SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: MacEwen v. Davidson, 2023 NSSM 28

Date: 20230705

Docket: 522669

Registry: Halifax

Between:

PATRICK K. MACEWEN

And

ENNIFER LYNN DAVIDSON

Adjudicator:	Darrel Pink
Heard:	June 28, 2023 in Halifax, Nova Scotia
Decision	July 5, 2023
Counsel:	Patrick MacEwen for the Claimant Jennifer Davidson – self-represented

By the Court:

Introduction

[1] Lawyers should document their contractual arrangements or 'retainer' with clients in writing.

[2] This was stressed in Adjudicator Gus Richardson's timeless description of the process for assessment of legal fees in *The Taxation of Legal Accounts in The Small Claims Court of Nova Scotia*[1] where he noted:

> The courts have stressed on innumerable occasions the importance of a written agreement (or at least record) of the scope of the lawyer's retainer and his or her expected remuneration.[28] [See, for example, *Gorin v. Flinn Merrick* (1994) 131 NSR (2d) 55 (SC), aff'd at (1995) 138 NSR (2d) 116 (CA).] Such agreements do not and cannot oust the jurisdiction of the court to vary, reduce or disallow a bill;[29] but they do provide an important justification for the fee or cost that is being taxed.
>
> Moreover, in the absence of any such *written* agreement or record the burden will be on the lawyer to establish the scope of his or her retainer and the basis for remuneration; and where there is a conflict in the evidence "weight must be given to the version advanced by the client rather than that of the lawyer."[30] (Footnotes omitted)

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[1] http://www.gusrichardson.com/wp-content/uploads/2009/07/The-Taxation-of-Legal-Accounts-in-the-Small-Claims-Court-CBA-20064.pdf

Background

[3] The Claimant is a lawyer practicing in a boutique litigation firm in Halifax. He was called to the bar in 2004 and according to the firm's website, he practices primarily in criminal defence.[2]

[4] The Defendant was involved in an incident on January 3, 2020, that lead to criminal charges for assault, mischief and uttering a threat. These were common and straight forward charges.

[5] The Defendant was a senior social worker with over twenty years of experience in child welfare work. She had been involved in a child protection matter with a Mr. B, who she believed was dangerous. She alleged Mr. B, along with one other, was harassing her by stalking her, taking her pictures/recording her and otherwise acting in an intimidating manner.

[6] The evidence does not reveal if the Defendant had any previous personal experience with lawyers. It does not appear she had hired a lawyer before or paid

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[2] https://www.macmcgiac.ca/lawyers

legal fees for counsel or other legal services. She was aware of the Defendant's reputation and on that basis contacted him for counsel.

[7] At the time of their initial contact in January 2020, the Defendant was distraught by what she had recently experienced; she made this known to the Claimant as it related to the lawyer-client relationship about to ensue.

[8] The facts relating to the criminal charges were stated as follows by Justice Jamie Campbell in a Summary Conviction Appeal decision:

> [19] The incident that resulted in charges being laid against Ms. Davidson took place on January 3, 2020. She went to the liquor store in Hantsport in the evening. When she left the store and got into her car, she drove past a truck a realized that it was Mr. B. and another man. She had experienced some confrontations with them and was concerned that they were following her and essentially stalking her because of a report that she had made about Mr. B.
>
> [20] Ms. Davidson drove toward the vehicle in which she had seen Mr. B. She got out of her car. Mr. B. started to record the incident on his phone. Mr. B. said that he stayed in the vehicle and waited for the police. Ms. Davidson had told him that she had called 911.
>
> [21] Ms. Davidson walked around the vehicle. Mr. B. was recording the incident on his phone. Ms. Davidson spoke to Mr. S., who was the other man in the truck. She said, "What is your last name [I.], you old fucking man. Get out of your…. Get out you old fuck, you want to see what you're fucking with, stalk me, threaten. Get out of the fucking truck. You want some? You want to play? Let's play. Get out. Let's play [I.] , you old fuck."
>
> [22] Mr. S. said, "You're sick lady."

> [23] Ms. Davidson said, “I will rip your fucking throat out and you will not see your family. That’s an assault. That’s an assault. You’re stalking me. Follow me and stalk me. That is not okay.”
>
> [24] Mr. B. said that Ms. Davidson reached into the open window of his vehicle and grabbed his phone. She elbowed him in the face. She kicked the passenger side door of the vehicle and dented it.
>
> [25] Mr. B. heard sirens and Ms. Davidson got in her car and left. The police questioned Mr. B. and Mr. S. about what had happened.
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> [26] At the trial Ms. Davidson did not deny that she had approached the truck in which Mr. B. and Mr. S. were sitting. Her position is that her actions were justifiable because she felt that she needed to preserve herself and avoid a pending attack. She felt that things were escalating, and she was not getting the protection that she needed.
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> *Davidson v. His Majesty the King*, 2022 NSSC 327

The Client’s Evidence about the Arrangement with her Lawyer

[9] Shortly after the incident and before charges were laid, the Defendant contacted the Claimant. Their initial meeting, in early January, was at the Claimant’s office where she says she met first with a law student. The Claimant did not recall this, but indicated his practice would not have been to allow a law student to meet with a client alone. The Defendant recalls a pre-meeting with a student before she met her lawyer.

[10] The Defendant was looking for a lawyer to ‘do my worrying’ – a role which the Claimant acknowledged he undertook on her behalf. She related a history of stalking and harassment by MR. B and she wanted the police to investigate the

actions of MR. B that preceded the charges. She believed her behavior was justified and provided a foundation for what became an unsuccessful argument of self-defence.

[11] At their initial meeting the Defendant asked the Claimant to push for charges relating to the stalking and harassment she had experienced. She felt no one was looking at what she had experienced before the confrontation that led to the criminal charges. She needed the Claimant's assistance to file statements with the police, as she did not feel safe, doing so on her own. She believed the Claimant would take on that role.

[12] In her evidence she analogized her situation to that of other vulnerable women whose concerns have been minimized by the police and the criminal justice system. She referred to the partner of the perpetrator of the April 2020 mass murders in Nova Scotia as an example.

[13] On January 23, 2020, she emailed the Claimant:

> Hi Pat. I still haven't heard from the police and I'm totally fine with that, I haven't been going great. Partly because on Monday I went outside to take my 3 kids to school and my car was vandalized. It appeared as if someone threw food all over it. Back, side and front Windows we're cover (sic) with what appeared to be compost. Pieces of tomato/salsa/apples…covered my windows. I had to clean it to get the kids to school…I'm certain it wasn't a random act. I didn't call the

police because I just can't cope with this. I haven't been able to sleep alone since that and my car was right outside my window….

Just though I'd pass this along….

[14] The Claimant's reply was brief.

Thank you for the update. I'm sorry to hear that you're having a rough time lately.

My advice is to document everything with the police for further use. You may also want to look into purchasing an inexpensive security camera.

Keep me posted.

[15] On April 9, 2020, the Defendant emailed her lawyer:

… I want to follow up with you about my concerns that police have done nothing with the harassment and intimidation charages against T. (redacted) and I am now home alone with 3 children daily. I feel that a protective order, or something, is needed and follow up with the police about where my concerns stand is needed. They haven't even contacted me other than to say there was nothing in the can. I followed your advice and didn't contact police to discuss this but feel completely unprotected and not feeling great about just leaving this alone until court as it is very uncertain when court will be.

…

Thoughts on this? I know you said to leave it alone because it can backfire, but police are completely dismissing my concerns and I'm left feeling unprotected, unsafe and completely baffled by this.

[16] The Claimant's reply stated:

I am sorry you are feeling this way.

Currently, your only recourse is to call the police and tell them that you feel as though you have been harassed and/or stalked. Hopefully

> that will cause them to commence an investigation and may result in T.(redacted) being placed on a recognizance to stay away from you.
>
> I would advise you to please refrain from speaking directly about the incident for which you have been charged.

[17] The Defendant stated she was a 'victim' because no one in the criminal justice system took her concerns seriously. She says she suffered from criminal acts and the police did nothing to investigate them or to protect her from further threats or violence. She stated she felt dismissed and ignored. Like other women victims she felt no one looked out for or pushed for her, which is what she expected her lawyer to do.

[18] At this hearing, when reflecting on her relationship with her lawyer, with several years behind her, the said 'His reputation spilled into my case. The lawyer I read about didn't show up for me.' She expected the Claimant would 'protect her' and that is why she was hiring him. She believed that was the agreement they had.

The Lawyer's Evidence about the Arrangement with his Client

[19] The Claimant, in presenting his case against the Defendant, recapped his involvement. He stated he met with the Defendant in February 2020 at his office. He related the charges were 'assault, threats and mischief/property damage'. He stated his hourly rate was $325/hour and he required a deposit against future fees

(a ‘retainer’) of $3500. The Defendant paid him $2000 on February 20, $1000 on February 21 and $500 on March 6, 2020.

[20] The Claimant provided no estimate to the client on the total anticipated fees. He did not generally show her the financial commitment for which she had to plan.

[21] The Claimant did not consider he was engaged by the Defendant until he received his financial retainer.

[22] On February 20, he called the assigned Crown Attorney to start the process to obtain the Crown’s disclosure.

[23] The Claimant did not confirm his arrangement with the Defendant in writing. He explained that with the onset of the COVID pandemic, his law firm was closed, and he was managing his practice primarily through his phone. He stated it was COVID and the change in how he practiced that caused him not to confirm or outline in writing the services he was to provide to the Defendant.

[24] The Claimant committed to the Defendant that he would ‘do the worrying’. What this entailed was not clarified. He described the services for which he was retained was as a criminal defence lawyer. This appears to mean he would address the criminal charges against his client and the processes required to have them adjudicated. The Claimant did not elaborate on how he conducts his criminal law

practice generally, though his evidence suggested his approach to this file was consistent with how he deals with matters involving straight forward charges in the Provincial Court.

The Lawyer's Evidence about the Proceedings

[25] The Claimant's involvement with the Defendant lasted until December 2021.

[26] The Claimant described, in general terms, the steps in the process. There was little activity between January and June 2020. COVID had limited the activities of the prosecution. Disclosure came intermittently. There was an initial appearance by phone in November. There were exchanges with the Crown Attorney, in hopes of a resolution. The trial was scheduled for August 2021 and occurred in October. Following conviction, sentencing was scheduled for December.

[27] The Claimant produced no documentary evidence to disclose the nature of what was done, any notes of meetings with the Crown, his client or witnesses, any reporting to the client via email or otherwise. The Defendant introduced emails to which the Claimant responded. Most were initiated by the Defendant.

[28] There were numerous exchanges (around seven – nine) with the Crown about disclosure, in particular about a file of Kenville Police Services relating to its

investigation into the Defendant's concerns about harassment and stalking by Mr. B. In the end it turned out there was no file.

[29] The Defendant's legal problems were not limited to the criminal charges. She was dismissed from her employment. She was subject to an investigation by her professional regulator. Her lawyer, though not engaged on these matters, was aware of them.

[30] The Claimant believed the matter could be resolved by a referral to the Restorative Justice Program. The Defendant was not agreeable. It did not occur. No written material containing the lawyer's advice regarding this, or any other tactic or strategy was produced.

[31] The trial, scheduled for Windsor, NS, was adjourned from the summer of 2021 to the fall. On October 7, evidence was called. Then there was an adjournment until October 27 to allow for briefing of the trial judge on an evidentiary issue relating to permitted cross examination of Mr. B.

[32] The Defendant wanted a colleague from the Department of Community Services to testify. She represented his evidence would be useful and vindicate her position. The Claimant stated he had difficulty meeting with that person and called him as a witness without having done a thorough interview. His evidence was not

helpful to the Defendant. No written material regarding this witness's evidence issue was produced.

[33] There were disagreements about trial tactics. The Defendant, believing the trail judge may be biased against her or the Department of Community Services (her employer), wanted her lawyer to apply for her recusal. No written evidence regarding the Claimant's advice, the alternatives or disagreements between the lawyer and client on this issue was produced.

[34] The Defendant was convicted. Before sentencing she wished the Claimant to file an appeal. His advice was to wait until after the sentencing. No memorandum or other record of this exchange was provided. This disagreement resulted in a termination of the lawyer-client relationship before sentencing. The Claimant rendered accounts for his services from February 2020 to December 2021.

[35] The Claimant asserts the relationship with the Defendant was positive until the trial, when the disagreements on trial tactics arose. As a criminal defence lawyer he noted, 'Clients and I don't always agree. I have to manage that.'

The Claim for Unpaid Fees

[36] The Claimant issued these accounts:

(a) June 30, 2020 – Invoice 7995 – 6.80 hr. - $2576. It was paid from trust (An administrative charge of $34.50 was added to this.)

(b) October 30, 2020 – Invoice 8227 -2.0 hr. - $747.50 + $343.57 (Disbursement) = $1091.07. $924 was paid from trust leaving a balance of $167.07.

(c) January 5, 2021 – Invoice 8314 – 2.50 hr. - $934.38. The $1000 paid in December was applied to this account and the outstanding balance, resulting in a balance of $101.45 owed on account by the Defendant.

(d) September 8, 2021 – Invoice 8741 – 15.25 hr.- $5960.69 + $632.90 (Disbursements) = $6593.59

(e) March 3, 2022 – Invoice 9146 -18.0 hr. - $6737.50 + $80.18 (Disbursements) = $6807.68

[37] Each invoice outlines services provided (recorded in a computerized time docket or client ledger), usually described in one line, the time spent, the charge for the service (hours x rate) and the HST amount.

[38] In addition to the initial fee deposit, on December 7, 2020, the Defendant paid $1000 on account.

[39] On October 18, 2021, the Defendant paid $6332.59 on her account.

[40] No evidence explained any exchanges between the parties around the breakdown of the lawyer-client relationship, billing or accounts. When the evidence had been completed the Claimant did not write to his client about where the matter stood regarding fees – why the costs were as they were, whether they varied from what was expected, and what more might the client anticipate.

[41] The Claimant noted he did not charge for most telephone calls of short duration, for mileage when travelling to court or other non-substantial items.

[42] Fees and disbursements, including HST, totaled $18002.72. The hours totaled 44.55. The approach taken by the lawyer was to multiply the time docketed by his hourly rate, subject to not charging some small amounts, which he also did not docket. There is no evidence the lawyer turned his mind to whether the account reflected a value for the client in terms of what she expected from the legal services.

[43] There was no evidence of communications to the client regarding payment of the initial accounts from the lawyer's trust account. It appears the accounts were rendered, and invoices marked 'paid' were sent to the client, as

is evident from the 'Trust Statement' that accompanies Invoice 7995.[3] No letters of transmittal that would have had the invoices enclosed were produced.

[44] Payments on account totaled $10832.59, leaving a balance of $7170.13. The Claimant calculates outstanding fees at $6909.13. The Court cannot account for the difference in arithmetic.

[45] Costs of filing and service of this proceeding equal $443.25.

[46] In *The Taxation of Accounts in the Small Claims Court*[4], Adjudicator Richardson states at para. 119:

> It is suggested that at a minimum the lawyer seeking to tax an account, or advance a claim on it, bring witnesses or documents relevant to the following:
>
> a. the nature and scope of the initial retainer;
>
> b. any written retainer letters or agreements;
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> c. any discussions or agreements (oral or written) regarding payment

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[3] It appears this practice is contrary to the Nova Scotia Barristers Society Regulations which require a lawyer to advise the client before funds are withdrawn from trust. See Reg. 10.3.4 - Proper Withdrawal from Trust Account Money must not be withdrawn or transferred from a trust account except: money properly required for or toward payment of the practising **lawyer's or law firm's fees that have been disclosed to the client**;

[4] Footnote 1 above

of fees *and* disbursements;

d. any discussions or estimates (oral or written) as to projected fees, both at the time of the initial retainer and later as the matter progressed;

e. affidavit in proof of disbursements;

f. time dockets; and

g. evidence as to what actually was accomplished by the lawyer.

[47] This is what the Court generally expects a lawyer to provide on a taxation of legal accounts so the requisite analysis can be undertaken with all the relevant facts before the Court.

[48] In this matter, most of this information was not available. The lawyer was the sole witness. No file documentation was presented. There was no written retainer or description of it, no agreements, no estimates of fees, time or effort, no affidavit of disbursements (which were not significant and were addressed by the lawyer in his evidence), and no descriptive evidence of what was accomplished by the lawyers efforts.

[49] The Defendant's position regarding the claim for unpaid legal fees is that the services provided by the Claimant were of no value to her and that she should be relieved from all charges, resulting in a reimbursement of what has already been paid to the lawyer.

Findings

[50] The Defendant was a social worker who had practiced for over twenty years. She had been a witness in child welfare matters. She had not previously engaged a criminal lawyer on her own behalf and had no personal experience with the criminal justice system as an accused person. Regarding being a client, she was unsophisticated in relation to the financial elements involved such as hourly rates, financial retainers, billings, and taxation of fees.

[51] The Code of Professional Conduct (the Code)[5] stipulates the essential elements for the formation of the lawyer-client relationship. 'Client' is defined in Paragraph 1.1.1(b):

> "client" means a person who:
>
> > (i) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

[5] https://nsbs.org/wp-content/uploads/2019/11/CodeofProfessionalConduct.pdf

> (ii) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf, and includes ...
>
> **Commentary**
>
> [1] A lawyer-client relationship may be established without formality.

[52] The lawyer-client relationship commenced when the Defendant met with the Claimant in January 2020. From that point the lawyer owed a full range of duties to his client. Contrary to the view of the Claimant, the subsequent financial arrangements do not determine when the lawyer-client relationship commenced.

[53] The arrangements or retainer between the parties was not recorded in writing.

[54] Absent a written confirmation of the arrangements for legal services, the Court must identify what the lawyer was retained or engaged to do[6]. After that, I must assess the fees against the applicable principles that apply to the taxation or assessment of lawyers' accounts.

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[6] See also - Smith v. Ward, 2009 NSSM 65.

[55] The leading case in Nova Scotia relating to the approach to be taken when there is no written fee or retainer agreement is *Lindsay v. Stewart, MacKeen & Covert, 1988 CanLII 5743 (NS CA)* where the Court states:

> [30] There are few decisions in this province setting out the principles applicable to the taxation of solicitor and client costs. I propose therefore to refer to some of the cases in other provinces. In doing so one must bear in mind that there are differences in the rules and practice in other provinces. The practice has shifted more recently to calculating fees for services based on time expended on behalf of the client.
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> [31] The general rule applicable to legal fees is stated in a paper on "Lawyers' Fees", published by the Continuing Legal Education Society of British Columbia (1984), at p. 3.2.01, as follows:
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> > Where there is no tariff of costs which can be applied ... and where there is no specific contract between the solicitor and his client, the general custom and practice of solicitors is to be the guide if such ... exists; if there is no custom, the value of the services rendered is to be estimated on a *quantum meruit.*
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> [32] The following passage is from Orkin, *The Law of Costs*, 2nd ed., para. 301.2:
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> > It is considered important for a solicitor to obtain a written retainer from the client. The court has said:
> >
> > > "It is the duty of a solicitor to obtain a written authority from his client before he commences a suit. If circumstances are urgent, and he is obliged to commence proceedings without such authority, he should obtain it as soon afterwards as he can. An authority may however be implied, where the client acquiesces in and adopts the proceedings; but if the solicitor's authority is disputed, it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the

> Court will treat him as unauthorised, and he must abide by the consequences of his neglect."

[33] The following is from the headnote in *MacGill & Grant v. Chin Yow You* (1914), 1980 CanLII 520 (BC SC), 19 B.C.L.R. 241, a decision of the British Columbia Court of Appeal:

> On all questions as to the retainer of a solicitor, where there is no written retainer and there is a conflict of evidence as to the authority between the solicitor and the client without further circumstances, weight must be given to the denial of the party sought to be charged rather than to the affirmation of the solicitor.
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> That statement is a summary of the cases referred to by counsel. MacDonald C.J.A. stated [at p. 242]:
>
> The authorities referred to by Mr. Mayers make it abundantly clear that a solicitor who undertakes legal business without a written retainer from his client proceeds at his peril. The principles which ought to apply to the trial of a case of this kind are authoritatively laid down in those cases, and, I think, the rule is a salutary one.

[34] In *Griffiths v. Evans*, [1953] 2 All E.R. 1364 at p. 1369, Denning L.J. in a separate judgment stated:

> On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last hundred years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it: see *Crossley v. Crowther* (7), per SIR GEORGE J. TURNER, V.-C.; *Re Paine* (8), per WARRINGTON, J. The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.

[56] Mr. MacEwen had no clear recollection of the initial discussions with Ms Davidson. He gave the wrong date for their initial meeting when he testified. He

did not recall a law student at that first conference. He believed his retainer for services did not start until he received his financial retainer. He explained he did not create a written retainer because of COVID. I take judicial notice the Emergency was not declared in Nova Scotia until March 2020, up to 2 months after the initial meeting between the parties.

[57] Ms. Davidson's memory is clear about what she wanted from her lawyer and what her lawyer agreed to do. Her primary concern, when she initially met with the Claimant, was to have the police and the criminal justice system address her fear and vulnerability. She felt she was being harassed and clearly communicated that to her prospective counsel. She expected he would assist her in pursuing the police for intervention or an investigation. By indicating that he would do the 'worrying', given that she was primarily worried about the inaction by the system regarding how Mr. B and others were harassing and bothering her and her family, Mr. MacEwen agreed to take on that role and to assist her.

[58] I accept the Defendant's evidence about the initial discussions and the formation of the lawyer-client relationship, including what the Claimant agreed to do. This was a unique and once in a lifetime experience for the Defendant. It was an emotional and distressing time. She knew what she wanted from her lawyer and was clear at the outset and in the subsequent months about that. For the lawyer, this

was a routine process of initial contact with a new client. On the small details the Claimant's recollection is not as clear as the Defendant's.

[59] The nature of the assistance required to address the client's concerns, was not fully developed, but the email communication in January 2020 makes it clear he was giving her advice on the approach to take, what to do and what not to do. The client learned of the numerous calls between the Crown and the Claimant. She believed these would result in production of information about what the police had done. But they had done nothing.

[60] Ms. Davidson expected her lawyer would actively intervene with authorities. Her expectations were reasonable, given the exchanges that occurred at the outset of the retainer. They became an essential part of the arrangements for legal services and the lawyer's retainer.

[61] I find the Claimant was retained to act as criminal defence counsel and to pursue, on behalf of or with the client, an active intervention with criminal justice authorities (police and perhaps Crown) regarding the harassment and stalking of which she had allegedly been a victim. It is impossible to say what would have resulted from this having occurred, but because there was no robust investigation of her concerns or no detailed explanation of why there was no independent

consideration of them, the client justifiably felt her lawyer had not done what he agreed to do and therefore she was left with fewer options as the criminal proceeding progressed.

[62] I find the lawyer did not establish that his retainer was limited to providing traditional criminal defence lawyer services, such as obtaining disclosure from the Crown, analyzing the evidence, advising the client on possible options and outcomes and representing the client at trial. The client was distressed from the behaviour of the former child welfare clients. She felt Mr. B was dangerous. She believed she was being stalked, being harassed and she felt unsafe for herself and her children. She told all this to the Claimant and expected her lawyer to assist her in having these matters addressed by the police either to investigate and possible charge those who were after her or to prevent them from coming near her. In April 2020, Mr. MacEwen referred to 'recognizance to stay away from you', one of the very remedies she sought.

[63] In 2019, Council of the Nova Scotia Barristers' Society adopted Criminal Law Standards[7] that include this provision regarding 'competence':

[7] https://www.lians.ca/sites/default/files/documents/00200745.pdf

> A lawyer must be competent to perform all legal services undertaken on behalf of a client. In the criminal law context, competence requires: an objective assessment of whether the lawyer can **competently represent the client on the specific matter, having regard to the seriousness of the charge(s) and the complexity of the matter**, given the lawyer's experience, preexisting caseload and available resources. an ability to recognize potential legal, ethical and evidentiary issues. (Emphasis added)

[64] There is no allegation in this file regarding the competence of defence counsel or the adequacy of his trail work. However, the circumstances giving rise to resulted in a complexity the lawyer needed to focus on for his client.

[65] The reference in the standard to 'complexity of the matter' requires a defence lawyer to understand the context in which the criminal charges are being processed.

[66] In the Barristers' Society Law Office Management Standards[8], the standard expected is that a lawyer will:

> A lawyer must **obtain the facts, identify the issues, ascertain the client's objectives,** consider possible options and develop and advise the client on appropriate courses of action except in those circumstances in which the lawyer's retention is for limited scope of professional services. (Emphasis added)

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[8] https://www.lians.ca/standards/law-office-management-standards/2-client-service

[67] Thus it is for the lawyer to ascertain the client's objectives as part of the process of agreeing to provide legal services. Here, the client made it clear what her priorities were. She wanted and expected her lawyer to assist her to address the ramifications of the behavior she had been exposed to. That was part of the arrangement for the provision of legal services.

[68] Professional standards[9] adopted by the Nova Scotia Barristers' Society, as the governing body for the legal profession in Nova Scotia, create an expectation for Nova Scotia lawyers they cannot avoid. The Society's regulations make that clear:

> **Code of Professional Conduct**
>
> 8.1.1 The ethical standards contained in the rules and commentaries of the Code of Professional Conduct, as amended, are adopted as ethical standards for all members of the Society, including Articled Clerks, law firms and lawyers who are subject to the rules governing members.
>
> **Professional Standards**
>
> 8.1.3 Lawyers practicing an area of law must comply with the standards of practice applicable to that area of law.

[9] Adopted pursuant so s. 4(2)(b) of the Legal Profession Act as part of the purpose of the Society - (b) establish standards for the professional responsibility and competence of members in the Society;

[69] Lawyers, regardless of their area of practice, must know their obligations under Professional Standards which the Society has adopted.

Basis for Assessing Legal Fees.

[70] Having found there were two parts to the arrangements or retainer for legal services, I must now assess whether the total account was appropriate.

[71] The jJurisdiction of the Small Claims Court to review lawyers' accounts is based on several provisions.

[72] Section 9A of the *Small Claims Court Act* :

> 9A (1) An adjudicator has all the powers that were exercised by taxing masters appointed pursuant to the Taxing Masters Act immediately before the repeal of that Act, and may carry out any taxations of fees, costs, charges or disbursements that a taxing master had jurisdiction to perform pursuant to any enactment or rule.

[73] Taxation or assessment of fees is done in the accordance with the Legal Profession Act[10] and the Code. The governing provisions of the Code are in Rule 3.6:

> **Reasonable Fees and Disbursements**

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[10] **Account recoverable** – s. 66. A lawyer may sue to recover the lawyer's reasonable and lawful account. 2004, c. 28, s. 66. **Taxation** s. 67 Notwithstanding any other enactment, a lawyer's account may be taxed by (a) an adjudicator; or (b) a judge.

3.6-1 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.

[74] In some taxations, the Civil Procedure Rules also govern the assessment, but the CPR's application is limited to 'proceedings' in the Supreme Court, so they do not apply in this matter[11].

[11] CPR 77.13 - Counsel's fees and disbursements: entitlement and assessment

[75] The Code outlines the factors to be considered in assessing reasonableness. To assess what is fair and reasonable, I will address the applicable provisions of 3.6-1.

[76] **(a) the time and effort required and spent** – The evidence, through counsel's invoices, disclose that 44.55 hours were billed to the file. The Claimant did not produce the file or provide any evidence about what happened for any of the fee entries in his invoices. No notes or communications with the client were produced that showed either what options were available or what advice he was providing. He does not produce information about what occurred in various conversations with the Crown or at trial. The Defendant was present for trial but did not participate in the telephone conversations between defence and Crown counsel. There was evidence about some research and briefing required for the trail judge, but little other evidence about what was involved in the individual time entries. There are no reporting letters to the Client at any stage of the proceedings.

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(1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding. 'Proceeding' is limited by Rule 2.01 to 'proceedings in the Supreme Court of Nova Scotia'.

[77] It is impossible to ascertain if the time and effort were necessary. It is acknowledged the file happened during the COVID Pandemic and this created inefficiencies for all in the criminal justice system. The effect of that on this file was not explained in either oral evidence or in any documentation.

[78] **(b) the difficulty of the matter and the importance of the matter to the client –** for the Defendant, her career depended in part on the outcome of the criminal proceedings. Of primary importance to her was to have the police and others deal with those she believed were harassing and stalking her. I have found the Claimant failed to make this part of his retainer.

[79] The criminal charges themselves and the defence proposed were not complicated for a lawyer of the Claimant's experience. He stated he had done dozens of cases where a s. 34 'self-defence' argument was being made. The one small complexity revolved around some evidence that required a little research (1 hr. indicated on the invoice), but that hardly made the matter difficult.

[80] **(c) whether special skill or service has been required and provided; (i) the experience and ability of the lawyer –** The Claimant relied on the Claimant's experience and ability as a criminal defence lawyer to prepare for and mount his defence. His description of this work was that, but for the effect of COVID, it was

routine or mundane. The disagreements regarding trial tactics required the Claimant to demonstrate his knowledge and experience as trial counsel, which he recounted in his evidence.

[81] He did not use his experience, knowledge or skills to do what the client wanted him to do – advocate on her behalf regarding the harassment and fear to which she was subject. To do so would have required the lawyer to undertake work or exercise skills, based on his familiarity with the institutions, people and processes involved in the criminal justice system. Other than to give advice about maintaining records of her encounters with Mr. B and others, the Claimant did not actively provide any service respecting the client's priority. Nor did he advise her that, based on his experience and skill, such efforts would not be fruitful.

[82] **(d) the results obtained –** Two aspects of 'results' need to be considered, namely the outcome of the criminal proceeding and the results of efforts to have authorities address the Defendant's concerns.

[83] There is no guarantee in a criminal trial, and none was offered. The Claimant testified there was no dispute about the facts. The issue was the 'rationale for them' in the Claimant's words. The Summary Conviction Appeal Decision, upholding the

conviction, indicates the Claimant did no wrong in his conduct of the trail. The result was what the facts, as found by the trail judge, required.

[84] The second aspect of the client's desired outcome was not pursued or obtained. The Claimant did not actively address what the client wanted. Had he done so, he could have explained to her what he did, and what happened with her concerns. He could have demonstrated what discretion was exercised by justice authorities and why they made the choices they did. He could have addressed her specific concerns, maybe not to her satisfaction, but at least to where he demonstrated that he understood her expectations and followed up to the extent he reasonably could.

[85] The Claimant failed in an area of vital importance to his client to address her requirements or obtain any results for her.

[86] **(j) any estimate or range of fees given by the lawyer** – The Claimant failed to provide an estimate of the expenses the Defendant could expect. He quoted an hourly rate. He required a deposit against fees. He did not say to the client that he would expect in the normal course of events he estimated a defence, would cost $x if the matter was resolved without a trial and $y if a trial was required.

[87] The Code is clear lawyers should provide clients with estimates of the fees they can expect. In most areas of business, buyers of goods or services know what they will be charged before they decide to purchase. Lawyers should not be any different. If they cannot give a good estimate, this should be clearly communicated to the client so the bais upon which charges will be forthcoming is clearly stated and understood.

[88] Commentary 3 to Code Rule 3.6-1 states:

> [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.(Empasis added)
>
> Commentary 4 adds:
>
> …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.

[89] This reflects the law as stated in *Atlantic Nurseries Ltd. v. McInnes Cooper & Robertson,* 1991 CanLII 4369, where Justice Elizabeth Roscoe of the Nova Scotia Supreme Court held, regarding a quote or estimate provided by a lawyer, that the lawyer has an ongoing obligation to keep the client advised throughout the proceeding regarding how costs are proceeding in relation to the original estimate of fees provided to the client.

[90] Justice Roscoe held the Court may exercise its discretion to tax the lawyer's account at some amount lower than the actual fees and disbursements if the client is not kept up to date should the actual costs of services exceed the original amount quoted.

[91] The Claimant did not address his billings with the client at any stage of the proceedings. Once a financial retainer was provided, it was deposited to the lawyer's trust account and the initial accounts were paid from that trust account when the lawyer's firm applied the balance in trust to the account. The lawyer provided no explanations for the accounts, how they were paid, what financial outlay the client might next expect or what the total fees or a range of fees might be.

Conclusion

[92] In determining the reasonableness of the fees, the factors from the Code noted above must be applied. Not all factors apply in every matter. Because the basis for the lawyer-client relationship is based on the fiduciary role of the lawyer

to act in the client's best interests[12] the approach must be to look at what was reasonable, in all the circumstances of the relationship between the parties.

[93] In determining reasonableness, the nature of the arrangement or the retainer, the totality of the fees and the nature of the lawyer's services (factors a, b, c, d and j) are to be considered. One approach to assessing reasonableness can be found in *Weldon McInnis v. John Doe* 2014 NSSM 13 where Adjudicator Richardson reviewed each account and reflected on the time charged and whether it was appropriate.

[94] Rather than taking that approach, which I will call a 'review of the lawyer's work' approach, I ascertain the value of the services to the client based on the retainer, the factors in the Code and the fiduciary duty of the lawyer to put the client's interests first. I do so because using the lawyer's work approach drives one to looking at the time spent on the file rather than the value of the legal services to the client, which is what the fiduciary duty requires the Court to ascertain. This

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[12] See Hodgkinson v Simms, [1994] 3 SCR 377 and the cases deal with conflicts of interest - MacDonald Estate v. Martin, 1990 CanLII 32 (SCC), R. v. Neil, 2002 SCC 70 and Canadian National Railway Co. v. McKercher LLP, 2013 SCC 39.

approach allows one to reflect on the lawyer's obligations to the client as opposed to slavishly billing based on a multiplication of hours times rates.[13]

[95] It also reflects this file was a routine criminal file. It is appreciated that much criminal law practice is casual, often without the formalities of other areas of litigation.[14] That does not relieve criminal law practitioners from their obligations regarding their clients. Regardless of client background or familiarity with the system, those charged with criminal offences deserve the same quality of service from lawyers, respecting how their matter is handled, documented, reported on and billed as clients in other areas of law practice.

[96] I conclude the totality of the account ($18002) is too high given:

(a) The lawyer did not undertake a significant aspect of the services for which he was retained, namely addressing his client's concerns about how she was being treated or how her anxieties were not being addressed by the criminal justice system;

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[13] See Wickwire Holm v. Stephen, 2008 NSSM 39.

[14] See Western Regional Health Board v. Zimmer, 2008 NSSM 25 where the informal approach to billing in criminal law matters is acknowledged.

(b) The matter was not complex, difficult and did not require significant special skills; and

(c) The lawyer failed to properly document and communicate most aspects of the file, either formally or informally.

[97] Given that the lawyer failed to undertake the work of primary importance to his client and given there is no evidence of what that would have entailed or cost, the Court is left to determine what the overall value of the services were to the client.

[98] The client's position there was no value is untenable. She was charged with criminal offences which needed to be addressed. Though the outcome may not be what she desired, the Claimant competently acted as trial counsel. Disagreements regarding strategy or tactics do not take away from that.

[99] Because the lawyer failed to carry out the work he was retained to perform, because he failed to adequately keep the client appraised in writing or orally about what was happening on her file, his advice and the alternatives available to her, his fees must be discounted from what he charged. They simply do not reflect a value to the client approximate or equal to the amount billed.

[100] I place the value of the services provided by the Claimant while acting as counsel on the criminal charges at $10000 including disbursements and HST. To establish that sum, I consider:

(a) the results achieved (a conditional discharge),

(b) the pre-trial options provided to the Defendant (Restorative Justice) which she declined,

(c) the time the matter took, both in terms of time spent and elapsed time from charge to disposition, which was affected by the COVID Pandemic, and

(d) the challenges presented by the client as she argued about strategy (application for trial judge recusal) and provided information that may not have been as reliable as she had represented (calling her colleague as a witness).

[101] In reaching this conclusion, I consider both the value to the client of what was done and work fir which the lawyer cannot charge because he did not do what the client required and he failed to properly document his advice and communications with her.

[102] I assess the Claimant's fees at $10000 including disbursements and HST.

[103] Given the Defendant has paid the Claimant $10832.59, the Claimant must reimburse the Defendant $832.59.

Dated at Halifax, Nova Scotia, on July 5, 2023

Darrel Pink, Small Claims Court Adjudicator