Claim No: 482521

In the Small Claims Court of Nova Scotia
Citation: *Burchell MacDougall LLP v. A.M.*, 2020 NSSM 7

BETWEEN:

Burchell Macdougall LLP
710 Prince St
Truro, NS
82H 5H1

CLAIMANT

AND

A.M.
[address deleted]

RESPONDENT

Restriction on Publication

Pursuant to subsection 94(1) of the *Children and Family Services Act*, 1990, c. 5, s. 1.there is a ban on disclosing information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child. This decision complies with this restriction so that it can be published.

REASONS FOR DECISION

BEFORE
Shelly A. Martin, Adjudicator
Hearing held at Truro, Nova Scotia on April 1, 2019
Decision rendered on January 31, 2020

APPEARANCES

For the Claimant	Adam Harris
For the Defendant(s)	Self-represented

By the Court

[1] This matter was brought before me by the Claimant as an outstanding collection of a bill for service provided to the Defendant A.M.. At the conclusion of a difficult, two year child protection matter, the Defendant's outstanding bill is $5751.80, which he is refusing to pay, citing dissatisfaction with the representation he received from Daniel Roper, an associate of the Claimant firm, who assumed responsibility for the Defendant's case from his associate, Tammy MacKenzie. This matter was a difficult one to parse, given that Mr. M. had a litany of complaints about his representation and clearly feels a sense of disappointment with the justice system as a whole. After some discussion about the limits of the court's jurisdiction, I agreed to proceed on the limited basis of a taxation, reminding him that this was not meant to be a disciplinary hearing

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

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

[4] Nova Scotia Civil Procedure Rule 77.13, states that:

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

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

a) counsel's efforts to secure speed and avoid expense for the client;
b) the nature, importance, and urgency of the case;
c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;

d) the general conduct and expense of the proceeding;
e) the skill, labour, and responsibility involved;
f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

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

a) The taxation may disallow fees charged for proceedings taken that were unnecessary (such as by over caution or merely error);
b) Fees may be disallowed if, objectively speaking, too much time was spent on any particular step, or overall, which reflects poorly on the lawyer's skill;
c) The results achieved may be considered, but in some instances may be totally irrelevant;
d) The client's ability to pay may be relevant;
e) The client's expectations may carry some weight, for example where the lawyer's fees significantly exceed an estimate given;
f) The degree of skill demonstrated may, in some cases, be important, though the lawyer may not have had to exercise all of his or her skills to achieve the result;

[6] Mr. M. was named as a respondent in a proceeding brought by the Minister of Community Services under the *Children and Family Services Act.* In October an emergency hearing was scheduled before Justice Cindy Murray to review custody and parenting arrangements for Mr. M.'s son. The hearing resulted in the status quo being maintained and their son remained at that time with Mr. M.'s former wife. A final hearing to settle the matter before Justice Murray was scheduled for December 2017.

[7] This was a multi-party litigation, which included a *guardian ad litem* for Mr. M.'s son and a significant volume of material that was submitted on behalf of all parties; the Minister of Community Services, the *guardian ad litem,* and counsel for Mr. M.'s former wife. After the October hearing, Mr. M. was concerned about the costs incurred on the file. Mr. M. also felt frustrated that he had been drug into court on an interim hearing, expecting that the support of the *guardian ad litem* and others would result in a change of custody. Instead, Justice Murray decided to

maintain the status quo until a full hearing in December. Mr. M. felt that this was "an unjust cost upon us" and began to explore options for the December trial. Mr. M. wondered about approaching the media to express his disappointment, though he was advised against this by Ms. MacKenzie. He fell upon the idea of representing himself at trial, with Ms. MacKenzie on call to answer questions if need be. Ms. MacKenzie was clear that the bill before the December hearing would be in excess of $6000.00 and in an email dated October 19th, 2017, stated that "As for the December hearing, I would estimate the costs to be in excess of $10,000.00" and gave Mr. M. a few options. In addition to offering to draft a Notice of Intention to Act on One's own, she also offered the services of Mr. Roper, who worked with Ms. MacKenzie on her files and stated that "he may be able to do the hearing for one half to two third of the cost." It is important to note that Ms. MacKenzie was not present during the hearing before me, but I read her comment with respect to the $10,000.00 and costs as her clearly making reference to the December trial. I do not accept that it somehow bound Mr. Roper to charging less than that for the extensive work he did on the file. In any case, Mr. M. agreed and as he was an existing client of the firm, Mr. Roper did not insist on a new retainer agreement.

[8] The stakes were high in advance of the December hearing and Mr. Roper's main task as he understood it was to ensure that Mr. M.'s child would be placed in his sole custody and able to transfer attendance to a school within close proximity to Mr. M.'s residence. Mr. Roper testified he was focussed on getting the best possible outcome for his client. It is worth mentioning that at this time, Mr. M. also benefitted from Ms. McKenzie's experience as she continued to provide a supervisory role on the file. Mr. Roper testified that after he assumed carriage of the M. file, Ms. MacKenzie's input time was never posted to the bill for services. Ms. MacKenzie produced her final bill for work on the file between September 8, and October 20th, 2017 in the amount of $8638.12. This included $381.90 for travel and $15.00 on courier fees. I note this bill also shows Ms. MacKenzie's reduction of the bill by $1255.50.

[9] Mr. Roper had the unenviable task of having to prepare for trial twice, as December's trial was adjourned at the last minute at the request of legal counsel for the Department of Community Services and rescheduled for February 2018. In January 2018, Mr. Roper prepared a bill for $2465.32, representing work done between October 20, 2017 and January 15th, 2018. During this period, Mr. Roper testified that he and Mr. M. were in "constant" contact. The invoice reflects his attention to the file: there are 16 instances of emails (often entered as "emails to and from client," indicating there was time dedicated to an ongoing exchange) to

and three telephone conferences with Mr. M. between October 20th and January 18th I also note this file involves preparation for and attendance at pre trial conferences. All of this reflects the work that on the whole is part and parcel of familiarizing oneself with a new, complex file and advancing it forward. Everything on this bill is directed toward preparation for a matter of some urgency and high jeopardy and on my reading of it, it is wholly reasonable.

[10] On February 12, only days before the trial was to proceed, Mr. Roper received an offer of settlement to avoid the trial and end the Child Protection Proceedings that had brought Mr. M. to court. After several months of negotiations, the parties agreed to a Consent Variation Order that set down the terms of custody and access between the parties. In the end, Mr. M. was awarded custody of his son, which included permission to allow his son to transfer to a school in the vicinity of his new home, though he expressed anger over this particular part of the Order, as his son was ordered to finished the last weeks of the school year in his former school and transfer to the local school in the following school year.

[11] A bill for $8781.86 for the work involved in negotiating the Consent Variation Order was issued April 13, 2019 and included work performed between January 17th, 2018 and March 29th 2018. This involved travel to Port Hawkesbury from Truro for a pre-trial conference on January 31, intensive back-and forth communications between the court and the parties and an extensive back-and-forth between Mr. Roper and Mr. M, involving at least 28 email exchanges, often multiple times per day and 6 telephone conferences between them. Family proceedings rely heavily on affidavit evidence and it is clear that Mr. Roper spent time reviewing all the materials and evidence submitted by the parties and then drafting and revising affidavit evidence of Mr. M. and his wife as part of the preparatory work in advance of trial. The work on this file appeared to be extensive, as any representation of a client on a high-jeopardy file should be.

[12] The costs to Mr. M. were undeniably significant. I am mindful of the fact that Mr. M. was offered Mr. Roper's services by Ms. MacKenzie as a cost-saving measure to help him avoid having to representing himself. During the hearing Mr. M. wondered where the savings were, given the amounts billed for his representation by Mr. Roper. I have examined Ms. MacKenzie's invoice in advance of the emergency hearing in October 2017 and note that her bill over a one-month period in advance of the hearing was in the range of $8638.12. By comparison, Mr. Roper's bill for three months' work, which included travel, pretrial conferences and preparations, subsequent negotiations and execution of the Consent Variation

Order came in at $8781.86. Mr. M. alluded to duplication of Ms. MacKenzie's work in the hearing and on the evidence of before me, I cannot agree this was the case. I also reject the idea that Mr. Roper's lack of skill somehow led to a higher bill or that he overbilled but was somehow still "absent" from the file, or unrepresentative of his client, On the whole, I do not find these amounts, for a multi-party matter involving DCS and the Minister unreasonable. Mr. M. paid $3000.00 toward this bill on April 19th, 2018, leaving the now-disputed balance of $5781.86.

[13] In response to this action by Burchell MacDougall, Mr. M. raised issues about his representation in the volume of material submitted during the hearing, the bulk of which were not considered as part of this decision, owing to my limited jurisdiction and the fact that there is another process through which complaints about legal representation are managed. I acknowledge Mr. M.'s frustration with the legal process in which he has found himself embroiled with his former wife. Despite the fact that Mr. Roper achieved the outcome Mr. M. sought (custody of his son and transfer to a nearby school), he claimed that his instructions to Mr. Roper were ignored and remains irritated with the inconvenience and costs incurred as a result of the Consent Variation Order since it was signed.

[14] It's clear Mr. M. did not trust his former spouse and was, understandably, quite worried about his son and unhappy with this process. He complained about feeling "unrepresented," even early on during his matter. As an example, he blamed Ms. MacKenzie for Justice Murray's decision to not change custody in October 2017, complaining that he personally observed her "laughing and relaxing'" with his former wife's counsel in court. I mention this because Mr. M. made much of a lawyer's duty to their client, but it is important to also remember a lawyer's duty of civility to other lawyers and the court. It is normal for lawyers to be cordial and collegial with each other, in fact, civility is the expected norm and often can help advance and develop trust between counsel, which can lead to a good outcome for one's client, despite what TV courtroom dramas would have us believe.

[15] On the Consent Variation Order, I will only say it is not meant to be a tool to avoid any and all human conflict and arriving at an agreement that will satisfy the Minister and all parties in this kind of proceeding is a dynamic process that requires weighing a lot of factors and opinions to arrive at what is best for a child. There is perhaps a fine line here to parse between a client's instructions being "ignored" versus having legal counsel to exercise their judgment and expertise to tell a client their instructions are unreasonable and do not serve the desired

outcome of one's case. The records Mr. M. provided are not complete but they do suggest at minimum that Mr. Roper did indeed seek feedback and review of the drafts of the Consent Variation Order and that Mr. M. would respond, often in multiple page emails. Mr. Roper used his judgement and legal expertise to advise Mr. M. on what he felt would or would not work (for example, rejecting the inclusion of a clause that would ensure a court-ordered period of ten hours sleep per night for his son, or telling Mr. M. that a court would not agree to him having full control over Christmas scheduling), bearing in mind the need to make compromises at times for the concerns about his son's safety and best interests. Although the Consent Variation Order required some clarification on financials, I accept Mr. Roper's explanation on why it was silent on the matter of child support. I also note that the firm offered to address the issues with the Order, pro bono. Although there were compromises to be made, in the end, Mr. Roper achieved what Mr. M. wanted most: his son safe and in his care. He was made aware of the financial implications of continued representation and he did receive representation at a fee that was, in fact, lower than Ms. MacKenzie's fees.

[16] I have already noted the fees charged are reasonable for a matter involving so many parties and with such serious consequences. Legal advice is expensive, but the fees were not neither excessive nor made more costly owing to a lack of experience or diligence. Having examined the fees of the invoices submitted, I do find them to have been reasonable given the complexity of the work and the lengths to which Mr. Roper went to ensure Mr. M. was informed of and participated in his own case. Likewise, examining the factors that would permit me to disallow fees per *Bunford*, I do not find them here and accordingly would allow the Claimant's claim.

Dated at Truro, Nova Scotia, this 31st day of January, 2020.

Shelly A. Martin, Adjudicator

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)

Claim No: 482521

Order
In the Small Claims Court of Nova Scotia

BETWEEN:

BURCHELL MACDOUGALL LLP
710 Prince Street Truro, NS
B2N 5H1

CLAIMANT

AND

A.M.
[address deleted]

RESPONDENT

On April 1, 2019, a hearing was held in the above matter, with both parties representing themselves . Based on the representations of each party during the hearing and materials provided at that time, the following Order is made:

1. That the **CLAIMANT'S** action against the **DEFENDANT** is allowed, as per the attached decision of this court.
2. That the **DEFENDANT** pay to the **CLAIMANT** the sums as follows:

Debt: $5781.86
Costs: $199.35
Total Judgement: $5981.21

Dated at Truro, in the County of Colchester
on the 31st January, 2020.

Original Court File
Copy Claimant(s)
Copy Defendant(s)

Shelly A. Martin, Adjudicator