IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Law Firm v. Client*, 2022 NSSM 46

Date: 20221230
Claim: No. [Redacted]
Registry: Halifax

Between:

Law Firm

CLAIMANT/DEFENDANT

and

Client

DEFENDANT/CLAIMANT

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: September 17, 18, and 30, 2022 in person, and October 19, 2022 by Teams , in Halifax, Nova Scotia

Counsel: Jocelyn Campbell, KC and Kelcie White, for the Law Firm
William M. Leahey, for the Client

Balmanoukian, Adjudicator:

[1] Almost 70 years ago, Lord Denning bemoaned that "this case ought to have been simple, but the lawyers have made it complicated."[1] With the advent of quick and easy ways to proliferate documents and information, the complication of the otherwise straightforward has become the rule rather than the exception.

Introduction and background, and a word on the language of this decision

[2] This was a hotly contested taxation of a senior lawyer's account to her client in a lengthy and complex family law matter. In all, the Client filed two briefs and two affidavits. The Lawyer filed a brief and four affidavits, one of which (with exhibits) exceeded 900 pages; another, close to 200 pages, and a third, 58. Her partner filed one as well, mercifully much shorter. The taxation hearing took three quite full hearing days, plus an additional partial day for completion of argument. There were also pre-hearing conferences and motions. Many trees paid the ultimate sacrifice. That said, the parties did agree on several matters which are worth setting out at inception, and which will also serve to explain the lexicon I have employed.

[1] *Marsden v. Regan*, [1954] 1 All E.R. 475

[3] Although the lawyer initiated the taxation claim, there was a parallel action by the client to tax the entire account (the client having promptly paid all but the last three bills in full). Although these actions were not formally consolidated, it was agreed I would hear both simultaneously and on common evidence.

[4] The parties also agreed that regardless of by whom initiated, the burden in both actions is on the lawyer, to a civil standard, to establish the quantum and entitlement to fees and disbursements. This is in accordance with the decision of our Court of Appeal in *Mor-Town Developments Ltd. v. MacDonald*, 2012 NSCA 35 at para. 49. As such, the law firm presented its evidence first.

[5] As well, the parties agreed that this would be heard outside of normal Court hours as a special hearing (as approved by the Department of Justice) in one of counsel's boardrooms. It was also agreed that the parties waived the usual requirement that this be heard in a Courtroom pursuant to Section 6 of the *Small Claims Court Taxation of Costs Regulations*, NS.Reg 37/2001 as amended. I was "brought in" to hear the matter perhaps as one of the few adjudicators with no affiliation or transactions with any of the stakeholders.

[6] All agreed that the lawyers could testify as Court officers, without oath or affirmation. The Client, who was the Client's only witness, was affirmed for her testimony.

[7] The parties also agreed that the parties would be referenced by pseudonyms and that the affidavits and briefs would be sealed and, subject to expiry or disposition of any appeal, destroyed. I challenged this agreement under the Open Court principle and under Section 5 of the aforesaid Regulations, at a pre-hearing conference. I was convinced that the nature of the allegations, combined with the sensitive family circumstances of the solicitor-client relationship and a need for a fulsome hearing of their circumstances made this appropriate. I ordered that books of authorities would not be sealed or redacted from the file. I will return the unsealed portions of the files directly to the Clerk with copies of this decision, for the Court's records. I will retain the sealed portions pending any appeal, or expiry for the time thereof.

[8] Accordingly, I have further expunged the file numbers from the publication of this decision, and refer to the parties as the Law Firm, the Client, and the lawyer with primary carriage of the Client's matter as the Lawyer. The Client's (former) Spouse and Child shall carry those monikers; the Lawyer's partner who had some involvement (and who testified), the Partner. I have done my best to anonymize

other identifying characteristics such as employment and addresses, although as will be seen some discussion of these is inevitable to provide coherence to these reasons. The litigants will be able readily to grasp the context; to others for whom this bowdlerization may render obscurity or narrative turgidity, I apologize.[2]

The nature of the dispute

[9] Although this taxation took three very full days, plus part of a fourth for completion of argument and rebuttal via Teams, this proceeding did not have some of the complexities that otherwise may arise when a lawyer's bill is in dispute. The Client did not dispute the time spent or (with one minor exception to be discussed) the rate charged. She did not dispute the retainer or (again, with one exception) its general terms. She paid the first 17 of 20 bills[3] promptly and in full. The last three were issued in quick succession and are unpaid, amounting to just

[2] A few more words on lexicon. There were various affidavits filed. I will refer to them as follows:
Lawyer's Partner's affidavit sworn October 29, 2021 – the "Partner's Affidavit"
Lawyer's affidavit of March 30, 2021 – the "Lawyer's Short Affidavit"
Lawyer's affidavit of October 29, 2021 – the "Lawyer's Long Affidavit"
Lawyer's affidavit of August 30, 2022 – the "Lawyer's Supplemental Affidavit"
Lawyer's affidavit of September 13, 2022 – the "Lawyer's Second Supplemental Affidavit"
Client's affidavit of August 9, 2021 – the "Client Affidavit"
Client's affidavit of August 2, 2022 – the "Client Supplemental Affidavit"

[3] Lawyer's Second Supplemental Affidavit, Exhibits C through V.

over $20,000, including interest to mid-2021[4]. She takes no issue with the promptness of service or fulsomeness of communication.

[10] She paid approximately $90,000 including taxes and disbursements over a period of close to three years, including a significant disbursement for an expert engagement which she now contests. At the very end of her matrimonial dispute, she engaged a subsequent solicitor (apparently, her third – the Lawyer under consideration was her second and principal counsel), who finalized the matter with few if any changes to the substantive agreement[5].

[11] She does take issue with the quality of service in the sense that she says the efforts and resources expended were disproportionate to the results obtained, and in some cases showed overcaution, capitulation to the position espoused by the Spouse (who was also represented by experienced counsel), or misjudgment. For that, says she, the Client is entitled to a "substantial reduction" in the total account. The quantum of that "substantial" reduction was not argued except in response to a direct question from the Court during the Client's rebuttal submissions. She now

[4] The principal amount is $19,986.44, of which $575 represents an increase in the Lawyer's hourly rate in her last bill plus HST. The principal balance without regard to that is therefore $19,411.44. See Lawyer's Second Supplemental Affidavit, Exhibit V.
[5] Lawyer's long affidavit, paragraphs 11-12.

says the account should be reduced by half, on the logic that there were two sets of tasks set out for the Lawyer, and that the Lawyer only accomplished one.

[12] The Lawyer says that every step of the proceeding was warranted, instructed, and taken with the informed consent of the Client[6]. She stands by her overall advice and says that any compromises or concessions were warranted in law; were a fair resolution given the cost-benefit of a trial; or decided upon by the client and influenced by exhaustion of mental and financial resources. The Lawyer says that this is now a case of "buyer's remorse" and that her paid accounts should stand and, with a minor revision, the unpaid ones should be taxed and allowed in full. She also points out several "courtesy discounts" in her accounts and also that significant amounts of a partner's time were not charged when conferring over strategy or the partner's additional expertise in certain topics[7]. Lastly, she identified a substantial underrecording of a particular time entry for preparation which was charged at 0.1 hour (presumably as a place keeper entry) instead of the nearly full day it actually took[8]. She, quite properly, does not seek to "claw back" any of these amounts.

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[6] In cross examination, the Lawyer said that the Client was not the sort to say, "do what you think is best," but instead regularly challenged advice or sought to have its genesis explained to her.
[7] The partner says she docketed $3,710 in time for which $2,240 – or just over 60% - was billed: Partner's affidavit, para. 13.
[8] Lawyer's long affidavit, paragraph 43.

Two quick points

[13] Before reviewing the evidence, the two minor matters to which I have alluded may quickly be disposed of. The Law Firm's final account contained a rate adjustment from counsel's normal $350/hour to $400. The Lawyer readily admitted that the unsigned engagement letter did not refer to rate changes, and although a letter was sent to clients to this effect, there is no indication that the client agreed to this (albeit some three years later, and I do not want to be taken as suggesting that in such circumstances a lawyer is "stuck" with the same rate proverbially forever). This final account was for 10 hours, for a difference of $500. The Law Firm conceded that this may be deducted from the amount taxed, notwithstanding the abatements noted above and the passage of time.

[14] Second, the Law Firm could not produce a signed engagement/retainer letter, although all indications are that the Client was aware of its contents and the parties' relationship was in broad accord with it. However, the Client only provided an initial retainer and when these trust funds were exhausted, the Law Firm did not require additional security. The Client paid subsequent bills promptly on rendering, with the exception of the last three. Consequently, there is no indication by written acknowledgement or by conduct that the Client contemplated or agreed to pay interest on outstanding accounts. The fact the invoices referred to

interest, in itself, is inadequate to establish such an entitlement: *K.W. Robb Associates Ltd. v. Wilson* (1998), 169 NSR (2d) 101 (CA), *Tannous v. Halifax (City)* (1995), 145 NSR (2d) 13 (SC).

What this decision is *not*

[15] I also bear in mind an overarching and critical point: although the Client challenges the Lawyer's recommendations, judgment, and strategy (in some cases vociferously), this is *not* a negligence action. It is a taxation. Findings with respect to the applicable standard of care and any breach, causation, and damages is (if at all) for another Court on another day. *That said*, the advice given, steps taken, and results obtained *are* relevant to the reasonableness of the Lawyer's account. Over preliminary objection by the Law Firm's counsel prior to hearing, I heard significant evidence on the substantive family law file throughout. Indeed, it was one of the driving factors for the partial sealing order discussed above.

[16] Against this general background, agreements, and ancillary matters, I turn to the evidence. Specific topics and issues will take their proper and respective places. I will not refer to every speck of evidence, or every question posed and answer provided. Doing so will exhaust both the parties, who are intimately familiar with them (usually having referred to them more than once) and to the

new reader who does not need to be so burdened in order to understand the dispute or my analysis. Both the stakeholders and the public at large may, however, be assured that I have listened to and read everything that has been put before me.

Overview of the Client's situation

[17] The Client's separation involved a variety of disputes: custody and the parenting arrangement of the Child, the valuation and division of various assets (and whether they were fully accounted for), and spousal and child support (and the evidence and preparation needed to establish these). The Client also asserted that her estranged Spouse was abusive mentally and physically. Further, the Client questioned her Spouse's sexual orientation (a matter of considerable concern to her, although its relevance in the divorce context was never made fully clear to me or, apparently, to an experienced family counsellor). Indeed, it may fairly be said that few domestic matters were *not* in dispute at least at some point in the proceedings. The Lawyer aptly termed the issue matrix as "complex," and the Client as one of "high needs."[9] As the file evolved, discrete issues emerged or

[9] Lawyer's Short Affidavit, paragraphs 7 and 8. The Lawyer's brief also uses the term "high maintenance" and the Lawyer's long affidavit, "high conflict" (paragraph 15). The Lawyer's counsel referred to the Client as having a 'strong demeanor' which manifested itself in parts of this taxation. The Client, in contrast, characterized herself as a "compliant and helpful client" who "attempted to be cooperative" and, given her financial background, as a person who "pays my bills." She testified on re-direct examination that "it didn't matter what I said…[the Lawyer] would do whatever she wanted."

became clearer. The Client takes issue with the Lawyer's handling of almost all of them. The reader may best understand the Client's issue with the overall account by addressing the file issues, rather than a line-by-line analysis of each account (indeed, as noted the Client does not dispute the time spent or the original $350 hourly rate). I will do so "holistically," to borrow Adjudicator Sloane's apt terminology[10], after a review of the principles applicable to this taxation.

Taxation – general principles

[18] A Lawyer's account must be fair and reasonable. The burden is on the Lawyer to demonstrate that it is so. What constitutes "fair and reasonable" is a highly contextual question, bearing in mind factors relevant to the case. As I said at the outset of this decision, a taxation is not a negligence action. However, the advice given, steps taken, and results obtained can be relevant to the reasonableness of the account.[11]

[19] In *Re Crummy and Wojtniak*, 2020 NSSC 377, I (sitting as Registrar in Bankruptcy) outlined my overall thoughts on taxation of accounts as follows,

[10] *S(H) v. Owen*, 2016 NSSC 44 – also a family law taxation case - at para. 24.
[11] As acknowledged by the Lawyer's counsel in her closing submissions.

before going on to cut an uncontested bill that I found to be manifestly unreasonable almost in half:

> [15] Before embarking on my analysis of the account against this standard, I wish clearly to state my starting point: it is not the function of this Court to reduce or adjust an account willy-nilly. I have bemoaned cases in which a Court appears to reduce a consensual account (especially where the client is also the ultimate payor) essentially for the asking. When competent and consensual parties enter into *a fair and reasonable arrangement* for the provision of professional services, and those services are competently rendered in a timely fashion, that professional is entitled to fair compensation. The agreement on that amount, *if an amount or means of calculation was fixed and there is documentation to corroborate that*, should not be interfered with lightly, again in particular where the client so agreeing is the ultimate payor. The Court's taxation function is not that of a discount house. [emphasis in the original]

[20] I then went on to cite our regulatory Code of Professional Conduct:

> [23] Chapter 3.6-1 of that *Code*, and its commentary, reads:
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> A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.
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> Commentary
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> [1] What is a fair and reasonable fee depends on such factors as:
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> (a) the time and effort required and spent;
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> (b) the difficulty of the matter and the importance of the matter to the client;
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> (c) whether special skill or service has been required and provided;
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> (d) the results obtained;
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> (e) fees authorized by statute or regulation;
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> (f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
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> (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;

> (h) any relevant agreement between the lawyer and the client;
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> (i) the experience and ability of the lawyer;
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> (j) any estimate or range of fees given by the lawyer; and
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> (k) the client's prior consent to the fee.
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> [2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, extra fees, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.
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> [3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined.
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> [4] A lawyer should be ready to explain the basis of the fees and disbursement charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

[emphases from original revised]

[21] Adjudicator Martin summarized the relevant principles in *Burchell MacDougall v. AM* 2020 NSSM 7 as follows:

> [2] For taxation matters, any assessment of an account is guided by Section 9A(1) of the *Small Claims Court Act* and the *Small Claims Court Taxation of Costs Regulations,* as well as the factors and principles found in section 77.13 of the Nova Scotia Civil Procedure Rules, the Code of Professional Conduct of the Nova Scotia Barristers Society.

[3] Reasonableness is the standard for calculating taxation costs. Section 3.6-1 of the Nova Scotia Barristers' Society *Code of Professional Conduct* states that a lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion. Civil Procedure Rule 77.13 also governs entitlement and assessment of fees and disbursements.

…

[5] Additionally, Counsel for the Claimant raised the case of *Bunford v. Bunford*, 2016 NSSM 55, and a sister case, *Proost v. Bunford*, 2016 NSSM 56, both as a summary of the principles that must be examined in the assessment of whether a fee charged to a client is in fact reasonable and the factors that determine whether fees may be disallowed. I note, in particular, the following:

a) The taxation may disallow fees charged for proceedings taken that were unnecessary (such as by over caution or merely error);

b) Fees may be disallowed if, objectively speaking, too much time was spent on any particular step, or overall, which reflects poorly on the lawyer's skill;

c) The results achieved may be considered, but in some instances may be totally irrelevant;

d) The client's ability to pay may be relevant;

e) The client's expectations may carry some weight, for example where the lawyer's fees significantly exceed an estimate given;

f) The degree of skill demonstrated may, in some cases, be important, though the lawyer may not have had to exercise all of his or her skills to achieve the result;

[Bold emphases added, underlining in original][12]

[22] Rule 77.13 of the Civil Procedure Rules reads:

77.13 Counsel's fees and disbursements: entitlement and assessment

(1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.

[12] Very similar wording may be found in *S(H) v. Owen*, 2016 NSSC 44 at para. 22, per Adjudicator Sloane.

(2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:

(a) counsel's efforts to secure speed and avoid expense for the client;

(b) the nature, importance, and urgency of the case;

(c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;

(d) the general conduct and expense of the proceeding;

(e) the skill, labour, and responsibility involved;

(f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

[23] And, Rule 77.16 reads:

77.16 Taxation of costs

(1) A judge who awards costs may fix the amount or order that the amount, or a part of the amount, be fixed by taxation before an adjudicator under the Small Claims Court Act.

(2) A judge may order that the amount of fees and disbursements owing by a party to the party's counsel be fixed by taxation before an adjudicator.

(3) An adjudicator who fixes the amount of fees and disbursements owing to counsel may disallow fees for a service, or disallow a disbursement, that is unnecessary or otherwise unreasonable.

(4) The adjudicator may allow fees for a service, or allow a disbursement, that is rendered, or incurred, on the client's specific instruction even if the service, or disbursement, is otherwise unreasonable.

(5) A certificate of taxation is final and conclusive of the amounts certified on it against a person who was notified of the taxation, except for each of the following:

(a) the certificate may contain terms upon which the amount is to be calculated;

(b) the order may contain terms limiting the taxation or providing conditions for payment of some or all of the taxed amount;

(c) the certificate may be varied on appeal.

Comments on where the evidence diverges: credibility and reliability

[24] Before turning to the specific issues, I add a few words on credibility. Counsel for the Law Firm points to several discrepancies and inconsistencies with the Client's testimony and urges me, where the Client's and Lawyer/ Partner's recollections and evidence differ, to accept that of the Lawyer (or the Partner, as the case may be).

[25] Credibility and reliability are not the same thing. Credibility relates to whether I think the witness is doing their level best to tell the truth. Reliability relates to whether I accept that evidence as correct. A person can be credible without being reliable. A person who is not reliable is not credible.

[26] Justice Chipman, *in R. v. P(W)*, 2021 NSSC 59 (quoting Justice Arnold in *R. v. Gilliatt*, 2021 NSSC 17) summarized as follows:

> [51] In considering this matter, I am mindful of all of the evidence. In deciding whether I am satisfied beyond a reasonable doubt of the guilt of WEP and/or ELP, I must consider the credibility and reliability of all of the witnesses. In *Gilliatt*, Justice Arnold provided a most helpful overview of these concepts (which I adopt) at paras. 24 – 30:
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> > [24] The trier of fact must consider all of the evidence. In this case, I have to decide if I am satisfied beyond a reasonable doubt that the Crown has proven that Mr. Gilliatt committed any of the crimes that he is charged with in this case. This will require consideration of the credibility of witnesses, including the complainant. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152, the majority of the British Columbia Court of Appeal discussed credibility as follows:

> 11 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

[25] In *Baker v. Aboud*, 2017 NSSC 42, Forgeron J. summarized the principles governing credibility assessment (some citations omitted):

> [13] Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:
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> • Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (S.C.C.), para.20. ... "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.
>
> • There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, *Novak Estate, Re, supra*.
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> • Demeanor is not a good indicator of credibility: *R. v. Norman* (1993), 1993 CanLII 3387 (ON CA), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.
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> • Questions which should be addressed when assessing credibility include:
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> a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re, supra*;
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> b) Did the witness have an interest in the outcome or were they personally connected to either party;
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> c) Did the witness have a motive to deceive;
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> d) Did the witness have the ability to observe the factual matters about which they testified;

> e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
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> f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.);
>
> g) Was there an internal consistency and logical flow to the evidence;
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> h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
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> i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[26] The majority in *Lifchus* acknowledged that "certain doubts, although reasonable, are simply incapable of articulation" and emphasized that a "juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanor cannot be taken into consideration in the assessment of credibility" (para. 29).

[27] A related principle to credibility is reliability. The relationship between the two concepts was explained in *Cameco Corporation v. The Queen*, 2018 TCC 195:

> [11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In *R. v. Norman*, [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:
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> . . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . .

[28] Care must be taken in differentiating credibility from reliability. In *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, [1995] O.J. No. 639 (Ont. C.A.), Doherty J.A. said, for the court:

> 33. Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility.

> When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross- examination.

[29] In *R. v. H.C.*, 2009 ONCA 56, Watt J.A. discussed the difference between credibility and reliability and stated for the court:

> [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
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> i. observe;
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> ii. recall; and
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> iii. recount
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> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence...
>
> [42] This case required the trial judge to assess the credibility of two mature adults, T.F. and the appellant, as well as of a child of ten, K.F. Credibility requires a careful assessment, against a standard of proof that is common to young and old alike. But the standard of the "reasonable adult" is not necessarily apt for assessing the credibility of young children. Flaws, such as contradictions, in the testimony of a child may not toll so heavily against credibility and reliability as equivalent flaws in the testimony of an adult... [Citations omitted.] [my emphases throughout]

[27] In this case, I found all witnesses *credible* in the sense that they were trying to give their evidence as they saw it or recalled it, allowing for the inevitable subjectivity inherent to a rancorous dispute that has had time to ferment. I do not believe anyone set out to lie, although again some answers by both the Lawyer and the Client had strains of advocacy and even argument to the replies.

[28] That is not, however, to say that all evidence was equally *reliable*. The Client was the subject of a long and probing cross-examination, both as to her affidavit and to elements of her prior testimony. Ultimately, she recanted her affidavit evidence that the Lawyer referred to her as a potential "vexatious litigant" as opposed to an "unreasonable litigant" should she refuse to consent to the suspension order, and that she was advised that she could lose custody as a result. Her ultimate explanation is that her misrecollections were attributable to her mental state at the time and that "trauma brain will do that."[13]

[29] That may well be so. However, my job where the discrepancies are relevant to the taxation is to assess not only credibility, but reliability. In contrast, the Lawyer's evidence (although again, at times moving into advocacy) was clear, consistent, and in accordance with the documentary record.

[30] Where the evidence diverges, and is relevant to the taxation, I accept that of the Lawyer (or Partner, as applicable) over that of the Client. In doing so, I wish to re-emphasize that I am not doubting the Client's sincerity or *credibility*, but instead *reliability*; and in doing so I am not relying on demeanour as cautioned in the cases cited above.

[13] She denied having any active pathology in this regard at the time of the taxation.

[31] I also say this with no disrespect to the health difficulties cited by the Client. There is no question she has had, at the risk of oversimplification, a rough number of years. That does not change the fact that I need to weigh evidence and decide what to do when the witness' accounts diverge and when relevant to the issues before me. That is what I have done; nothing more, nothing less.

Issues 1-4: Maintenance, the engagement of KPMG, Suspension of Maintenance, and the Final Cancellation of Arrears

[32] While at times these were discrete issues, they are best treated together.

[33] Spousal and child maintenance were issues from inception. Quantum for both, and duration for spousal, were in issue. The Spouse took the position that his true income was (substantially) different from that reported on his Canadian T1 returns, due to deductibility of expenses/maintenance and timing of tax liabilities in the various jurisdictions in which he works.[14]

[34] The Lawyer recommended, and the Client (in writing) accepted the engagement of KPMG to work through these issues. The Client signed the

[14] He also has been in an ongoing and far from clearcut dispute with CRA as to the amount of his pre-separation tax liability. This naturally played its role in determining net matrimonial assets available for division. Although not strenuously argued in this taxation, it must be remembered that the considerable variation in these numbers was a factor in the advice given and instruction received by the Lawyer in effecting a division of net matrimonial assets.

engagement letter and took an active part in KPMG's work. The KPMG principal ultimately testified, as an expert, at the hearing before Justice Jollimore in August 2018.

[35] Justice Jollimore found that the Spouse's income, for maintenance purposes, was as shown on his Canadian tax returns, and that he had not discharged the burden upon him to show that a lesser amount should be used. The Client now says that the approximately $10,000 spent on KPMG[15] was accordingly either a waste of money, or overcaution.

[36] The Lawyer responds that not only was the KPMG engagement expressly authorized by the Client, given the Spouse's assertions, it would have been dangerous or derelict not to have this evidence available. Although not expressly cited to me, Rule 77.16(4), cited above, is relevant to this argument.

[37] I agree with the Lawyer. The Spouse attempted to have his obligations fixed based on income that was a fraction of what was declared. Although the burden was on him, I am confident that the Client would (with some justification) have been extremely upset had a Court accepted the Spouse's argument and would have asked why her case was not in a position to respond. Further, it would have set the

[15] Which was added to one of the Lawyer's paid accounts, on the Lawyer's advice, so that it could form part of the deductible legal expenses associated with support.

tone for other issues in dispute, and potentially given rise to precisely the biggest single objection the Client has to the Lawyer's advice – disincentivizing the Spouse to resolve matters or move them to trial, since he would have been paying far less than he should have.

[38] Further and in the alternative, I find that the disbursement is the type contemplated by Rule 77.16(4) as "client authorized" and should be allowed as such.

[39] There is no question that the Client was substantially successful at the initial application for support. Justice Jollimore ordered spousal support in the monthly amount of $4,000 and child support in the amount of $3,618, healthy amounts reflective of the Spouse's healthy income.

[40] Although the Client had some initial concerns with the parenting plan, she did not appeal and ultimately the parenting arrangements "on the ground" deviated sufficiently from the ordered plan that the Client was satisfied, with some exceptions regarding travel.

[41] Insofar as the support order went, the Client was completely satisfied. As well she should have been. The child support (non taxable) was the table amount as derived by Justice Jollimore. The spousal support essentially made up the

Client's remaining budget deficit. They totalled some $91,000 per year, of which almost half was tax free.

[42] Then came the spring of 2020[16]. Mere anarchy was loosed upon the world. International travel slowed to single-digit percentages of pre-pandemic levels. International and domestic borders closed. Nova Scotians were told to "stay the blazes home." Governments held daily briefings on health, safety, and financial measures. "Turmoil" in every aspect of modern life was an understatement. Although the world had dealt with epidemics such as SARS, MARS, Ebola, and H1N1 and implemented emergency containment measures to bring them to heel, only a tiny handful of the most senior members of our society have had first-hand exposure to the last great pandemic, the influenza which ravaged the world in the wake of World War I.[17]

[43] Courts and the legal system were not exempt. Only the most "urgent and essential" matters were allowed to proceed, and those almost exclusively virtually.

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[16] It should be noted that the Spouse was off work in January 2020 ostensibly for medical reasons, which may also have had knock-on support consequences. When he was cleared to return in April 2020, pandemic restrictions were at their apex.

[17] I wish to add this: I am not one who considers "Covid" to be a catch-all answer to anything and everything that has not gone normally in the last few years. I have had people cite it as an excuse for defaults and tumults dating back to 2018 or before – it's called Covid-***19*** for a reason. That said, there is no question in the current case that it put both the Spouse's situation, and the ability of the parties to move matters forward in or out of Court, into considerable uncertainty. As I will discuss, the fact that Justice Cormier was prepared in July 2020 to hear a suspension or variation application on an urgent basis only weeks after Nova Scotia moved from an "essential services" to a "safe services" delivery model in June 2020 speaks to the merits in this unique environment, and to the billable skill and knowledge brought to bear by the Lawyer in advising and obtaining instruction.

Courthouses emptied. Justice officials were sent home, and only the most skeletal staff rotated on site. Law offices furloughed supports (and in many cases, lawyers) in droves. Any number of omnibus orders, directives, and regulations tolled proceedings. Office buildings fell dark.

[44] Against this maelstrom of uncertainty, the Spouse took the position that he was no longer able to travel internationally for his work – either at all, or under such arduous conditions (such as lengthy quarantines on each end) that it made it distasteful at best. He further took the position that his pay would be affected downwards, and that quarantining would unduly restrict his parenting time with the parties' child.

[45] The Client, understandably, viewed all of this with some circumspection. A judicial conference ensued, in which Justice Cormier indicated that she would be prepared to hear an application to vary and/or suspend spousal and child maintenance on an urgent basis[18]. Many discussions ensued between the Lawyer and the Client. The Lawyer recommended that the Client consent to a suspension of enforcement of support (although arrears would continue to accrue at the ordered rate), pending developments in relevant circumstances (most specifically,

[18] Lawyer's long affidavit, para. 70. The Spouse also sought, in the event of such a motion, a declaration that child support had been overpaid. The order suspending enforcement was ultimately issued on September 24, 2020 – Lawyer's long affidavit, Exhibit 17 .

travel permissions and logistics, and the Spouse's rate of pay). Ultimately, this suspension of enforcement was issued on a consent basis. Her current counsel views this with incredulity, arguing that "you don't give these things away."

[46] On final resolution of matters between the parties, arrears (by then potentially amounting to some $66,000[19]) were set at nil.

[47] The Client now says this is the most egregious of the Lawyer's missteps – to the point that her counsel said at hearing that if I accepted that the advice was appropriate, "I guess we have lost the taxation." Put another way, the issue of advice given and steps taken in this regard is so central to the dispute the Client has with the Lawyer, to her everything else in this taxation is secondary.

[48] The Client insists that, in suspending enforcement, she lost whatever "leverage" she had with her spouse in effecting either a move towards trial, or resolution.[20] Since his payment obligations were so emasculated, he had no incentive either to return to work, or to finalize a division of property[21]. She

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[19] I read the Client affidavit, paras. 46-7 as asserting $13,000 outstanding as of the date of the suspension order, plus nearly $53,000 more accruing to January 2021; however, at paragraph 74 the Client asserts only the $52,000 figure, and in her Supplemental Affidavit at para. 42, $39,000. For current purposes, it is adequate to accept that the amount was sizeable and would factor considerably into any resolution or adjudication.

[20] She also asserts that she lost a $10,000 deposit on a $350,000 "rent to own" transaction. One may question the prudence of entering into such an agreement when her financial position was not finalized; there is no evidence the Lawyer played any part in any of these decisions.

[21] As it turns out, the Spouse took a job as a bus driver at $30,000 a year; the Court was advised that he now does not work at all, after finalization of matters between he and the Client.

further points out that she had evidence from a friend in a similar industry that travel was indeed possible to at least one of the international locations, albeit under suboptimal conditions[22] – and that the Spouse's assertions that it would eviscerate his parenting time was a canard, given how much of it he used in the first place.

[49] The Client also objects that the final agreement does not provide for even the most nominal of spousal support, which could leave the door open to future variation if the facts and law so warranted. It is common ground that child support is always open for revisitation, when appropriate.

[50] The Lawyer answers that the Client did not lose her leverage[23], and indeed would have lost an application to suspend and/or to vary in the unique circumstances. The accumulated arrears formed part of the "leverage" used to effect a final settlement and indeed, the Client agreed to include part of the settlement as spousal support (taxable) in order to "get the deal done." That concession ultimately did not form part of the final order but (says the Lawyer) speaks to the desperation and/or exhaustion of the Client and her willingness to agree to not-so-great conditions.

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[22] Client affidavit, para. 54. Texts to like effect were also in evidence – Lawyer's long affidavit, exhibit 54.
[23] A position the Client's counsel eloquently termed "poppycock."

[51] The Lawyer goes on to say that litigating such an application, if one were made, would have been seen as unreasonable in the eyes of a Court, and that the Client would not only have had to pay the costs of that litigation, but probably called on to pay costs to the Spouse. Finally, contesting such an application would put the Client in the position of an unreasonable litigant, an unenviable position indeed.[24]

[52] Finally, the Lawyer points out that the Spouse never did go back to his high-paying overseas job, and indeed even quit his $30,000 Canadian job afterwards, with no apparent replacement income[25]. The Client now makes more than that, and as such it is unlikely that a Court would have ordered spousal support at the time of final resolution of matters between the parties, or now. As noted, child support is always "on the table." The latest figure I have is $450 monthly.

[53] Once again, I must find *for taxation purposes* that the Lawyer's advice was considered and appropriate or, at least, not inappropriate in the unique circumstances of 2020-21[26]. The great certainty of the time was uncertainty itself. The fact that Justice Cormier was prepared to hear an application by the Spouse

[24] The Client says the Lawyer used the term "vexatious litigant." I will return to this.
[25] With the possible exception of some work done for a relative's nascent small business.
[26] Indeed, at least two Justices – Cormier and Williams – queried the extent if any to which income should be imputed to the Spouse in the unique circumstances of 2020-21.

under the constrained judicial environment of the time[27] speaks to its likelihood of success. The Client faced the prospect of not mere suspension of enforcement, but reduction or elimination of support *per se*. The argument made by the Spouse as to impact on parenting time may or may not have been accepted, but in order to find that the Spouse was deliberately underemployed, a Court would have had to find not only that travel was possible (which may well have been the case) but reasonable, for the reduced amount of money being offered[28]. The evidence was, at best, that the lengthy quarantine periods on each end would mean that the Spouse would have had liberty of movement in Canada only a fraction of his "off" time, and a Court could well have found it reasonable for the Spouse to have declined such conditions, for logistical, mobility, health, safety, or financial reasons. Had a Court accepted this argument, and varied rather than suspended enforcement of support, the Spouse would have had even less incentive to move the divorce forward to settlement or adjudication.

[54] The final cancellation of arrears deserves a short recap. As noted, they were set at nil. The Client now says that was poor lawyering. For practical purposes, it

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[27] By then – mere weeks before- the Courts had moved from an "essential services" model to a "safe services" one, which permitted some matters to proceed, mostly in a virtual fashion. However, resources remained strained and allocated on a triage basis, to say the least.

[28] Apparently, at a salary of approximately $200,000 per year versus a pre-pandemic amounts which ran from a low of $216,000 in 2014 to a high of $471,000 in 2017 and which was $292,000 in 2019. Client affidavit, Exhibit G, page 2. Pre-pandemic salaries taken from Client's second brief.

is difficult to see how a settlement could have come about under any other arrangement, especially given that the Spouse resiled from a lump sum he provisionally agreed to at the final Judicial Settlement Conference. Indeed, the Client was prepared to accept approximately $30,000 of the funds she *did* receive as taxable spousal support, to "get it done." That was not part of the final order. I agree with the Lawyer that revisiting the arrears aspect of the settlement now is a case of "buyer regret," not one coming out of advice, instruction, or negotiation that should now be unbillable. I reject the assertion in the Client's second brief that the Client "accepted the settlement because she felt she had no choice." She may well have been exhausted by the process[29] – many litigants are; but she was not frogmarched to sign on the line that is dotted.

[55] To be clear, I am not saying a Court would have bought everything the Spouse was selling. *That is not my function*. For taxation purposes, what I need to decide whether the advice given, and the informed instruction received as a result of that advice, is that for which a fair and reasonable bill could be rendered and collectable. It was.

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[29] In at least one email, the Client essentially says as much, indicating that her Spouse and his family are litigious by nature. Specifically, she says "I cannot stay in this conflicting balance and uncertainty any longer, for [Child's] sake and mine we must move forward. I look forward to refocusing my life on rebuilding instead of burning up precious time in this battle." She then asks for a release from certain of the Spouse's family members as "[the Spouse] has threatened to sue me in writing…..[and in asking for family members' releases continues] I have been informed these people like to sue people, it's their thing." Client affidavit, Exhibit J, email of January 13, 2021. She also testified on cross-examination that "[the Spouse] was never going to negotiate in good faith."

[56] Given the Client's counsel's assertions on the centrality of this issue, this may indeed have been adequate to dispose of the taxation. I, however, do not agree. There were other issues, robustly argued. They deserve to be addressed.

Issues 5-6: The Matrimonial Home, and the Alleged Undisclosed Overseas Accounts

[57] The asset division portions of the file involved two principal disputes: valuation and interest in the matrimonial home, and the Client's belief that the Spouse had undisclosed or undervalued assets overseas (specifically, the Channel Islands).

[58] The land on which the matrimonial home is situated originally belonged to the Spouse's mother. Her home was on prime real estate, but was derelict, and beyond the mother's means to care for or repair. Ultimately, she agreed to transfer it to the Client and the Spouse. The same lawyer (not involved in this taxation) acted for all parties. The mother retained no registered interest. The deal was the Client and the Spouse would build a new home on the property, with a "granny flat" included. The mother would live in that flat, paying a nominal amount for rent and a portion of utilities.

[59] This was done.

[60] When the Client and the Spouse separated, the mother asserted that the property was subject to a constructive or resulting trust in her favour, for the value transferred. She engaged counsel (again, not involved in this taxation) but did not start any action and was not a party to or an intervenor in the matrimonial proceedings. As a consequence, says the Client, that trust assertion should be ignored for valuation and division purposes, and it was an error on the part of the Lawyer to consider this argument when going through the net asset equalization process. The Client further points out that although the Lawyer asked the Client to spend considerable effort in calculating the value of her contributions (construction supervision), soft costs (site preparation) and the value saved by mother under the agreed terms, these were ignored by the Lawyer to the Client's detriment[30].

[61] The Spouse asserted, when discussing settlement, that the mother's equitable interest should be recognized and, when the mortgage is taken into account, the matrimonial home had significant *negative* equity.

[62] Ultimately, the parties were able to reach resolution, using a calculation and valuation matrix which – with some creativity - recognized the mother's claim in

[30] Client Supplemental Affidavit, Exhibit F. Also separately in evidence as Exhibit 6.

the matrimonial home. The Client says that was in error – her counsel referred to the Client as being the "victim of lousy legal advice."

[63] The Lawyer reiterates that the Client was "in the loop" every step of the way and provided informed instruction; that it was plausible a Court might recognize this interest and the quantification would be a fraught, expensive, and uncertain exercise (likely requiring actuarial or other expert testimony); and that in particular, the Partner provided experience and insight in this regard, some of which was not billed.

[64] At the taxation, I asked the Partner whether she was aware (at the relevant time) of *Reid v. Reid*, 2019 NSSC 229, appeal dismissed 2020 NSCA 32. The Partner said she was.

[65] I raised this as *Reid* involved (almost at the same time as this matrimonial dispute) a similar issue of a parent making a transfer of real property to a child, in exchange for accommodation; later, when the parties separated, the daughter-in-law excluded the former owner. Justice Moir, at hearing, recognized a monetary interest of the former owner, in lieu of a constructive trust[31]. The Court of Appeal

[31] Justice Moir indicated that but for the intervening complication of a lease of another apartment, he would have imposed a constructive trust on the subject property; that complication made him substitute a monetary rather than a proprietary remedy.

recognized the "restitutionary" aspect of an unjust enrichment award, and dismissed the appeal.

[66] Counsel for the Client sought to distinguish *Reid* on the basis that in the present case, the mother got what she bargained for – an apartment in which she continues to reside on the terms agreed. On that basis, says he, the mother had no standing or additional entitlement – there was, and is, no deprivation which is a required element of an unjust enrichment claim - and the Lawyer was derelict (or, at least for current purposes, engaged in conduct unbillable) in countenancing such a claim.

[67] Counsel for the Client further goes on to cite *Nicholson v. Whyte*, 2005 NSSC 198 in which Justice Williams rejected a *resulting* trust claim in a domestic relationship, where the transfer was "not gratuitous."

[68] All of these issues may well have cut the Client's way at trial. *For taxation purposes*, what is relevant is whether the bill rendered for the services is fair and reasonable, given the advice given and the resultant instructions obtained; and whether the results obtained are such that such a bill may be rendered and collectable.

[69] I find that they are. Respectfully, while the issues of resulting and constructive trusts, and monetary or proprietary awards for unjust enrichment are all related equitable remedies sometimes used haphazardly, they share one characteristic: they are imposed *as a matter of law despite the legal state of ownership*. By definition, they arise when property in the name of one person is impressed with an equitable obligation in favour of another, for a valid juristic reason (or, in the case of unjust enrichment, a lack of a juristic reason not to provide a restitutionary remedy).

[70] It is a false start to say that the mother did not reserve an interest to herself when she deeded the property, and thus is out of luck. She could well assert such a claim as a matter of law, particularly where she did not appear to have independent legal advice or representation. As pointed out by the Lawyer, refuting or minimizing such a claim would be an expensive and fraught enterprise, requiring substantial preparation and expert evidence (recalling, again, the objection the Client makes now to the cost of such things). One need not decide for taxation purposes whether a deduction would have been made to the home's equity to reflect the mother's equitable claim (whether because she "got what she bargained for" or otherwise) – one need only recognize that it was a live and real possibility, and that valuation would be a substantial issue. As it turns out, the final equity

figure subject to division appears to have been $148,000[32], versus $196,201.64 (or later $147,412.60) as espoused by the Client[33] or *negative* $28,880.97 as argued by the Spouse[34]. The Lawyer said in her testimony, "was it pretty, absolutely not," but it finalized the issue.

[71] A final point on the matrimonial home. It was pointed out to me that the property was refinanced after the parties finalized their arrangements, and this was presented as argument both of the Spouse's financial means, and perhaps as a "double-cross" as the property was put back into the mother's name (along with that of the Spouse and the Spouse's new girlfriend/partner). This is a complete *non-sequitur*; there was no evidence as to the means available to each of these parties (aside from the Spouse's $30,000 a year bus driving job), but it *was* in

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[32] Lawyer's long affidavit, Exhibit 34 and 36; the letter to the Court refers to $147,412.**69**.

[33] Lawyer's long affidavit, Exhibits 7 and 29.

[34] Lawyer's long affidavit, Exhibit 45 (equalization chart of the Spouse; A separate line item for a hot tub was later removed as this was considered part of the realty.). It will be noted that this chart called for a payment from the Client TO the Spouse of over $81,000.

The Spouse's equalization chart in the Lawyer's Supplemental affidavit, Exhibit B, Page 14, later revised the house equity calculation to negative $22,686 and an equalization payment *from* the Client *to* the Spouse of $64,412.21.

The ultimate settlement was that approximately $204,000 was paid FROM the Spouse to the client, in a mixture of registered and non-registered cash. See corollary relief order, Lawyer's Long Affidavit, Exhibit 1, paragraph 22, which corresponds with the Client's instructions in the email attached to the Lawyer's long affidavit at Exhibit 44. In all, as calculated by the Lawyer's counsel, the Client received a total of $424,582 of which much was either tax free or tax deferred. In fairness, it cannot be said that 100% of this was directly attributable to counsel, as there was never any assertion that the Client should have nothing.

evidence that this was a financing requirement[35]. I place no weight on this whatsoever.

[72] The overseas accounts bear something of a similar cost-benefit analysis, albeit on very different facts. The Client sought, and by consent obtained, a production order against the bank with which the parties dealt, and which had both a Canadian and overseas presence. Canadian records were produced. The Client suspected the Spouse had undisclosed[36] overseas accounts, specifically in the Channel Islands. Eventually, the overseas records were produced in support of the proposition that these were 'flow through' accounts for part of the Spouse's remuneration, which were either accounted for or disclosed elsewhere.

[73] The Client did not fully 'buy' this explanation. No satisfactory evidence was produced to me to support this contention. Again, it is not my lot to decide whether that suspicion/contention is correct. What was manifest to me was that this was a complicated arrangement, which to pursue further would have required detailed and perhaps forensic inquiry, probably in-person, at substantial expense with limited prospect of net return. The Lawyer brought this to bear with the Client, that there was no obvious "smoking gun" of funds squirreled away in bank

[35] Lawyer's short affidavit, Exhibit F – Mortgage commitment, condition 2.
[36] Or disclosed, but with current figures significantly lower than at separation.

or bunker on that storied archipelago, and concluded and advised that it was not cost effective to pursue. That is billable time.

[74] Additional comments on disclosure and available information are in order. The Client alleges that the Lawyer proceeded to a settlement conference without adequate, or complete, information. The Lawyer points out that the Client had the option to "call off" that conference, and that it was not binding[37]. The resolution that ultimately followed[38] (which did not completely accord with the settlement conference, in particular when a double-counting error by the presiding Justice became clear[39], and with the significant change already noted that the Spouse resiled from payment of lump sum support) was the decision of the Client, and was not the consequence of anything at the conference which bound the parties.

[75] I agree with the Lawyer.

Issue 7: The Parenting Arrangement

[76] This may be addressed with comparative brevity, and in the interests of some of the sensitivities involved I will do so.

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[37] The Lawyer's long affidavit, at paras. 91-100, outline in detail the Client's participation in the preparation of the Judicial Settlement Conference brief. See also the client information circular contained in the Lawyer's long affidavit, Exhibit 30.
[38] The conference was in January 2021. The corollary relief order is about a month and a half later.
[39] See Lawyer's long affidavit, Exhibit 39.

[77] It is literally and figuratively motherhood to say "the kid comes first." In this case, although parenting plans and logistics were assuredly in issue for parts of the proceeding, in terms of time spent they later (but perhaps not initially) took a back seat to the monetary issues[40]. Suffice it to say that at various points there were issues which included decision-making, domestic travel, and the perceived best interests and wishes of the child. As noted, the Client also expressed concerns (which were neither demonstrated to me as to existence in fact or relevance) of the Spouse's sexual orientation[41] and how this could impact the parenting plan. This appears to have been complicated as the Client turned to at least one online group she considered relevant, with predictable "armchair counsel" consequences that the Lawyer then had to address and, perhaps, redress.[42] These types of "time sucks" are the bane of many a lawyer. While the lawyer may (and *should*) do their level best to dissuade the client from expending resources on them, if the client persists in doing so that is for the account of the client.

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[40] See Lawyer's long affidavit, Exhibit 71 which allocated 75% of legal expenses for 2018 to issues of support. This is no evidence with respect to later years.

[41] Although for completeness, it appears that the Spouse has a new partner of opposite gender. I reiterate and emphasize that I am befuddled as to the relevancy of the Spouse's orientation, as apparently was Martin Whitzman, universally referred to with respect in this proceeding as an experienced family counsellor. I also say that I completely differentiate this issue from that of the assertions of physical and emotional mistreatment of the Client by the Spouse during their relationship which was described in some detail to me, and which need not be repeated here even in redacted form. It is adequate to say they were severe.

[42] See Lawyer's brief at paras. 17-20 and evidence cited therein.

[78] In short, the parties derived a parenting plan which was ultimately ordered in the final corollary relief judgment and almost completely in accordance with the Client's wishes[43]. No dispute was brought to my attention as to the ultimate outcome or its current functionality. As time has passed, the Child's own wishes and objectives have taken their increased and proper station and the Client has not sought to modify any of the parenting plan finally ordered. Indeed, if I read her counsel's comments that I should cut the bill in half "because there were two issues involved" correctly, he seems to suggest that the custody/parenting issues came out just fine, and the property/final support issues were a complete hash. Whether I am correct in that interpretation or not, I would not reduce any of the accounts insofar as they relate to parenting/custody/access issues.

Other issues, and their interface with credibility and reliability: "Vexatious litigant" and "the worm has turned"

[79] A couple sidebar points require comment for fullness of consideration. The Client alleged that the Lawyer told her she would be viewed as a "vexatious litigant" if she refused to consent to the suspension order (and that it could lead to

[43] Client supplemental affidavit, para. 19: "I know that throughout the timeframe that [Lawyer] represented me, she did accomplish some positive tasks such as obtaining a Parenting Order and setting up support payments that exceeded the amounts that [Spouse] was paying voluntarily by approximately $2,600 per month."

loss of child custody)[44]; and that the Lawyer's partner commented that "the worm has turned" after the Client objected to the final accounts.

[80] The Lawyer was adamant that she advised the Lawyer that she could be viewed as an "unreasonable" litigant, and vehemently denied either using the term "vexatious" or tying the suspension issue to parenting. On vigorous cross-examination, the Client ultimately admitted that the Lawyer may not have used the term "vexatious," and that the parenting connection may have been made in her own mind as the issues were in play at the same time and that "trauma brain will do that." I accept that, however received, the Lawyer neither referred to the suspension issue as being tied to custody, nor did she express that a Court would view the Client as "vexatious" as opposed to "unreasonable."

[81] Turning to the worm. The Lawyer's partner denied using the term in the pejorative sense; the Client maintained that this is only capable of such a meaning and at one point interjected that "we can bring out the Oxford English dictionary."

[82] I did.

[83] While the Partner's choice of words may not have been optimal, and the email originally intended for internal consumption within the law firm, I accept

[44] Client affidavit, paragraph 60 and 66. Client supplemental affidavit, paragraph 35.

that the Partner was not using the term "worm" in a derogatory fashion. Instead, I accept that "the worm has turned" can refer (somewhat archaically) as a corkscrew twist, or a strong change in attitude or direction – that is in this context, for the Client having "turned" on the Lawyer at the end of the engagement and that the Client was now going to dispute the quality of results and amount charged. As, indeed, she did. I have placed no weight on this sidebar in my analysis.

A final note

[84] This decision, regrettably, is rendered slightly outside of the 60 days from conclusion of hearing, mandated by s. 29(1) of the *Small Claims Court Act*. I advised the parties prior to expiration of that period that such would be the case (and indeed alluded to it at the conclusion of hearing that I would endeavour to comply with that timeframe on a "best efforts" basis[45]). That section, and time period, is "directory and not mandatory" and does not vitiate the decision or remove this Court's jurisdiction: *JeBailey v. Hawa's Electric Limited*, 2022 NSSC 101, per Arnold, J., at paras. 9-12. As in *JeBailey*, this was a long hearing with numerous issues raised and vociferously contested.

[45] It is perhaps appropriate to note that adjudicators are remunerated for their sitting, but not for writing, time.

Conclusion

[85] "The life of the Law has not been logic. It has been experience.[46]" It follows that, when delivering legal advice and services, experience counts.

[86] The Client asserts many times that the Lawyer had either no information, or inadequate information, to proceed to a settlement conference, or to settle. The alternative was to "call it off," and/or get ready for trial. The Client follows up on that binary choice by asserting – to the Lawyer's vehement denial – that the Lawyer "did not want to go to trial" and was not the "fighter" she was looking for[47]. As I have said, what is more accurate is to say the Client "ran out of gas," both emotionally and perhaps in her perception financially[48]. That is not uncommon in litigation, especially long and emotionally fraught litigation. It is at least as germane to say that given the issues as perceived by the Client, very

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[46] United States Supreme Court Justice Oliver Wendell Holmes, from *The Common Law* (1881).

[47] Late in the hearing, the Client began to contrast her desire for a "litigator" with her view that the Lawyer was "collaborative," saying she did not want or need the latter. In argument, it was set forth that the Lawyer does not formally practice collaborative family law nor has credentials in that regard. I did not take the exchange this way, but instead that the Client was making the point that she sought an aggressive counsel rather than one who would encourage settlement or resolution.

[48] To be clear, to the extent relevant to this taxation (and bearing in mind the cited caselaw that ability to pay may be relevant). Although there is no question that the account in total is substantial, the Client has the ability to pay the balance outstanding. She received a property division which put both registered and unregistered funds in her hands; she says she used the unregistered cash to put a down payment on a house, but that goes to her decisions as to the use of that resource, not her ability to fund payment of her Lawyer. She is also gainfully employed and making a liveable if not extraordinary salary. She is in what I will gracefully refer to as "early middle age" with considerable standard working years ahead.

substantial additional resources would be needed, and through the prism of early 2021, obtaining the block of Court time needed would have pushed a hearing date well into the future (perhaps to or beyond even the present).[49] The decision not to do so, ultimately, was that of the Client (after being advised that she may want to obtain a second opinion; she did not appear to do so and affirmed her wish to continue using the Lawyer's services). The time spent by the Lawyer in getting to that point is billable.[50]

[87] The Client is adamant that the Lawyer made various legal and strategic errors. I have found that *for taxation purposes*, they were issues which were intelligently considered and in which the Client provided informed instruction. If the Client considers herself negligently served, as opposed to being disappointed with taxation's consideration of 'results obtained,' that is for a different forum.

[88] The Client did not come out of her divorce proceeding with "the best day she ever had." Very few litigants do, whether by settlement or adjudication. One is reminded of Voltaire's quip that he was never ruined but twice – once when he

[49] I heard estimates of required trial time of anywhere between three to four days (estimated by the Spouse's counsel) and two weeks (estimated by the Lawyer). Given the time spent on this taxation and its interplay with the issues raised but not needed to be decided, I am inclined towards the higher end of this range – with the associated costs and fees.

[50] On cross-examination, the Client was asked, "because you wanted to settle, you wanted a reduction in fees?" The Client's answer was "yes," and that at least part of her decision to settle was based on a relative's offer of financial assistance going forward – which the evidence revealed indeed took place.

lost a lawsuit and once when he won one. What the Lawyer was engaged to do was to represent the Client, to advise, and to obtain informed instruction (sometimes, requiring difficult conversations or being the bearer of bad news). For that, she is entitled to be paid in accordance with the *Code of Professional Conduct*, the applicable *Civil Procedure Rules*, and subject to those overriding principles, the agreement between the parties. The fact the Client did not get everything she wanted does not change that[51]. The fact the Lawyer advocated a particular position before at least three Justices or with opposing counsel at various times, and the ultimate disposition was less favourable to the Client, is not an indicator of failure, as appears to have been suggested by her current counsel. It is an indicator of zealous advocacy (within reason and ethics), and flexibility. It is what advocates do. The standard for payment is not, and cannot be, results that "blow the other side out of the water." The standard is that of fairness and reasonableness, considering the relevant circumstances set out in the *Code of Professional Conduct*, the *Civil Procedure Rules*, and the agreement of the parties.

[89] Similarly, not "running to Court" or filing a motion the first moment there is an issue to be resolved is not a sign of capitulation. It is the job of the lawyer to

[51] It may be overstating it slightly to approve of the statement in the Lawyer's brief that "[the Client] asks the Court to scrutinize [the Lawyer's] actions, with the benefit of hindsight, and hold [the Lawyer] to a standard of perfection." But only slightly.

discuss, under cloak of privilege, the Client's strengths and weaknesses; their strategic, ethical, financial, and perhaps emotional or mental consequences; and to take informed instruction. And, subject to ethics, if so instructed to put the Client's best foot forward and advocate their interests even if the Lawyer has advised to the contrary. That is, at the end of the day, what I heard the Lawyer do here. I will add that all the solicitor-client communication I had in evidence was exceptionally prompt and professional.

[90] The burden was on the Lawyer to discharge the reasonableness of her fees. With minor exceptions, she has discharged that burden, and despite the considerable efforts of her current counsel, the Lawyer has done so with room to spare. Insofar as is necessary for the purposes of a taxation (I again emphasize that this is not a negligence hearing), she has been vindicated. The *paid* accounts are taxed and allowed as rendered. The *outstanding* accounts are taxed and allowed as rendered, less $500 plus tax representing the difference in hourly rate in the last account, for a balance of $19,411.44. As there was no evidence of an agreement to pay interest by signed agreement or conduct, I allow interest on the outstanding balance at the simple rate of 4% per annum from 30 days after their respective rendering to date, pursuant to Regulation 16 of the *Small Claims Court Forms and*

Procedures Regulations, NS.Reg. 17/93 as amended. If the parties cannot agree on these calculations, I remain seized to settle them.

[91] Costs in this Court, given its scope of authority to award them, are almost an afterthought. I would hope that the parties can come to terms on these. That failing, I will accept written submissions of no more than ten double-spaced pages each (exclusive of authorities) within 30 days of communication of this decision.

[92] Although this taxation was at times animated, all counsel proceeded with thorough preparation and robust advocacy. Their cooperation on logistics assisted greatly in removing this from what would have been a cumbersome and substantially more lengthy Death By Videoconference. The Court is grateful both to the parties for this accommodation, and for the dispensation provided by the Department of Justice to allow it.

[93] I would ask that counsel for the Lawyer prepare a draft order for assent or dissent as to form by counsel for the Client, and for my review.

Balmanoukian, Adj.