# SUPREME COURT OF NOVA SCOTIA
# IN BANKRUPTCY AND INSOLVENCY

**Citation:** *Crummey and Wojtyniac (re)*, 2020 NSSC 377

**Date:** 20201218
**Docket:** No. B-19-487650
B-19-487649
**Registry:** Sydney
**Estate Number**: 43245
43247

**In the Matter of:** The bankruptcies of Gary Lionel Crummey and Rita Gerdina Wojtyniac

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| **Judge:** | Raffi A. Balmanoukian, Registrar |
| **Heard:** | October 27, 2020, in Sydney, Nova Scotia |
| **Final Written Submissions:** | October 27, 2020 |
| **Counsel:** | Leonard A. Shaw, for the Trustee, BDO Canada Inc.<br>Vincent A. Gillis, for himself as solicitor with account under taxation<br>Gary Lionel Crummey and Rita Gerdina Wojtyniak, not appearing |

**Balmanoukian, Registrar:**

[1] Lawyers' fees must be fair and reasonable. This is the case even when the person hiring that lawyer is not the ultimate payor.

[2] Vincent A. Gillis billed the Trustee a total of $8,160 for services related to the sale of the bankrupts' residential property, and another lot. The Trustee doesn't seem to mind; and perhaps for that matter might not much care, because the fees are not coming out of its pocket. The bankrupts' situation does not change so perhaps they don't care either.

[3] I do.

[4] Rule 18 of the *Bankruptcy and Insolvency Act General Rules*, CSC 1978, c. 368 as amended (the "General Rules") requires me to tax accounts for legal services over $2500 (exclusive of taxes). The accounts describe "in a fair, reasonable and detailed manner, the nature of the legal services provided" as required by General Rule 19. I will discuss those in due course. The Trustee indicated its consent under General Rule 20 (although it referred, in apparent error, to Rule 18).

[5] General Rule 21 requires me to consider whether the services have been duly rendered; if they are reasonable; if the services rendered are accounted for; and (if the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 [the “BIA”] so requires), the legal services have been approved.

[6] Only the second of these considerations – whether the account is fair and reasonable – is at issue.

[7] I directed that this taxation be put on the regular docket for hearing at Sydney; I declined to tax it on a “desktop” basis, as presented or otherwise. Mr. Gillis was given notice and appeared. His submissions were, to put it mildly, robust. So much so, that he appears to have taken personal affront that the Court would have the temerity to question his bill, and that doing so is an assault upon his good name and character. Nonetheless, it falls to me to weigh those submissions objectively, against the objective standard of fairness and reasonableness.

[8] Contrary to Mr. Gillis’ invitation to the Court in oral argument to “give [him] a number” that he would accept, this is not a flea market or a haggling session. It is a taxation. The standard is not what “everyone can live with,” it is what is fair and reasonable given the factors relevant to the particular transaction.

**Background**

[9] The facts, briefly: the bankrupts made their assignments on April 30, 2019 (Crummey) and May 1, 2019 (Wojtyniak). BDO Canada Limited became Trustee. They are ordinary administrations. The bankrupts owned two nearby pieces of real property at Chapel Road, Cape Breton. An appraisal valued them at $314,000. It is unclear when they were exposed to sale, but an acceptable offer presented itself in short order. The sale price was $349,000.[1]

[10] Mr. Gillis was engaged to represent the vendor's interests. There is no written retainer. There was no indication that Mr. Gillis provided either an estimate or a quote. He is therefore entitled to *quantum meruit* compensation.

[11] The scope of the engagement required conversion of both parcels of land under the *Land Registration Act*, SNS 2001, c. 6 (usually referred to as "migration"). It is not disputed that the protocol in Cape Breton County (as with most of Nova Scotia) is that this is done by the vendor, at the vendor's expense. The scope of the engagement also required the services of vendor's counsel as conveyancer.

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[1] While the purchase and sale agreement was not in evidence, it appears this is the final purchase price after a $9,000 price abatement I will discuss in due course.

[12] Mr. Gillis submitted that the following issues arose in the course of his engagement:

1. Although the abstracts – which he produced at my direction – had some common elements in the chain of title, they were not parallel; and they were complicated by the revelation of a road reserve that had to be discussed and reconciled with the Land Registration Office's mapping authorities. The resolution appears to have been comparatively straightforward, and I will return to that;
2. A well water test required the well to be shocked and re-tested;
3. The purchaser objected to the presence of Kitec plumbing in the premises, an issue which Mr. Gillis alleges he spent four hours researching;
4. The bankrupts were tardy or reluctant to deliver up vacant possession;
5. The facts of bankruptcy and a mortgage default required additional work and interface with lender's counsel, and
6. An old "legacy" mortgage required verification that it had been paid, and post-closing follow up (Mr. Gillis said the release has not yet been procured).

[13] For this, he billed as follows:

1. Migration: $3,000 ($1,500 per lot)
2. Sale: $3,250
3. Copying and subsearch: $107.50
4. Land Registration Office recording fees for migration: $200.00 (2 @ $100.00)
5. Recording assignments in bankruptcy: $400 (4 @ $100)
6. Title search (Mr. Gillis appears to have used a title searcher) $250.00
7. Certified cheque to lender's counsel: $15.00
8. HST, where applicable

[14] This totalled $6,250 in fees, plus HST and disbursements, for the total I have previously noted of $8,160. This was divided equally between the two estates.

[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.

[16] That said, the lawyer is still an officer of this Court. The lawyer is accountable to it. The Court has an oversight and supervisory function. It is not a rubber stamp. It is here to pass judgment on accounts and whether they are fair and reasonable – not on whether someone has their nose out of joint. That is the case whether the lawyer is offended by the process, or whether the Trustee has signed off under General Rule 20. If those were conclusive, the taxation function would be meaningless.

[17] I have referred to the client's consent to the account when the client is the ultimate payor, as having considerable weight. In this case, the Trustee is not the ultimate payor – Mr. Gillis' account in the final analysis comes from the pool of funds available for creditors. The fact a creditor has not objected is not a significant factor where, as here, there is no indication that the account has been made known to the creditors whose pool will be affected. The fact that the

bankrupts have not objected, nor did they appear, is similarly not a significant factor – it appears there will still be a deficiency in the estate with or without Mr. Gillis' account factored in. The bankrupts, as a consequence, have no "skin in the game."

[18] I now turn to the law applicable to the services rendered, and whether Mr. Gillis has discharged the civil burden upon him to demonstrate the reasonableness of his account.

**The Law**

[19] The law is clear: the burden is on the lawyer – always – to demonstrate to a civil standard that the account is fair and reasonable. In *Mor-town Developments Limited v. MacDonald*, 2012 NSCA 35, Saunders JA said, for the Court:

> [49] To the extent that there remains any confusion regarding who bears the onus during the taxation of a lawyer's account let me be clear. The onus of proving the reasonableness of an account should always rest with the lawyer. The lawyer knows what was done, by whom and when. The lawyer knows how long it took to complete the task(s) and what fee was charged to do it. The lawyer will also know why the task or particular action was necessary. Rarely would a client be possessed of such information. To expect the client to "prove" the unreasonableness of the work done by the lawyer would neither be practical nor fair. In summary, whether the taxation is initiated by either the client or the lawyer, the lawyer bears the onus of proving that his or her account is lawful, and reasonable, in all of the circumstances. [emphases added]

[20] This is regardless of who initiates the taxation, or indeed whether the bill has already been paid (the client, who objected to the paid account, was the initiator in

*Mor-town*). The same goes for if the catalyst for taxation is a requirement at law for the process, as is the case here.

[21] As I have said, General Rule 18 requires me to tax this account. Rule 19 requires it to be reasonable. Rule 20 requires the Trustee's consent.

[22] As a starting point, Mr. Gillis took offence at comparing the informal tariff he says is in effect in Cape Breton for conveyancing work as against other regions of the Province. He told the Court that "you seem to want one standard for the whole Province." I replied that the standard of fairness and reasonableness was indeed a singular standard throughout the Province; the *Code of Professional Conduct* is the same in Yarmouth, Sydney, Amherst, and Halifax, and everywhere in between. That *Code* deals extensively with accounts, in the context of professional ethics.

[23] Chapter 3.6-1 of that *Code*, and its commentary, reads:

> 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.
>
> Commentary
>
> [1] What is a fair and reasonable fee depends on such factors as:
>
> (a) the time and effort required and spent;
>
> (b) the difficulty of the matter and the importance of the matter to the client;

(c) whether special skill or service has been required and provided;

(d) the results obtained;

(e) fees authorized by statute or regulation;

(f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;

(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;

(i) the experience and ability of the lawyer;

(j) any estimate or range of fees given by the lawyer; and

(k) the client's prior consent to the fee.

[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.

[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.

[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 added]

[24] As I have noted, General Rule 18 applies and Rule 20 requires me to determine, among other things, that the charges are reasonable.

[25] General Rule 3 incorporates the provincial *Civil Procedure Rules* except where supplanted by the BIA or the General Rules. Rule 77.13 provides the same general guidance with respect to costs as between solicitor and own client. That is to say, the overriding principle is reasonableness, bearing in mind that the solicitor is not a charity and is entitled to "reasonable compensation," in light of all relevant circumstances. It reads:

> 77.13 Counsel's fees and disbursements: entitlement and assessment
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> (1) Counsel is entitled <u>to reasonable compensation for services performed</u>, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.
>
> (2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are <u>examples</u> 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;
>
> <u>(c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid</u>;
>
> (d) the general conduct and expense of the proceeding;
>
> (e) the skill, labour, and responsibility involved;
>
> (f) <u>counsel's terms of retention</u>, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing. [emphases added]

[26] None of these require that fees or rates or prevailing *prix fixe* defaults be uniform across the Province. They do require that they be fair and reasonable across the Province. Mr. Gillis submits that he charges minimum sums for migration and conveyancing work, which he says is consistent with local practice. He says these are at least $1,000 per migration (usually $1500, perhaps with an abatement for a second related lot; he admits that the protocol at one time was $1,000 but "we got away from that" in the Sydney area, with the passage of time), and at least $1,000 for a residential conveyance. What brings us to a total of $8,160, says he, is the confluence of the bankruptcy with the factors I have outlined above.

[27] Let us examine those, against the factors set out in the *BIA General Rules*, the *Civil Procedure Rules*, the *Code of Professional Conduct*, and the common law as expressed in *Mor-Town* (and countless other cases).

**The (alleged) Complications**

[28] The Migration: I have reviewed the abstracts Mr. Gillis produced, at my direction. To use a good Nova Scotian expression, the title was not rocket surgery. Neither were they completely straight-forward. A road allowance had to be reconciled with the mapping graphics. The chain of title is partially but not

completely common to both lots. Various conveyances out of the root had to be addressed. The two abstracts, collectively, are less than a centimeter thick. They appear to have been contracted out to an independent title searcher, and charged to the account under taxation accordingly ($250.00).

[29] Mr. Gillis admits that the documentation required to effect migration can be common to both lots (that is, the authorization and Form 5 under the *Land Registration Administration Regulations*, NS. Reg. 207/2009, as amended); the Property Description Certification Applications ("PDCA") must be submitted in longhand; whether the Applications for Registration ("AFRs") are an exercise in duplication depends on whether the same enabling instrument is at hand; if not, the current owner's particulars (address, residency) will be the same but the enabling instrument will need to be changed to reflect each parcel's respective deed (or other instrument as the case may be). The upshot is that the second migration at the same time for the same client will involve more work than one migration, but less than for two unrelated ones at different times – how much less, will vary from matter to matter.

[30] It appears that the road reserve issue in the 99 x 99 foot lot was addressed through the simple modality of excepting and reserving "any portion of the current Chapel Road that may be included in the above described lot" (page 7 of the

applicable abstract). This appears to have been accepted by the mapper and, ultimately, the purchaser.

[31] If I accept, as I do, that $1,000 "per stand alone migration" is somewhat out of date, I do not accept that a straight lineal $1500 per "at the same time" migration for each of two lots is fair and reasonable, in these circumstances. This is especially so where the search itself is not conducted by the lawyer and, to boot, added on as a disbursement. The search is the heavy lifting which enables the lawyer to form their professional opinion as to the current state of title.

[32] The balance of the factors at hand relate to Mr. Gillis' fee of $3250 for the conveyancing work.

[33] The well test: A failed coliform well test in rural Nova Scotia occurs on days that end with a Y. The protocol is old hat, known (or should be known) to anyone who has a rural conveyancing practice. It involves little to no action by the lawyer, aside perhaps from providing requisite notice under any agreement of purchase and sale. Generally, the well is "shocked" (using a chlorine-based product) and re-tested. That (sometimes with a third test) failing, a well driller or other expert is engaged – the majority of the time, a UV light solves the problem and there may be a discussion piece about who pays for it and/or its operating costs

for a period of time. Only in rare cases is more drastic action – such as a new well – required, involving the negotiating skills and the legal and practical counsel of the lawyer. At the “re-testing/UV light” stage, at least, in my opinion it is not justified to add to the applicable legal fees unless there is considerable activity or engagement by counsel. There is no such evidence here.

[34] The Kitec Plumbing: This too, unfortunately, is a common problem. At the risk of iconoclasm, I repeat my comments at the hearing that unless counsel has been living under a rock, the insurance and practical issues of Kitec, and how they are addressed, are also old hat. I have referred to “Kitec as the new vermiculite; vermiculite was the new UFFI.” All reflect previously common materials that have posed various health, safety, insurability, and inspection issues. They are (and, really, can only be) addressed in one of three ways: the vendor may remediate the issue, there may be an abatement of the purchase price to reflect the alleged issue (or the vendor may say “take it or leave it”), or the purchaser may seek to terminate the transaction. Rarely, the matter may proceed to litigation over whether the objection is legitimate or timely. No assertion is made here that the purchaser was bound by expiry of time or otherwise to complete the transaction on its original terms.

[35] In the context of this bankruptcy, there were really only two – and ultimately one – possible resolutions: terminate the transaction, or adjust the price. The Trustee would not be in a position to remediate. Certainly the Trustee would not become embroiled in the class action suits that are or have been launched (and even if it did, it would not affect the conveyance except insofar as it may decide whether to assign or retain its rights under any such class action). If the Trustee terminated, it would still be faced with the same issue with a subsequent purchaser, and be faced with the potential issue of whether it made the right judgment call in terminating the earlier transaction. The only reasonable course was for the Trustee to attempt a reasonable abatement to the price and have the property sold "as is," as per normal Trustee dispositions, or terminate if the price abatement sought was unreasonable.

[36] This issue, and the counsel that flowed from it, does not justify the four hours' research that Mr. Gillis says he spent on the issue. It, too – and with respect – is not rocket surgery.

[37] The ultimate abatement, I am told, was somewhere in the neighbourhood of $9,000, all-inclusive, to address all issues. Given that there was a rapid sale, some $34,000 over appraisal, it appears that this was both reasonable and reflective of "keeping a good deal but not giving away the store." There was no evidence as to

who (or what combination of people) could take credit for this; if Mr. Gillis had his hand in, he did good work; but it was not a complicated piece of legal analysis to reach the options at hand and to provide counsel. While I will be the first to recognize that good results justify a good fee, that fee must still be fair and reasonable. Even the best results do not justify charging unreasonable fees: *Atlantic Jewish Foundation v. Leventhal Estate* 2018 NSSC 297.

[38] Vacant possession: I accept that it was problematic to get the former owners out of the property. It was not in evidence how much of a problem this actually was, or what Mr. Gillis' role was in securing the ultimate vacancy. I don't know if it was a phone call, an emphatic letter, or the modalities of the Trustee or the estate agent. Again, the burden is on the lawyer to justify any extra fee and what was done to earn it. I posited in argument that Mr. Gillis did not go to the premises with a moving van. He did not dispute that.

[39] The complications inherent in the existence of a bankruptcy: True enough. Bankruptcy does add an extra layer; sometimes more than one. The assignment must be recorded; the persons in occupation may not be cooperative or motivated to make the property presentable, marketable, kempt, or for that matter vacant. There may be default under security (as appears to have been the case here). However, the ultimate vendor – the Trustee – is sophisticated and does not need to

be "walked through" such things as conveyancing documents, adjustments, receipts and disbursements with the same painstaking vigour as is sometimes the case with lay clients. Nor are they filled with the same angst and emotional baggage that sometimes goes with the sale of a family residence, particularly where there are other sentiments at play (such as with a deceased's estate or a domestic separation), which sometimes requires the attentions, diplomacy, and/or firmness of counsel. I believe that it is fair to charge a reasonable additional net amount for recording the assignment and for a reasonable reflection of the work differential (if any) between a mom-and-pop transaction and a bankruptcy one.

[40] Mr. Gillis' submission was that he charges a "minimum" of $1000 for a residential sale, and that $1500 is "more reasonable." I do not in itself accept that $1500 (especially "plus plus," meaning disbursements are over and above) is reasonable for a "mom and pop." Certainly $3,250 for this bankruptcy conveyance is not.

[41] The default, and the legacy mortgage: I accept that there is extra effort involved when a mortgage has gone into default (although no proceedings were apparently started here) and one must deal with lender's counsel rather than the

lender or a payout platform. Again, however, the associated fees must be reasonable[2].

[42] The same goes for legacy mortgages (that is, an old mortgage for which there is no discharge). The lawyer is put to their due diligence to ensure that it has indeed been paid, and that they are able to procure its removal from the parcel register.

[43] That said, however, once the lawyer has adequate evidence that the mortgage has indeed been paid, s. 60 of the *Land Registration Act* provides for an expedient and efficient way to procure the mortgage's removal[3]. One is no longer saddled with chasing a recalcitrant lender, or the cumbersome process of a Court application under s. 28 of the *Real Property Act*, RSNS 1989, c. 385 as amended (although both remain available). S. 24 of the *Real Property Limitations Act*, RSNS 1989, c. 258 as amended also provides a possible avenue, when applicable, for the lawyer to remove the offending legacy mortgage from the parcel register by

[2] I note in passing that Mr. Gillis referred to the lender's counsel's legal account as a comparator. The amount of that bill was not argued, except as a "you should look at what THEY billed" submission. It appears in the payout statement provided as $1,362.50, all-inclusive. I make no comment on its reasonability or otherwise, except to observe that two wrongs don't make a right.

[3] It is, in fact, a requirement of vendor's counsel under Regulation 8.2.9 under the Regulations made pursuant to the *Legal Profession Act*, SNS 2004, c. 28, as amended, if a release is not forthcoming within the timeframe prescribed therein.

operation of law. The point being, while it is an irksome piece of extra work to deal with such matters, they do not constitute a thirteenth Herculean penance.

**Application of the law to the account**

[44] Applying to the factors I outlined in the *Code*, the *BIA General Rules*, the *Civil Procedure Rules*, and the common law: there was extra effort and the lawyer is entitled to be paid for it on a *quantum meruit* basis – but not double to triple a 'mom and pop' transaction. This migration and sale had its difficulties but was not exceptionally difficult. No special skills beyond that of a reasonably competent and practical conveyancing lawyer were brought to bear. The result – the sale – was ultimately satisfactory. There was no written retainer, or exchange setting out the fee. The trustee's *ex post facto* Rule 20 consent to the account is of limited weight. The "fund out of which counsel is to be paid" (CPR 73.13(c )) is ultimately the pool available to the creditors, not the people who are before me.

[45] I apply my discretion: I allow $1200 for the first migration and $600 for the second, for a total of $1800. I find, having reviewed these abstracts, that $1800 plus tax and disbursements is fair and reasonable in these circumstances.

[46] I allow $1,500 for the sale. This is in no way an acceptance that a "minimum of $1,000" is a reasonable default or starting point for a residential

consumer sale. It does reflect that a series of comparatively pedestrian issues, in combination, can justify a reasonable premium on a reasonable default amount. I have opined that the Kitec and well water issues are not ones which persuade me. The legacy mortgage (insofar as verifying its payout), the dealing with lender's counsel, and the need to deal with vacant possession, combined with the extra recording required by the bankruptcy are factors which persuade me to exercise my discretion to arrive at this $1500 figure.

[47] Turning to disbursements. Chapter 3.6-3 and a commentary in the Code of Professional Conduct provides that:

> 3.6-3 In a statement of an account delivered to a client, a lawyer must clearly and separately detail the amounts charged as fees and disbursements.
>
> Commentary [1] The two main categories of charges on a statement of account are fees and disbursements. A lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf. However, a subcategory entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided that the client has agreed, in writing, to such costs. [emphases added]

[48] I have assumed that the title search of $250 was arm's length. I allow this, and in particular reiterate that I have considered it in fixing the amount allowed for the migration – to disallow it would be to double-count a deduction in fixing what is a fair fee for these migrations and the fact the search was "farmed out." HST does not appear to have applied.

[49] There is no breakdown between the $107.50 charged for "copying and subsearch." There is no written agreement to incur the copying overhead as required by the *Code*. I disallow this amount.

[50] I allow the $200 disbursement for the two AFRs.

[51] Mr. Gillis charged $400 to record the assignments. Only two are in evidence. If he recorded them twice each (one for each parcel), that is an unnecessary duplication. I allow $200.

[52] I allow the $15.00 for the certified cheque.

[53] To summarize, and in my discretion, I tax and allow the following:

1. Migration: $1,800.00
2. Sale: $1,500.00
3. HST on $3,300.00: $495.00
4. AFRs (2) $200.00
5. Assignments (2): $200.00
6. Title search: $250.00
7. Certified cheque: $15.00

TOTAL: $4,460.00

[54] This shall be allocated equally between the two estates. It appears Mr. Gillis obtained payment on closing. If not, the Trustee shall pay this amount. If so, Mr. Gillis shall forthwith refund the difference to the Trustee for the general benefit of creditors.

[55] I am forwarding the order prepared by the Court with this decision.

Balmanoukian, R.