SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Wolfson v Wolfson*, 2022 NSSC 263

Date: 20220923
Docket: SFH No. 1201-071176
Registry: Halifax

Between:

Louis Wolfson

Petitioner

v.

Jennifer Wolfson

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Theresa M. Forgeron
Costs Submissions:	March 18 and 25, 2022; April 26, 2022
Decision:	September 23, 2022
Subject:	Costs
Result:	**Is HST on legal fees recoverable on a costs award assessed on a party and party basis?** Yes. (1) The state of the law is not entirely clear given the conflicting case authorities at the trial and appellate level. (2) This case involved a strategic and egregious dereliction in the duty to disclose, which likely resulted in a conservative calculation of the true value of the husband's corporate shares. (3) The wife paid all invoices; there was no WIP outstanding. (4) Neither the wife, nor her counsel had the option of excluding HST in the calculation of legal fees. HST is an unavoidable, incidental cost of litigation. (5) It is unfair to ignore the 15% nondiscretionary HST payment. In this case, justice cannot be done, as between the parties, if HST is excluded from the calculation of legal fees.

In the alternative, HST on legal fees is recoverable as a necessary, reasonable, and just disbursement that is incidental to the litigation.

Can settlement conference materials and "without prejudice" emails be considered for costs purposes?

Rules 10.03 and 77.07(3) and case authorities prohibit the consideration of settlement conference briefs and associated e-mails when determining costs.

Are recoverable expert fees limited to those connected with the expert report or testimony?

No. The court has authority to compensate for consulting charges related to technical matters, trial preparation, and brief writing, provided they are incidental to the litigation, even when some of the charges are for services performed by individuals other than the expert who testified.

In this case, the wife proved the two-part test - (1) That it was reasonable for her to retain the three experts. (2) That the adjusted expert fees were reasonable, just, and incidental to the litigation. The husband was ordered to pay $168,117.50 for expert fees and HST.

Should costs be granted based on the tariff amount or a lump sum?

The amount involved was calculated to be about $4.8 million. The tariff amount was not used because its application would produce a result perilously close to an award of solicitor and client costs. Instead, a lump sum based on 75% of the wife's adjusted legal fees was applied to produce an award of $254,450 for legal fees, inclusive of HST and disbursements.

Total costs of $422,567 were payable in 45 days for legal fees, expert fees, disbursements, and HST.

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Counsel:	The Petitioner, Louis Wolfson, self-represented
	Richard Bureau and Ryan Christen for the Respondent, Jennifer Wolfson

By the Court:

Introduction

[1] This decision will determine the costs award arising from the aggressively contested and complex divorce trial involving the classification and division of over $16 million in assets, and the quantification of spousal and child support arising from the income produced by the assets. The trial was held over six days in 2020 and 2021. In addition to the parties and lay witnesses, four experts testified.

[2] The lengthy divorce decision is reported as ***Wolfson v Wolfson***, 2021 NSSC 260, and the ancillary decision is reported as ***Wolfson v Wolfson***, 2022 NSSC 25. Following the conclusion of the trial, the parties were invited to submit their position on costs. Costs submissions were received on March 18 and 25, and April 26, 2022.

[3] For her part, Ms. Wolfson seeks tariff costs of $482,968.50 based on her success at trial, her settlement position, and the procedural history. This amount includes disbursements of about $171,000 for expert fees. Ms. Wolfson retained experts to provide opinion evidence and advice on accounting and taxation issues, the market value of commercial real property, and the planning and development potential of some of the rental properties. She states that the expert fees were reasonable, just, and necessary. In the alternative, Ms. Wolfson seeks an all-inclusive lump sum costs award between $440,856 and $450,000.

[4] In contrast, Mr. Wolfson is not seeking costs from Ms. Wolfson. He says that any costs payable by him should not exceed $250,000. In support of his position, Mr. Wolfson states that the court, in determining costs, has no authority to consider either HST paid on legal fees, or settlement positions adopted in settlement conference materials or communicated via "without prejudice" emails from counsel. Mr. Wolfson also disputes some of the expert fees and the amount charged for photocopies.

Issues

[5] In this decision, I will determine the following four issues:

- Is HST on legal fees recoverable?

- Can settlement conference materials and "without prejudice" emails be considered for costs purposes?
- What expert fees are recoverable?
- What is the appropriate costs award?

Analysis

[6] **Is HST on legal fees recoverable?**

Position of the Parties

[7] Mr. Wolfson disagrees with Ms. Wolfson's calculation of her legal fees, primarily because she included HST and unbilled WIP. Mr. Wolfson says Ms. Wolfson cannot claim the $44,734.22 in HST she paid on her legal fees, nor can she include unbilled WIP. From his perspective, Ms. Wolfson's total legal fees are $280,508, not the $340,279.55 claimed by her counsel. In support of this argument, Mr. Wolfson relies on ***Andrews v Keybase Financial Group Inc***, 2014 NSSC 287, paras 32 to 33**.**

[8] In contrast, Ms. Wolfson says the HST she has already paid on legal fees should be included when calculating the total amount of her legal and expert fees. She submits that the court has authority to include HST when calculating recoverable legal and expert fees: ***Landry v Kidlark***, 2014 NSSC 432; ***Shannon v Frank George's Island Investments Ltd***, 2015 NSSC 133; ***Henneberry v Compton***, 2014 NSSC 412; ***Laamanen v Cleary***, 2017 NSSC 153, affirmed at 2018 NSCA 12. Ms. Wolfson states that ***Andrews v Keybase Financial Group Inc,*** *supra*, does not absolutely bar the recovery of HST. She believes there is a distinction between adding HST to a lump sum costs award and including HST when calculating actual legal fees.

Law

[9] Courts have discussed whether HST is recoverable for costs purposes. Judges have consistently ruled that HST is recoverable on disbursements: ***MacDonell v M & M Developments Ltd***, [1997] NSJ No 342 (SC); ***Campbell v Lienaux***, [1997] NSJ No 343 (SC); ***Mader v Lahey,*** [1997] NSJ No 571 (SC); and ***Keddy v Western Regional Health Board***, [1999] NSJ No 464 (SC); and on legal

fees when costs are assessed on a solicitor and client basis: ***Halifax (Regional Municipality) v Joudrey***, 2001 NSSC 185.

[10] Nova Scotia courts have not, however, acted uniformly in their treatment of HST on legal fees when costs are assessed on a party and party basis. There are two streams of authority.

A. Cases Finding HST Is Not Recoverable

[11] The principle that HST is not recoverable on legal fees has its genesis in ***Roose v Hollett*** (1996), 154 NSR (2d) 161) (CA), leave to appeal refused [1996] SCCA No 541, where Flinn, JA wrote:

> [198] I agree with the comments of Goodfellow J. in *Day v. Day* (1994), 129 N.S.R. (2d) 186 at p. 193:
>
> > "While the theory of costs is that it is a partial reimbursement by way of indemnification to the successful party, costs are the property of the party, and no GST is incurred or is payable on an award of costs. Costs do not represent goods and services, and being owned by the party should not be related to a client's liability for whatever GST is required by law on a solicitor/client bill for legal fees."[i]

[12] Additional cases where HST was excluded from a party and party costs award include ***MacIntyre v Cape Breton District Health Authority***, 2010 NSSC 170, aff'd 2011 NSCA 3; ***Boutcher v Clearwater Seafoods Limited Partnership***, 2010 NSSC 64; ***Brocke Estate v Crowell***, 2014 NSSC 269; ***Leyte v Leyte***, 2020 NSSC 215; ***Little (Litigation guardian of) v Chignecto Central Regional School Board***, [2004] NSJ No 494 (SC); ***MacNeil v MacNeil,*** 2014 NSSC 307; and ***Bonitto v Halifax Regional School Board***, 2014 NSSC 406.

B. Cases Finding HST Is Recoverable

[13] In contrast, other courts have included HST when determining costs on a party and party basis. Most notably, in ***Moore v Darlington***, 2012 NSCA 68, Farrar, JA added HST to the costs awarded in a family law matter at the trial level. Costs were awarded as a penalty for the lack of disclosure which resulted in an adjournment:

> [62] The legal fees incurred, including all of the proceedings below, was approximately $60,000. Of that amount, approximately $24,000 was incurred between March 21st, 2011 and the Order dated June 8, 2011. Approximately $3,000

> in disbursements was incurred during the same period of time. Both of these amounts are without HST.
>
> [63] On the motion for the adjournment, Ms. Darlington's counsel was prepared to accept the sum of $5,000 as costs to agree to the adjournment. As a result, I would award costs to Ms. Darlington as follows:
>
> – $5,000 representing the time up to the request for the adjournment;
>
> – 25% of counsel fees from the date of the adjournment until the Order of June 8, 2011, approximately $6,000;
>
> – 25% of the disbursements incurred during the same period of time, approximately $750;
>
> [64] **Therefore, the total cost award to Ms. Darlington for the proceedings below resulting from this ruling granting the adjournment will be $11,750 plus HST.**
>
> [65] **This amount represents a penalty to Mr. Moore for his failure to comply with the disclosure requirements which created the log jam and caused the need for an adjournment.** *[Emphasis added]*

[14] Such an outcome is not entirely unexpected. The use of costs as a sanction for disclosure delinquency is embedded in foundational family law principles. Non-disclosure has been termed "the cancer of matrimonial property litigation": ***Leskun v Leskun***, 2006 SCC 25, at para 34, quoting with approval from ***Cunha v Cunha***, (1994), 99 BCLR (2d) 93 (SC). Most recently, Beaton, JA reiterated that a costs award is one of several tools available to sanction a party who falls short of meeting their disclosure obligations: ***Donner v Donner***, 2021 NSCA 30, para 42.

[15] In another decision, ***LKS v DMCT***, 2008 NSCA 61, the Court of Appeal affirmed a costs award which included HST on legal fees. ***LKS*** involved an appeal of a costs award following an application for a variation of child support. The mother's legal fees amounted to $123,225.50. Judge Levy deducted $26,137.50 for amounts he deemed unnecessary, too high, or not within the ambit of allowable items. He further reduced the remaining $97,088 in fees by 10%, to $87,379.20, to account for counsel's inexperience. To that amount, Judge Levy added $12,233.09 in HST and $9,441.77 for disbursements. He ordered the father to pay the total amount of $109,054.06 in costs. Both parties appealed the costs award. The father's grounds of appeal included that the trial judge erred in awarding the equivalent to solicitor-client costs. During the appeal, the legal principle stated in

Roose v Hollett, *supra*, was neither raised nor addressed. In affirming the trial judge's costs award, Roscoe, JA held:

> [49] As mentioned above (¶ 7) the standard of review of an order for costs made by a trial judge is highly deferential. We will not interfere in a trial judge's exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice.
>
> [50] I have carefully considered the arguments of both parties respecting the costs order and the detailed and careful reasons of the trial judge. None of the submissions has merit in my view. The amount ordered was not full solicitor client costs as evidenced by the reductions mentioned above. The judge made legitimate findings of fact about the conduct of the parties and the relative success of the applications and appropriately considered all of the other relevant factors in coming to his conclusion. I am completely satisfied that the judge applied the correct legal principles and that the decision is not clearly wrong nor does it amount to a manifest injustice. I would dismiss all the grounds of appeal regarding the costs order.

[16] The policy reasons to include HST in a costs assessment were canvassed in ***Eaton v Manning***, 2003 NSSC 91[ii], where Hall, J stated:

- There is no reason why a successful party should bear an additional burden for legal fees as a result of GST. GST is an unavoidable, incidental cost of litigation. To maintain the underlying principle of party and party costs, a court should include the GST in a costs award: para 20, from the cited case of ***Prentice v Sipos***, [1992] GSTC 8 (Ont Ct J (Gen Div)).

- To maintain the level of indemnification intended by an award of party and party costs, it is necessary to award GST to the extent that those costs will be subject to that tax: para 21, from the cited case of ***Ligate v Abocl*** (1991), 50 OR (3d) 332 (Ont Ct J (Gen Div)).

- The purpose of party and party costs is to provide a substantial contribution toward the successful party's reasonable expenses. It would be illogical and unreasonable for a court to fix an award of costs only to have it subsequently reduced or diminished by the imposition of a tax over which the parties and the courts have no control: para 25.

[17] In ***Conrad v Bremner,*** 2006 NSSC 99, B MacDonald, J adopted the reasoning in ***Eaton*** and included HST in her costs award. Many family law costs decisions follow this approach: ***Jensen v Jensen***, 2007 NSSC 354; ***Provost v***

Marsden, 2010 NSSC 423; ***AR v GR,*** 2010 NSSC 424; ***Burchill v Savoie***, 2011 NSSC 236; ***Darlington v Moore***, 2016 NSSC 84; ***MacIntyre v Ranni***, 2016 NSSC 238; ***Bruce v Ramey***, 2017 NSSC 60; ***Austin (Burke) v Casey***, 2018 NSSC 259; ***Fedortchouk v Boubnov***, 2020 NSSC 51; and ***Pike v Pike (Johannesen)***, 2021 NSSC 257.

[18] Other non-family, civil cases have also included HST in costs awards. For example, in ***Henneberry v Compton,*** *supra*, decided by Wright, J after his decision in ***Andrews v Keybase Financial Group Inc****, supra*, legal fees inclusive of HST were used to calculate costs:

> [31] As for quantum, I refer once again to the basic principle that a costs award should afford substantial contribution to the successful party's reasonable fees and expenses without amounting to a complete indemnity. **Bearing that principle in mind, and the manner in which it was applied in the *Williamson* and *Armoyan* cases, I conclude that the respondents should receive a party and party costs award of $20,000, measured against the rounded sum of $35,000 for legal fees incurred in relation to this litigation (including HST) which represents a recovery in that respect of approximately 57%.** In addition, the respondents will also be entitled to their taxable disbursements earlier reviewed in a rounded sum of $4,300 plus HST. *[Emphasis added]*

[19] A similar approach is adopted in ***Laamanen v Cleary***, *supra; **Landry v Kidlark,*** supra*; ***Shannon v Frank George's Island Investments Ltd***, *supra*; and ***Pink v Davis***, 2011 NSSC 237.

Decision

[20] I find that HST should be included when calculating the amount of legal fees incurred by Ms. Wolfson. I reach this conclusion for the following reasons:

- The state of the law is not entirely clear, given the conflicting case authorities at the trial and including those found at the appellate level.
- This case involved a strategic and egregious dereliction in the duty to disclose, which likely resulted in a conservative calculation of the true value of Mr. Wolfson's corporate shares: paras 55 to 62, 87 to 89, 103, 104, 107, 109, and 112 of the divorce decision.
- Ms. Wolfson paid all her legal invoices. All WIP has since been invoiced and paid. There are no legal fees outstanding.

- Neither Ms. Wolfson, nor her counsel, had the option of excluding HST in the calculation of legal fees. HST is an unavoidable, incidental cost of litigation.

- It is unfair to ignore the 15% nondiscretionary HST payment. In this case, justice cannot be done, as between the parties, if HST is excluded from the calculation of legal fees.

[21] In the event I erred by not following ***Roose v Hollett,*** *supra***,** I would nonetheless arrive at the same conclusion, by including all HST payable on legal fees as a reasonable, just, and necessary disbursement pursuant to Rule 77.10, which was enacted after ***Roose v Hollett*** was decided.

[22] **Can settlement conference materials and "without prejudice" emails be considered for costs purposes?**

Position of Ms. Wolfson

[23] Ms. Wolfson states that meaningful settlement discussions were frustrated because of a lack of fulsome disclosure by Mr. Wolfson, along with his stance on maintenance. Despite the lack of disclosure, Ms. Wolfson attempted to settle the outstanding issues during settlement conferences, and by negotiations through counsel. She states that her settlement positions and her offer of September 18, 2019 were more beneficial to Mr. Wolfson than the divorce decision. She therefore seeks increased costs.

[24] In addition, Ms. Wolfson states that the court has authority to consider the settlement discussions referenced in her costs submissions for two reasons. First, "without prejudice" privilege expires once the merits of the dispute are decided: ***Mahe v Boulianne***, 2010 ABCA 74, recently cited with approval in ***Veinotte v Chute***, 2020 NSSC 271, para 5. Second, although Ms. Wolfson acknowledges Rule 10.16, she notes that in ***Perrin v Perrin***, 2020 NSSC 378, the court referenced details of the wife's settlement conference brief when assessing costs from a failed settlement conference.

Position of Mr. Wolfson

[25] In contrast, Mr. Wolfson states that neither he, nor his counsel, ever received a settlement offer from Ms. Wolfson. In addition, Mr. Wolfson states that no informal offer to settle was presented. Although Mr. Wolfson agrees that

negotiations occurred during settlement conferences, he argues that settlement materials and discussions cannot be referenced in costs submissions: Rules 10.03 and 77.7(3).

[26] Further, Mr. Wolfson objects to the inclusion of any informal settlement negotiations contained in "without prejudice" e-mails from his lawyer. He says he did not authorize their release, and that any informal settlement e-mails are privileged.

Law and Decision

[27] Rule 10.16 provides that the privilege attached to settlement discussions applies to all written and oral communications between a party and the settlement judge, and between the parties themselves in connection with or at the settlement conference. Settlement briefs or position letters are thus captured by Rule 10.16.

[28] Further, Rule 10.03 states that a judge who determines costs may consider a written settlement offer unless the offer was made at a settlement conference. Rule 77.07(3) prohibits any reference to a settlement offer made at a settlement conference in evidence or in costs submissions.

[29] The policy reasons for excluding these offers from consideration were explained in ***Perry v Keyplan Housing Cooperative Ltd***, [1997] NSJ No 201 (SC), where Tidman, J stated:

> 2 In their submissions, counsel dealt with the effect matters arising from an earlier settlement conference should have on costs of the action.
>
> 3 Let me leave no doubt on this issue. What occurred in relation to the settlement conference will have absolutely no bearing on the award of costs. It is inappropriate for counsel to refer to matters occurring during the settlement conference process in arguing a claim for costs, including opinions which may be expressed by the settlement judge.
>
> 4 In order to maintain the integrity of the settlement conference process, it is absolutely essential that all discussions, positions taken and opinions expressed during the process remain confidential. If that were not so, parties understandably would be reluctant to frankly and openly discuss their positions either with each other or the settlement judge thus defeating the very objective of a settlement conference, i.e. to achieve a negotiated settlement of the action. All positions put forward by the parties should be on a strict "without prejudice" basis. If not, there would be an added danger that settlement judges might later be called as witnesses to give evidence of what occurred at the settlement conference. This, to say the least, would be an undesirable situation.

> 5 If counsel wish to use the effect of attempts at settlement in arguing costs, the Civil Procedure Rules make provision for doing so. Even informal timely offers of settlement are routinely considered by the court in exercising discretion in relation to costs, but not offers made during the settlement conference process.

[30] Courts have consistently applied Rules 10.03 and 77.07(3) to exclude all settlement briefs or position letters from their costs analysis. See for example: ***Lake v Lake,*** 2016 NSSC 255; ***Lubin v Lubin,*** 2012 NSSC 93; ***Johnston v Clearwater Seafoods Ltd***, 2008 NSSC 403; ***Giffin v Soontiens***, 2012 NSSC 354; ***Cole v Luckman,*** 2013 NSSC 6; and ***LL v KS***, 2021 NSSC 172.

[31] I too must follow these authorities. I will not consider the settlement conference materials or associated e-mails, including the September 18th offer contained in the settlement brief. If I am wrong, I find that the terms of the September 18th offer diverge too far from my decision to be relevant in my costs analysis.

[32] As a practice suggestion, rather than relying on settlement conference discussions or written position letters, parties should draft settlement offers independent of settlement conference materials so that they may be considered by the court in awarding costs.

[33] **What expert fees are recoverable?**

Position of Ms. Wolfson

[34] Ms. Wolfson retained three experts and claims their fees as recoverable disbursements:

- $124,986.75 for the PWC invoices associated with PWC partner, Nikki Robar, CPA, CA, CB. Ms. Robar was qualified to provide opinion evidence on *Guideline* income, including corporate attribution for the purposes of assessing the quantum of child and spousal support, business valuations of tangible and intangible assets, and associated general accounting and taxation matters. Ms. Wolfson also seeks reimbursement for services incidental to the litigation which were provided by other PWC associates, managers, directors, and partners.

- $38,249 for the expert fees charged by Jeff McLean, AACI, PApp. Mr. McLean was qualified to provide expert opinion in the field of commercial real estate valuation and appraisal.

- $7,733.75 for the expert fees charged by Chrystal Fuller, LPP, MCIP. Ms. Fuller was qualified to give expert opinion evidence in the field of planning and development potential of real estate properties.

[35] Ms. Wolfson seeks full compensation for all expert fees that she incurred based on Rule 77.10; ***Cashen v Donovan***, [1999] NSJ No 77 (SC); and ***Andrews v Keybase Financial Group Inc***, *supra*. She states that the retention of the three experts was reasonable, just, necessary, and appropriate, given the complexity of the outstanding issues and the lack of sufficient other expert evidence.

Position of Mr. Wolfson

[36] Mr. Wolfson did not specify concerns about the expert fees charged by Mr. McLean or Ms. Fuller. Mr. Wolfson did, however, list several concerns about the PWC invoices which total almost $125,000, including $16,300 HST. Mr. Wolfson states that $55,000 is the appropriate amount to be recovered for PWC invoices, for the following reasons:

- Recoverable expert fees are limited to those related to the expert's report or testimony. $16,470 in fees should therefore be deducted, as they represent consulting fees incurred when Ms. Robar assisted Ms. Wolfson's counsel at a settlement conference; helped counsel prepare for trial and draft a brief; summarized key discussion points after testifying; and helped counsel with the post-trial brief. Further, similar charges by other PWC managers and directors should also be disregarded, including $15,575 charged by senior manager, I Fraser, and $3,800 charged by tax director, R White, for trial preparation and brief writing.

- Recoverable expert fees should not be extended to billings from other PWC associates, managers, directors, and partners who did not testify at trial, including those charged by senior manager, I Fraser; tax director, R White; partner, P Levine; senior associate H MacKeigan, and senior associate, J Bischof. No details were provided as to what services these accountants added to Ms. Robar's report.

- Ms. Robar's testimony lasted three hours based on her invoice.

- In comparison, Paul Bradley, Mr. Wolfson's expert, charged $54,438.13 for the same type of report produced by Ms. Robar.

[37] Mr. Wolfson states that the following amounts represent reasonable, recoverable expert fees:

PWC Report	$ 55,000
Altus Report	$ 38,249
Brighter Planning Report	$ 7,733.75
Total	**$100,982.75**

Law

A. Rule 77.10

[38] Disbursements, including expert fees, are recoverable under Rule 77.10:

> 77.10 Disbursements included in award
>
> (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.
>
> (2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.

B. Test for Recoverable Disbursements

[39] In ***Murphy v Claussen Walters & Associates Limited,*** 2002 NSCA 20, the Court of Appeal explained the two-part test for the successful recovery of expert fees. First, the successful party must prove that it was reasonable to retain the expert. Second, the successful party must prove that the amount charged by the expert was just and reasonable. The judge's use or lack of use of the expert report, however, is not determinative:

> [11] … we think the trial judge was right to rule - over the objections of counsel for the appellants - that the reports prepared by Mr. Hardy were relevant and admissible.
>
> [12] A finding of relevance, however, did not end the matter. Before obliging the unsuccessful appellants to pay a significant disbursement of almost $16,500, **the trial judge was required to consider whether the amount charged was just and reasonable**. …
>
> …

> [15] We cannot accept counsel for the appellants' submission that all or a significant proportion of the Hardy invoices ought not to be recoverable because no use was made of the Hardy reports by the trial judge in his ultimate determination. In our view, this is immaterial. **The particular "use" to which an expert's report or opinion may be put by a trial judge may never be discerned. The only question is, as we have noted, whether in fact the disbursement is a "just" and "reasonable" charge against the opposing party.** *[Emphasis added]*

[40] In ***Go Travel Direct Com Inc v Maritime Travel Inc***, 2009 NSCA 42, the Court of Appeal, citing para 10 of *Hendrickson v. Hendrickson*, 2005 NSSC 202, clarified that "… the test relating to a disbursement is not whether it would eventually be needed, but … whether it was 'reasonable for a party to have engaged the services of an expert and that the quantum of the disbursement is just and reasonable'": para 115.

[41] A non-exhaustive list of factors deemed relevant to the determination of the reasonableness of a disbursement under the *Civil Procedure Rules* (1972) is found at para 10 of ***Cashen v Donovan***, *supra*. Such factors include whether the disbursement was necessary and reasonable and was of assistance to the court; the amount involved in the litigation; the complexity of the issues; the sufficiency of other available expert evidence; the professional quality of the evidence; the expert's hourly rate; the relevance of the opinion; the presence of any collateral benefit; and the examination into the nature of the work.

C. Consulting Services

[42] In ***Go Travel Direct Com Inc v Maritime Travel Inc,*** *supra,* the Nova Scotia Court of Appeal approved an Alberta Court of Queen's Bench decision which held that the "court has the discretion to allow costs of experts for investigations and inquiries and for assisting counsel at trial even though the experts do not testify": para 116, quoting from para 11 of ***Sidorsky v CFCN Communications Limited***, 1995 CarswellAlta 86 (QB).

[43] In ***MDS Inc v Factory Mutual Insurance Co (cob FM Global)***, 2021 ONCA 837, the Court of Appeal allowed the recovery of expert fees despite the expert report not being introduced at trial. The Court held that the disbursements were recoverable because the expert fees were incidental to the litigation, and were reasonably necessary for the conduct of the proceeding at the time the expert was retained:

> [16] Third, we agree that **FM Global should be allowed to recover the disbursements for expert advice regardless of whether the expert reports were introduced at trial or relied on by the trial judge.**
>
> [17] Each of the parties engaged multiple experts, and the court itself appointed an expert. **All expert fees were incidental to the litigation**. The experts quantified the losses and responded to issues raised by the opposing parties' experts.
>
> [18] FM Global's expert accounting firm, Matson, Driscoll & Damico ("MDD"), analyzed MDS' expert reports. MDD's expert advice concerned the quantification of loss from the date of the shutdown for the entire duration of the outage and the quantification of prejudgment interest. Although the expert report was not introduced at trial, the amounts were reasonably incurred to respond to the issues raised by MDS.
>
> [19] **We note that reasonable expert fees for expert reports reasonably necessary for the conduct of the proceeding are recoverable whether or not the expert is called to give evidence***: Charlesfort Developments Limited v. Ottawa (City),* 2021 ONCA 542, at para. 6, leave to appeal S.C.C. requested, 39818. **Nonetheless, the fact that the expert was not called to give evidence is a factor to be taken into account in determining the reasonableness of the overall fees charged**: *Charlesfort,* at para. 7.
>
> [20] **The reasonableness of retaining the expert is to be considered at the time the expense is incurred not in hindsight**: *Fan (Guardian ad litem of) v. Chana,* 2011 BCCA 516, 345 D.L.R. (4th) 453, at para. 56. **Neither the retainers nor the amounts charged are, in our view, untoward.** *[Emphasis added]*

[44] In ***Brown v Silvera,*** 2010 ABQB 224, the wife applied for solicitor and client costs and the payment of expert witness fees following her success in a dispute over matrimonial property. The husband challenged the expert witness fees on the basis that they were excessive and included services for trial preparation unrelated to the expert report or testimony. In rejecting the husband's argument, Moen, J held that the expert fees were recoverable:

> [96] Rule 600 states that "costs" include "all the reasonable and proper expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceedings" [Emphasis added.]. Rule 601(1) further indicates that the Court may consider the complexity of the proceedings in determining the issue of costs. **A quick survey of certain relevant case-law suggests that the court has the discretion to allow costs in the form of a disbursement for the use of experts in assisting counsel at trial even though the experts do not testify**: *Nova, an Alberta Corp. v. Guelph Engineering Co.* (1988), 89 A.R. 363, 60 Alta. L.R. (2d) 366 (Alta. Q.B.); *Petrogas Processing*

> *Ltd. v. Westcoast Transmission Co.* (1990), 105 A.R. 384, 73 Alta. L.R. (2d) 246 (Alta. Q.B.); and *Sidorsky v. CFCN Communications Ltd.* (1995), 167 A.R. 181, 27 Alta. L.R. (3d) 296 (Alta. Q.B.), varied 206 A.R. 382, 53 Alta. L.R. (3d) 255 (Alta. C.A.).
>
> …
>
> [98] The complexity of the financial matters and corporate valuations as disclosed in my decision in *Brown v. Silvera* suggests that it was reasonably necessary for Arès to require additional assistance from an expert for the purpose of running the trial. **In view of Arès' presentation during the long trial, it is certainly arguable that the expert assistance enhanced Arès' performance as Silvera's counsel in addressing complex issues and examining witnesses effectively. I certainly found the subject matter to be complex.** Further, Arès was caught by surprise as to Smith's criticism of Siebert's use of certain SIC codes that were critical to Siebert's building up of the value of Brown's assets. I also note that Arès was very good counsel at trial in taking the expert through the complex evidence and in cross-examining Smith. **I conclude that it was essential (not just reasonably necessary) for Arès to have technical assistance throughout the trial, particularly where the evidence related to the value of the companies, not just in cross-examining the expert. Further, it is reasonable for a lawyer to have technical expertise in assisting her to prepare the background for her own expert reports. Technical assistance in a complex scientific or accounting matter is essential as counsel cannot be expected to know the minutiae in such areas. I noticed how smoothly the evidence went in at trial in the areas requiring technical expertise. It is my view that this would not have happened but for the assistance of Bailey. Therefore, I find that his assistance not only assisted Arès but also the court.**
>
> [99] Arès provided detailed accounts from Bailey as to his assistance prior to trial and at trial. I find nothing unusual about those accounts and find that there is no duplication with the efforts of Siebert. *[Emphasis added]*

[45] The Federal Court also has held that fees paid to experts for technical assistance and case preparation in complex matters are recoverable, so long as they are reasonably necessary: ***Biovail Corp (dba Biovail Pharmaceuticals Canada) v Canada (Minister of Health and Welfare)***, [2007] FCJ No 1018 (FC), as upheld by Simpson, J (2008 FC 278), para 29.

[46] Further, in ***Adir v Apotex Inc***, [2008] FCJ No 1343 (FC), Snider, J expanded on the rationale for allowing recovery of expert fees for technical assistance and case preparation in complex cases:

> 21 I **am not prepared to limit the reimbursement of the experts** as requested by Apotex**.** In my view, **any assistance provided by an expert related to his or her area of expertise is justifiable.** That would include **assisting counsel in reviewing and understanding the expert reports from the other side and preparing for cross-examination.** Until we have a trial process that allows experts to openly question each other on their reports, lawyers must be involved. And, the only meaningful way counsel can be prepared to act as such middlemen is to have the experts' assistance. Recovery of the reasonable fees charged by the experts who then appeared at trial to provide this service is appropriate.
> *[Emphasis added]*

Decision

[47] Ms. Wolfson proved that she should recover most of the expert fees charged to her, even though some of the PWC fees relate to consulting, trial preparation, and brief writing, and some were for services performed by other associates, managers, directors, and partners of PWC who did not testify. Ms. Wolfson was successful because she satisfied both elements of the requisite two-part test.

A. Step 1 - Reasonable to Retain Experts

[48] Ms. Wolfson proved that it was reasonable to retain Ms. Robar of PWC, Mr. McLean, and Ms. Fuller for two reasons. First, without expert testimony, there was no evidence as to the value of Mr. Wolfson's corporate shares. Second, without expert evidence, it would have been most challenging to determine Mr. Wolfson's income for support purposes. Expert evidence was required to bridge the evidentiary gaps in these complex areas.

[49] The evidence of Ms. Robar, Mr. McLean, and Ms. Fuller was required to value Mr. Wolfson's corporate shares. As I noted in paras 55 to 62 of the divorce decision, Mr. Wolfson failed to supply proof of the value of his controlling shares in the 11 companies, which owned and operated 21 rental properties. Further, Mr. Wolfson did not provide proof of the value of his controlling shares in the management company, LSC Leasing Inc, which offered management services to the rental properties. As a result, Ms. Wolfson's only practical recourse was to retain experts to assist the court in determining the value of Mr. Wolfson's shares.

[50] All three experts retained by Ms. Wolfson provided evidence that, when combined, produced the value that was ultimately ascribed to Mr. Wolfson's shares. First, a schedule attached to Ms. Robar's expert report was adopted by both parties in their post-trial submissions to help value the rental properties, and, ultimately, Mr. Wolfson's shares. In this regard, the divorce decision states:

> [86] At the request of Ms. Wolfson, Ms. Robar produced a report detailing the income of Mr. Wolfson. In that report, Ms. Robar specifically notes that she did not prepare a valuation of the companies. She states as follows in exhibit 5, tab E:
>
> > E.16 We have not prepared a valuation of the Wolfson companies; however, the attached Schedule E.1 reflects the greater of the municipality assessed value, appraised value (for 5 properties only) and net book value of the properties, totaling $30,241,977. This is $15 million greater than the net book value of real property reported in the Companies' financial statements. As at May 31, 2019 the companies reported total debt of 16 million borrowed against the properties. This suggests there is approximately $14.2 million of equity in the properties available to the Companies and/or its owners for future business or other investment.
>
> [87] Despite Ms. Robar's *caveat*, both parties agreed in their post-trial submissions that the Robar Schedule should be adopted as proof of value, subject to upward adjustment because of the subsequent appraisals on some of the corporate rental properties.

[51] Several of the values Ms. Robar ascribed to the rental properties were increased because of the subsequent property appraisals completed by Mr. McLean. Mr. McLean examined and provided values for some of the commercial properties based on their location, including the rental properties located at the Oxford Street site; the properties located at the Robie/Shirley Streets site; and the properties located at the Windsor/Edinburgh Streets site. I accepted Mr. McLean's evidence as being professional, balanced, and evidence-based: para 109, divorce decision. Further, in his post-trial submissions, Mr. Wolfson adopted Mr. McLean's evidence as the best available evidence as to value: para 63, divorce decision.

[52] Ms. Fuller's evidence was also reasonable and necessary to assist Mr. McLean in determining value. Ms. Fuller provided an expert report about the best use, development, and planning potential for the rental properties. She also clarified issues related to the HRM Center Plan that were raised by Mr. Wolfson. Mr. McLean specifically used Ms. Fuller's report to determine his opinion about value.

[53] In the circumstances, Ms. Wolfson proved that it was reasonable to retain Ms. Robar, Mr. McLean, and Ms. Fuller so that the value of Mr. Wolfson's controlling shares in the 11 companies could be ascertained as required in a proceeding under the *Matrimonial Property Act*, RSNS 1989, c 275.

[54] It was also reasonable for Ms. Wolfson to retain Ms. Robar to determine Mr. Wolfson's *Guideline* income for support purposes. At the time Ms. Wolfson retained Ms. Robar, no other expert evidence existed. Mr. Wolfson did not retain his expert, Mr. Bradley, until after Ms. Robar filed her report.

[55] Quantifying Mr. Wolfson's income was central to determining child and spousal support. Quantification was a complex exercise because of ss 18 and 19 of the *Guidelines,* which require the examination of pre-tax corporate income, capital cost allowance, expenditures, dividend income, deductions, discretionary expenses, and actual income paid. Further, the calculation involved an analysis of extensive and detailed financial data from 12 companies.

[56] Ms. Robar's evidence was discussed and approved at length in the divorce decision, from paras 302 to 412. In contrast, I rejected scenario 1 and the five-year average proposed by Mr. Bradley. While I did use the Bradley report for 2019 figures, this was necessary because Mr. Wolfson had not provided Ms. Robar with the 2019 corporate tax returns.

[57] I therefore find that it was reasonable for Ms. Wolfson to retain Ms. Robar to prepare a report and give evidence about the calculation of Mr. Wolfson's *Guideline* income.

[58] In addition, I find that all PWC fees related to consulting, technical advice, trial preparation, cross-examination, and written or oral submissions were also reasonable and necessary, even when the expert did not testify, because of the complex and technical issues that were raised during the trial. For example, in the absence of an expert opinion, Mr. Wolfson asked me to deduct $7,366,836 for notional capital gains tax from the value of the rental properties. Ms. Wolfson needed to respond to this request. Legal counsel would not be expected to know such technical information. It was reasonable for Ms. Wolfson's counsel to seek expert advice on this and other technical issues for cross-examination and submissions.

[59] It was also reasonable for Ms. Wolfson's counsel to speak to other associates, partners, managers, and directors of PWC. Some discrete tax issues were likely best placed before a tax specialist. Also, it is reasonable for experts like Ms. Robar to receive assistance from other staff to help compile a report and respond to questions. Almost all of the work performed by PWC was incidental to the litigation and reasonably necessary for the conduct of the proceeding.

B. Step 2 – Amount Charged is Just and Reasonable

[60] Ms. Wolfson proved that Mr. McLean's invoice of $38,249, Ms. Fuller's invoice of $7,733.75, and most of the PWC invoices of $124,986.75 were just and reasonable in the circumstances for the following reasons:

- As I found in the divorce decision, Mr. Wolfson strategically chose not to produce evidence of value for his shares. He created an evidentiary vacuum in the hopes of a tactical advantage. Ms. Wolfson had to retain experts to fill the void.

- The trial was lengthy and complex. The two most significant issues, the value of Mr. Wolfson's shares and the determination of his income, involved highly technical and complex accounting and valuation principles which were interwoven with governing legal principles. Expert evidence was necessary to unravel the complexities and to assist in the conduct of the trial.

- Recoverable expert fees of $168,117.50 are reasonable and just in comparison to the quantum of the disputed issues. The trial involved matrimonial assets, net of debt, worth $9,271,418, and business assets, net of debt, worth $6,954,331. Spousal support was ordered at a rate of $13,914 per month, or $166,968 per annum, while the table amount of child support was set at $7,324 per month, or $87,888 per annum.

- The expert evidence was of high quality and provided invaluable assistance to the court. Although I did not accept Ms. Robar's opinion on every contested point, I nevertheless quoted extensively from her professional and detailed evidence, and also approvingly referred to the evidence of Mr. McLean and Ms. Fuller.

- The cross-examination and submissions of Ms. Wolfson's counsel were more focused and streamlined because of the technical advice received from Ms. Robar, her partners, and other PWC associates. The amounts charged by PWC for consulting services, including most of the services objected to by Mr. Wolfson, were a just and reasonable expense.

[61] Further, I do not consider Mr. Wolfson's statement that the PWC fees are unreasonable because Mr. Bradley only charged $54,438.13. Mr. Bradley's fees were based on the work he performed. The retainers of Mr. Bradley and PWC were

substantially different in two respects. First, Ms. Robar drafted her *Guideline* income report before Mr. Bradley. Mr. Bradley provided a response report.

[62] Second, unlike Ms. Wolfson, Mr. Wolfson did not retain his expert on a consulting basis. Ms. Wolfson needed specialized support. Mr. Wolfson did not. For example, it was Mr. Wolfson, and not Ms. Wolfson, who sought to deduct $7,366,836 for notional capital gains tax from the value of the rental properties. Further, it was Mr. Wolfson, and not Ms. Wolfson, who sought to substantially reduce his income for support purposes. In his pretrial brief, Mr. Wolfson asked that his annual income be set at $379,643. I found that it was about 1.74 times that amount - $660,000 per annum. In such circumstances, it was reasonable and just for Ms. Wolfson to consult with Ms. Robar, and other PWC associates, managers, directors, and partners on the technical and complex accounting and tax issues that permeated the proceedings.

[63] The only PWC fees that I find are not just and reasonable relate to those which provided a collateral benefit to Ms. Wolfson. Specifically, when preparing submissions for the ancillary decision and the form of the CRO, Ms. Wolfson sought out tax planning advice that was neither incidental to the litigation, nor reasonably necessary for the conduct of the proceeding. Ms. Wolfson wanted advice on how to structure the equalization payment in a tax advantageous way. As such, I deduct $2,480 plus HST of $372, for a total deduction of $2,852 from the PWC recoverable disbursement.

C. Summary of Reasonable and Just Expert Fees

[64] Mr. Wolfson will pay Ms. Wolfson recoverable expert fees and HST of **$168,117.50** because Ms. Wolfson proved that it was reasonable to retain the three experts and that their following fees were just and reasonable:

- Mr. McLean’s invoices of $38,249.
- Ms. Fuller’s invoices of $7,733.75.
- PWC invoices of $122,134.75.

[65] **What is the appropriate costs award?**

Position of Ms. Wolfson

[66] Ms. Wolfson states that she incurred legal and expert fees, inclusive of HST and disbursements, in the amount of $511,249.05. To do justice as between the parties, Ms. Wolfson seeks costs in the amount of $482,968.50. This figure is based on the amount of her legal fees (inclusive of HST), the litigation history, her success at trial, the parties' settlement positions, and tariff A. In the alternative, she seeks a lump sum award of $450,000, or a minimum of $440,856.17.

[67] Ms. Wolfson relies on Rule 77; ***Armoyan v Armoyan,*** 2013 NSCA 136; ***NDL v MSL,*** 2010 NSSC 159; ***Andrews v Keybase Financial Group Inc,*** *supra*; ***Cashen v Donovan***, *supra;* and ***Williamson v Williams***, 1998 NSCA 195. Ms. Wolfson's costs submissions include full indemnity for all expert fees.

[68] Ms. Wolfson submits that the amount involved for the purposes of tariff A should be $4,800,000, rounded down, as this sum represents the amount she was awarded at trial for the companies. Ms. Wolfson states that $4,800,000 is a conservative concession, because the amount involved should instead include:

- The value of Mr. Wolfson shares in the various companies, which are worth more than $31,000,000, less long-term debt, for a total equity of $13,908,662.

- The value of the other matrimonial assets, which are worth more than $3,210,996, less family debt, for a total equity of $2,317,087.

- The monthly spousal support of $13,914, which is payable until January 2030, which totals $1,391,400 (although this amount is taxable to Ms. Wolfson and tax deductible by Mr. Wolfson).

- The monthly child support of $7,324, which is payable, together with a prorated obligation for the payment of s. 7 expenses. The table amount of child support for just one year equals $87,888.

- The addition of $2,000 per day for the six days of trial that is permitted under tariff A.

[69] Further, Ms. Wolfson states that the amount involved would typically be increased for two reasons. First, the matter involved complex and important issues. Second, Mr. Wolfson caused delay and increased the litigation expense by failing to provide a valuation of his corporate shares and up-to-date real property appraisals for the corporate-owned properties; by not responding to PWC's

requests for disclosure so Ms. Robar could assess the personal and discretionary expenses claimed by the companies; and by not providing a copy of the requested 2019 corporate tax returns, with a May 31 year end. Mr. Wolfson also wasted court time by demanding that Ms. Wolfson's father testify about Ms. Wolfson's share in South Point Properties - an investment created for her when she was a child. Her father's testimony could have been avoided had Mr. Wolfson's counsel simply contacted Mr. Miller or Mr. Goldberg before trial as Ms. Wolfson's counsel had arranged.

[70] Based on a conservative calculation of $4,800,000 as the amount involved, Ms. Wolfson states that tariff A produces legal costs of $312,000. She also seeks indemnity for expert fees in the amount of $170,969.50, for a total costs award of $482,969.50.

[71] In the alternative, Ms. Wolfson seeks a lump sum of $450,000 for all legal fees and disbursements and all expert fees under Rule 77.08. She says such an award would provide a just outcome between the parties for the following reasons:

- The amount involved is about $7,759,509 considering the factors noted previously in para 68 of this decision. Tariff A produces an award of $504,368.08, plus $12,000 for the six days of trial, for a total award of $528,368.08 plus disbursements and expert fees.

- Significant costs sanctions must be imposed because of Mr. Wolfson's failure to disclose.

- The determination of Mr. Wolfson's income was one of the most contentious issues, with four witnesses providing evidence about its calculation – Mr. Wolfson, Mr. Timmons, Ms. Robar, and Mr. Bradley. Ms. Wolfson states she was successful on this issue.

- Ms. Wolfson's ability to settle the issues was hindered until expert evidence was produced. Ms. Wolfson seeks full indemnity for her legal fees until December 2019 when expert evidence was produced. Ms. Wolfson seeks 70% indemnity as a substantial indemnity for all legal fees and disbursements incurred after December 2019: ***Williamson v William***, *supra*.

[72] In the final alternative, Ms. Wolfson seeks a lump sum in the amount of $440,856.17.

Position of Mr. Wolfson

[73] Mr. Wolfson does not seek costs from Ms. Wolfson. Instead, Mr. Wolfson proposes that he pay Ms. Wolfson costs of $250,000, inclusive of disbursements.

[74] Mr. Wolfson notes that Ms. Wolfson seeks $312,000 in costs for recoverable legal fees based on tariff A, which is about $31,500 more than she actually paid in legal fees, once HST and the WIP are deleted. He notes that if Ms. Wolfson is successful in her costs submissions, she will recover more than 100% of her legal fees. From his perspective, the evidence and submissions do not support such an outcome.

[75] In the alternative, when calculating a lump sum, Mr. Wolfson says Ms. Wolfson must prove that her legal fees are reasonable. He said she did not do so because details of the services were not provided, as is required: ***Andrews v Keybase Financial group Inc***, *supra,* paras 24 to 26.

[76] In the absence of a detailed listing of services, Mr. Wolfson opined that the maximum amount of reasonable legal fees is $280,508. Mr. Wolfson submitted that 66% of this amount is recoverable on a party and party basis. Thus, the maximum appropriate lump sum is calculated at $185,135.28: $280,508 x 66% = $185,135.28. However, Mr. Wolfson states that this amount should be further reduced given the reasonable litigation conduct of the parties, such as:

- Both parties retained experts to provide a *Guideline* income report to focus and assist the court in the determination of his income.
- Settlement offers were not exchanged.
- Mr. Miller testified by video-link. Travel expenses were thus avoided. Mr. Miller's evidence surrounding South Point Properties was only disclosed in January 2020, shortly before the trial.

[77] Mr. Wolfson suggests that $155,000 is the appropriate, reasonable lump sum award for legal fees.

[78] In addition, Mr. Wolfson seeks to reduce recoverable photocopy charges to 10 cents per page: ***Andrews v Keybase Financial Group Inc****, supra,* paras 38 to 39. Ms. Wolfson's counsel charged 25 cents per page. The photocopy disbursement should therefore be reduced from the $1,466 claimed to $586.60.

[79] Mr. Wolfson states that a principled approach to costs supports a finding that $250,000 represents a reasonable and just recovery and a substantial indemnification towards Ms. Wolfson's legal fees and disbursements.

Law

[80] Costs are payable to the successful party. In ***Armoyan v Armoyan***, *supra*, Fichaud, JA reviewed relevant costs principles when determining whether costs should be paid based on the tariff or lump sum:

- The court's overall mandate is to "do justice between the parties": para 10.

- Unless otherwise ordered, party and party costs are quantified according to the tariffs. The court has discretion to raise or lower the tariffs, applying factors like those listed in Rule 77.07(2). These factors include unaccepted written settlement offers, and the conduct of the parties insofar as it affects the speed or expense of the proceeding: paras 12 and 13.

- The Rule permits the court to depart from the tariffs and award lump sum costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras 14 and 15.

- The basic principle is that costs "should afford a substantial contribution to the party's reasonable fees and expenses." A substantial contribution not amounting to a complete indemnity means more than 50% and less than 100% of a lawyer's reasonable bill for services: para 16.

- "The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs": para 17. Some cases, however, "bear no resemblance to the tariffs' assumptions": para 18. For example, "[a] proceeding begun nominally as a chambers motion … may assume trial functions"; "[a] case may have no 'amount involved' "; efforts may be "substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism"; "[t]he amount claimed may vary widely from the amount awarded"; "[t]he case may assume a complexity, with a corresponding work load, that is far disproportionate to the court time by

which costs are assessed under the tariffs"; and "[t]here may be rejected settlement offers, formal or informal, that would have saved everyone significant expense": para 18.

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

[81] In ***Ward v Murphy***, 2022 NSCA 20, Beaton JA, dissenting in part, reviewed the principles associated with party and party costs in family law litigation. After considering ***Armoyan***, she noted that "[t]he tariffs are the norm, and there must be a reason to consider a lump sum": para 15. A lump sum payment may be more appropriate, however, where the amount involved is difficult to identify. Beaton JA stated:

> [98] When determining costs it can sometimes be difficult to identify the "amount involved", particularly in family law litigation, where the issues in play are not always easily expressed as or quantified by a dollar amount. By contrast, other types of litigation may lend to easier quantification of the amount involved, such as, for example, in a contract dispute. The amount in issue was not easily discernable in this case. However, it was inaccurate for the judge to use the full amount of Mr. Ward's income from the previous 2017 order as the "amount involved", because while the parties disagreed on what figure represented Mr. Ward's income, he was not suggesting his income was zero. In that sense, the entire $120,000 was not in dispute, but rather only a portion of it. For that reason, costs would have been better expressed in this case as a lump sum award, owing to the need to adjust application of the Tariff to reflect the rather nebulous quantification of the "amount involved".

[82] The amount involved is defined in the *Rules* as follows:

> In these Tariffs unless otherwise prescribed, the "amount involved" shall be
>
> (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
>
> (i) the amount allowed,
>
> (ii) the complexity of the proceeding, and

(iii) the importance of the issues;

(b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to

(i) the amount of damages provisionally assessed by the court, if any,

(ii) the amount claimed, if any,

(iii) the complexity of the proceeding, and

(iv) the importance of the issues;

(c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to

(i) the complexity of the proceeding, and

(ii) the importance of the issues;

(d) an amount agreed upon by the parties.

[83] I will now conduct my analysis of these principles by addressing four factors - successful party; amount involved; tariff amount; and lump sum.

Decision

A. Successful Party

[84] Mr. Wolfson acknowledged that Ms. Wolfson was the successful party at trial. I agree. Her positions on the valuation, classification and division of property, and the amount of child and spousal support, more closely aligned with the divorce decision than did Mr. Wolfson's positions.

B. Amount Involved – Quantification based on Financial Outcome

[85] The amount involved can be identified for the *MPA* issues. In calculating the amount involved, I compared my decision with Mr. Wolfson's position as set out in his pretrial brief.[iii] The most significant litigated property issues concerned the classification and division of the value of Mr. Wolfson's shares in the 11 companies that owned and operated 21 rental properties. Mr. Wolfson said his shares should be excluded as exempt business assets, and that only a nominal award, if any, should be granted under ss. 18 or 13 of the *MPA.* I found that

$6,954,331 of the value of Mr. Wolfson's shares was matrimonial property and I awarded Ms. Wolfson $4,477,165.50 of this amount.

[86] Thus, $4,477,165 is the amount involved, subject to other adjustments based upon the differences between the equalization schedule awarded by me and that proposed by Mr. Wolfson in his pre-trial brief:

- $2,700 upward adjustment for excluding Mr. Wolfson's proposed capital gains tax deduction on the Shaw Island summer home.
- $25,000 upward adjustment by ordering an equal physical division of the household contents.
- $32,000 upward adjustment for including the value of the Boston whaler boat.
- $36,445 upward adjustment for including the csv of the life insurance.
- $15,000 upward adjustment for bank account balances.
- $9,540 credit for undervaluing Ms. Wolfson's pension.
- $444,000 credit for including the loan outstanding for the Shaw Island summer home.

[87] These adjustments, after an equal division, produce a credit of $171,198 to Mr. Wolfson. I therefore deduct $171,198 from $4,477,165 and conclude that the total amount involved based on the financial outcome of the *MPA* issues is $4,305,967.

[88] Next, I must determine the amount involved for the child and spousal support issues. This is more difficult to ascertain. Maintenance can be varied if there is a material change in circumstances, and spousal support is tax deductible to Mr. Wolfson and taxable to Ms. Wolfson. Nevertheless, my support rulings are relevant to the calculation of the amount involved.

[89] In his pre-trial brief, Mr. Wolfson proposed a spousal support payment of between $537 and $4,470, depending on who was responsible for the payment of the children's s. 7 expenses. If the s. 7 expenses were to be pro-rated, as I eventually determined, Mr. Wolfson proposed a monthly spousal support payment of $2,098. He also suggested that spousal support be payable until March 2027.

[90] In stark contrast, in my divorce and ancillary decision, I ordered Mr. Wolfson to pay monthly spousal support of $13,914, which is payable until January 2030. This amount is $11,816 more than what Mr. Wolfson proposed, and payable for almost three years longer.

[91] In his pre-trial brief, Mr. Wolfson suggested a monthly child support payment of $3,476. I ordered monthly child support of $7,324, which is $3,848 more than was proposed. Section 7 expenses were prorated between the parties.

[92] The most conservative estimate of the amount involved for the support issues is about $187,968, based on a one-year difference between the amount Mr. Wolfson proposed and the amount I ordered.

B. Amount Involved – Complexity

[93] I find that the litigation was highly complex and technical. The parties' contentious divorce involved substantial assets, including 11 corporate entities owning 21 rental properties, with 257 rental units housing 338 tenants. Also, the rental properties were managed by a 12th company. Mr. Wolfson did not produce a market valuation for his shares in any of the companies. The lack of disclosure made an already complex proceeding even more challenging.

[94] In the divorce and ancillary decisions, I resolved 14 legal issues, encompassing numerous sub-issues:

- Did Mr. Wolfson have a legal obligation to provide meaningful and credible evidence as to value?
- What was the value of Mr. Wolfson's corporate shares, including an allowance for disposition costs and deductions, such as real estate commission, capital gains tax, and environmental and capital expenditures?
- What was the value of the other assets and the balances of the other debt?
- Were the corporate shares exempt business assets?
- Should Ms. Wolfson be granted a s.18 award?
- Did Ms. Wolfson prove entitlement to an unequal division?

- What was the appropriate division of the assets and debts?
- Under what interest and security terms should the equalization transfer be made?
- What was the income of Ms. Wolfson?
- What was the income of Mr. Wolfson, including the examination of pre-tax corporate income, capital cost allowance, expenditures, dividend income, deductions, discretionary expenses, and actual income paid? The calculation involved an analysis of ss. 16, 17, 18 and 19 of the *Child Support Guidelines***,** evidence from two experts, and extensive and detailed financial data from 12 companies, as well as 12 corporate tax returns, financial statements, and financial records, together with Mr. Wolfson's tax returns.
- What was the appropriate quantum of child support in a shared parenting arrangement, including the payment of s. 7 expenses?
- What was the appropriate quantum and duration of spousal support?
- What were the appropriate insurance provisions?
- Should the court bifurcate the maintenance and property issues and allow additional evidence to be called even though the divorce decision was granted?

[95] Given the magnitude of the contested issues, the parties filed voluminous materials including detailed and complex expert reports, affidavits, exhibits, and extensive pre-trial and post-trial briefs. The parties devoted a tremendous amount of time to legal research. I considered approximately 125 cases in the divorce and ancillary decisions.

[96] In addition, the parties attended various court appearances including conferences, a case management conference, an interim motion hearing, three days of settlement conferencing, a six-day trial, and a post-trial appearance. Because most of the direct evidence was entered through affidavits and expert reports, the six-day trial was primarily focused on cross-examination.

B. Amount Involved – Importance of Issues

[97] The issues were important to the parties and the public for two reasons. First, the issues concerned the valuation, classification, and division of property, and particularly of corporate shares based on the *MPA's* exemption of business assets and unequal division provisions. Second, the issues concerned the determination of income and the calculation of child and spousal support, including how to approach the CCA deduction given the absence of appellate authority in Nova Scotia.

B. Amount Involved – Summary

[98] Given these factors, I find that the $4,800,000 figure for the amount involved as suggested by Ms. Wolfson is appropriate. I also agree that this figure is likely a conservative estimate.

C. Tariff Amount

[99] Tariff A would ordinarily be the appropriate scale to apply to this divorce trial. Tariff A produces an award of $312,000, which is subject to adjustments based on the factors in Rule 77.07(2):

- Rule 77 (2) (e) and (f) are applicable. For strategic and tactical reasons, Mr. Wolfson chose not to produce meaningful evidence as to the value of his shares in the companies that owned the rental properties. The lack of disclosure compromised the integrity of the proceeding, prevented meaningful settlement discussions, and added unnecessary costs and expense to Ms. Wolfson. A significant upward adjustment would be required in such circumstances.

- Rule 77.07(2)(h) is applicable. Mr. Wolfson should have admitted the value of Ms. Wolfson's share in South Point Property without the cross-examination of her father. However, this step did not inordinately add to the expense of the litigation.

[100] A principled approach to costs would lead me to apply tariff A. However, would justice be done as between the parties if I do so?

[101] Ms. Wolfson incurred $305,923.12 in legal fees to Morris Bureau and $34,355.43 to Sealy Cornish Coulthard, for total fees of $340,278.55. A costs award of $312,000 would result in a recovery of about 91.69% - a sum perilously close to a solicitor and client costs order. Case law does not support such a recovery notwithstanding the serious disclosure issues and tactical manipulation.

D. Lump Sum

[102] What about a lump sum?

[103] Mr. Wolfson questions the reasonableness of the legal accounts upon which a lump sum is to be determined. I, however, do not find the legal fees unreasonable for three reasons. First, the proceeding was complex, as previously reviewed in this decision. Second, the legal fees are less than that produced for a party and party costs award under tariff A. Third, the Morris Bureau account was significantly reduced because Mr. Ryan, a junior associate, competently and professionally performed many services at a favourable rate.

[104] On the other hand, I do agree that the photocopy charges should be reduced by $879.40 plus HST based on case authorities, although I do note that even court administration charges significantly more than 10 cents a page for more than 25 copies.

[105] To do justice between the parties, I award a lump costs award of $254,450, which represents about 75% of Ms. Wolfson's adjusted legal fees of $339,267.70[iv]. To this amount, I add an award of $168,117 for expert fees and HST, for a total lump sum award of $422,567. In reaching this conclusion, I balanced the many factors outlined in this decision, including:

- Costs are payable on a party and party basis and not on a solicitor client basis.
- Settlement positions and offers cannot be considered because of their connection with the parties' settlement conferences.
- HST on legal fees is a valid consideration in this case, either in its own right or as a reasonable, necessary, and just disbursement.
- The amount involved is at least $4.8 million.
- The litigation was complex and involved significant legal, accounting, and valuation issues. These issues were not only addressed by the parties, but also by four experts who provided detailed opinion evidence.
- This case involved a strategic and egregious dereliction in the duty to disclose, which likely resulted in a conservative calculation of the true

value of Mr. Wolfson's corporate shares. In addition, the lack of disclosure compromised the integrity of the trial process and limited the parties' ability to meaningfully engage in settlement discussions.

Conclusion

[106] Mr. Wolfson must pay costs to Ms. Wolfson in the amount of $422,567, which are payable in 45 days. Counsel for Ms. Wolfson is to draft and circulate the order.

Forgeron, J.

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[i] In *Wyatt v Franklin*, [1993] NSJ No 624 (SC), Goodfellow J. reasoned as follows at paras 15-17:

> There is no goods and services tax on party and party costs.
>
> Costs are the property of the client, and the solicitor and client fee is determined by the solicitor and client as a matter of contract, and it is generally on an hourly rate basis, set fee, ceiling account, contingency fee arrangement or a combination or variation of these various methods. The goods and services tax is assessed on the fee as determined by the solicitor and client.
>
> The G.S.T. is not incurred on legal fees until the account is rendered, due and payable. Recovery of disbursements is limited to expenses incurred and normally paid. The strict practice is to file an affidavit of payment of disbursements before recovery, and it cannot be said the G.S.T. on the solicitor and client fee has yet been incurred and the final determination is accomplished by rendering an account. It is a future matter to be struck on whatever basis the solicitor and client contractually agreed upon. For these reasons G.S.T. is not recoverable on party and party costs.

[ii] Hall, J did not reference ***Roose v Hollett***, *supra,* in his decision.

[iii] For the calculation, I did not use Mr. Wolfson's post-trial submissions because the trial was conducted on the basis of the parties' pretrial submissions.

[iv] The adjusted legal fees are calculated as follows: $340,278.55 – reduction in photocopy charges ($879 + HST $131.85) = $339,267.70.