers was really a sham. However, although this was relevant to my decision on the merits, I have not considered this on the issue of costs.

[84] Having considered all of the relevant factors, in my view a reasonable amount to award the Respondent for costs of this motion on a partial indemnity basis is \$7,000 for fees and disbursements, all inclusive.

Disposition

[85] Having considered all of the relevant factors, for these reasons stated, I find that the Respondent should pay the Applicant her costs of the withdrawn recusal motion in the sum of \$25,000 for fees and \$2,000 for disbursements all inclusive, for a total of \$27,000. As for the school motion, I find that the Applicant shall pay the Respondent the sum of \$7,000 for fees and disbursements, all inclusive, which is to be set off from the amount of costs owing by the Respondent to the Applicant. Accordingly, the Respondent shall pay the Applicant the net amount of \$20,000, within 30 days of the release of this decision.

A message for the parties

[86] A copy of this decision shall be provided by counsel to their respective clients so that I can insure that they understand what my concerns are as to how they have conducted this litigation.

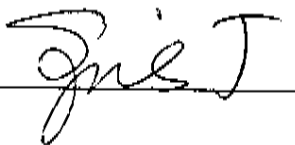
[87] The Applicant claims that she has over \$2 million at risk in the arbitration. That is, of course, a significant sum, but if these motions are any example, the costs of this case are already out of proportion to what is at stake and the arbitration is not yet complete. This does not appear to be a case where the parties have access to unlimited funds to fight these battles without considering the legal costs. The Applicant complains that she has limited financial resources and, as already set out, complains about the Respondent's conduct in this litigation, which she characterizes as a "style of combined stealth and hyper-aggression." The Respondent complains that the case has been protracted and acrimonious and that the conduct of the Applicant has led to an unnecessarily long arbitration. Both complain the other has been unreasonable in efforts to settle the matter. Both I am sure have other and better uses for their financial resources than this litigation.

[88] Although I have only seen the tip of the iceberg, this proceeding has clearly become unduly protracted and acrimonious. I am not in a position to judge who is at fault for this matter becoming such a high conflict and costly proceeding, or more likely to what extent each of the parties are contributing to this, but I am very concerned that the parties have lost sight of what the real issues are. They have a young daughter who must come first. I have no doubt that she is adversely impacted every day that this dispute continues. The parties must understand that she is not immune to this conflict even if they have done their best to keep her out of it.

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[89] It is not unusual for the parties in family proceedings to be governed by their emotions but I expect counsel, particularly senior family law practitioners, as the parties have retained in this case, to properly advise their clients and not accept instructions that will unnecessarily run up the costs of both parties.

[90] I hope the parties reflect on their actions and realize that their young daughter is no doubt being seriously impacted by their separation and this conflict. Furthermore, after the dust settles they will both have an ongoing obligation to financially support their only daughter. I sincerely hope for her sake that she will not suffer much longer from this ongoing conflict or because of the fact her parents are choosing to spend considerable funds on this litigation instead of what could be more productively spent on her current and future financial needs. I trust that counsel can assist the parties in focusing on what issues can be settled, what issues must be litigated and then resolve this matter as efficiently and expeditiously as possible.



SPIESS J.

Date: November 15, 2010