

CANADA / JUDGMENT

Clark Wilson LLP v. Nicoletti

2025 BCSC 433

COURT

Supreme Court of British Columbia

DECIDED

13 March 2025

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2025 BCSC 433 Clark Wilson LLP v. Nicoletti

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clark Wilson LLP v. Nicoletti,

2025 BCSC 433

Date: 20250313

Docket: S232270

Registry: Vancouver

Between:

Clark Wilson LLP

Solicitor

And

Mario Nicoletti and Agliotti Investments Ltd.

Former Client

Before: Registrar Gaily

Reasons for Decision

Counsel for the Solicitor:

D. Gorelov

S. Wu, Articled Student

Client, appearing in person and as the representative for Agliotti Investments Ltd.:

M. Nicoletti

Place and Dates of Hearing:

Vancouver, B.C.

January 7 and 10, 2025

Place and Date of Decision:

Vancouver, B.C.

March 13, 2025

Table of Contents

Introduction.. 3

The Reconsideration Proceeding.. 5

Background.. 7

The Retainer Agreements. 8

The Law Firm's bills. 10

The Work Performed. 12

Discussion and Legal Principles. 18

The Complexity, Difficulty or Novelty of the Issues Involved. 19

The Skill, Specialized Knowledge and Responsibility Required of the Lawyer 19

The Lawyer's Character and Standing in the Profession. 20

The Amount Involved. 20

The Time Reasonably Spent 20

Whether the Hourly Rate was Reasonable. 21

The Importance of the Matter to the Client 21

The Result Obtained. 22

Summary. 22

Costs. 23

Introduction

- [1] This review under the Legal Profession Act, S.B.C. 1998, c. 9 [LPA], was initiated by Clark Wilson LLP ("Clark Wilson" or the "Law Firm") when its former clients in a family matter, Mario Nicoletti and his company, Agliotti Investments Ltd. ("Agliotti"), failed to pay the Law Firm \$18,086.81, the balance owing on bills rendered over this short (five month) retainer. This LPA review is a reconsideration.
- [2] Clark Wilson filed the appointment for the LPA review on March 24, 2023. On June 16, 2023, sitting as registrar, Associate Judge Nielsen (then referred to as Master), conducted the LPA review (the "First LPA Review"), which Mr. Nicoletti did not attend. Nielsen A.J. allowed the fees as claimed and awarded \$2,000 costs to the Law Firm. A certificate of fees for \$20,086.81 was entered that same day (the "Certificate"). Section 76(3) of the LPA provides that a registrar's certificate of fees is deemed to be a judgment of the court after the expiry of the appeal period set out in s. 75 (generally, two weeks). Clark Wilson registered the judgment on properties owned by Mr. Nicoletti and Agliotti on June 20, 2023, four days after the Certificate was entered.
- [3] On August 4, 2023, after abandoning an appeal of the Certificate, Mr. Nicoletti applied for a reconsideration of the Certificate, which Associate Judge Dick heard on November 22, 2023. After determining that she had jurisdiction to make the order sought, Dick A.J. ordered this reconsideration. She also ordered that the costs of the application before her were to be determined by the presider at the reconsideration. On December 5, 2023, Clark Wilson filed a notice of appeal from Dick A.J.'s order and on February 6, 2024, Justice Thomas dismissed the appeal, awarding costs to Mr. Nicoletti (those costs are not before me).
- [4] In addition to ordering the reconsideration, Dick A.J. ordered the parties to attend a pre-hearing conference ("PHC") prior to the hearing. On April 10, 2024, Clark Wilson filed a subsequent appointment, setting the reconsideration for two hours on May 21, 2024, but it did not schedule the PHC as ordered by Dick A.J. When the parties appeared before Associate Judge Vos on May 21, he converted the hearing to a PHC and made a series of orders. The reconsideration was reset for October 29, 2024 for one day, but adjourned by consent to January 7, 2025. The hearing on January 7 did not conclude and I heard final submissions for a further half day on January 10.
- [5] For the reasons detailed below, I find that in the circumstances of this case and considering the factors set out under s. 71(4) of the LPA, the fees charged by Clark Wilson over this short five-month retainer should be reduced to a total of \$20,000 (inclusive of legal fees, disbursements and applicable taxes). Mr. Nicoletti has already paid the Law Firm \$10,000; accordingly, I find that he owes them a further \$10,000 (a reduction of \$8,086.81).
- [6] The amount I have allowed in this reconsideration is a reduction of more than 1/6th of the amount owing, and under s. 72(1)(a) of the LPA, the Clients are entitled to the costs of the reconsideration payable by Clark Wilson. However, s. 72(2) affords the registrar the discretion, in special circumstances, to order the payment of costs other than as provided in

s. 72(1). In my view, it is most unfortunate that the parties were not able to settle this and it proceeded to the hearing before me (I note that on ordering the reconsideration, Dick A.J. ordered Mr. Nicoletti to make a reasonable settlement offer to Clark Wilson within fourteen days of her order). Mr. Nicoletti has repeatedly stated that he does not want Clark Wilson "to be allowed to get away with it" and that this is a matter of principle (although he acknowledged that Dick A.J. advised him that "principles can be costly"). I can appreciate Mr. Nicoletti's frustration with the way this matter initially proceeded and that, as a self-represented litigant, he may not understand the limits of the registrar's jurisdiction on an LPA review. However, I cannot condone what I consider to be a disproportionate use of court resources (in this case, five separate appearances), for a dispute involving approximately \$20,000, and I find that both parties are responsible for prolonging these proceedings.

- [7] Clark Wilson formally offered to settle the matter on January 2, 2025 for an \$13,500 (above the \$10,000 retainer paid), which is more than I have found Mr. Nicoletti should pay. Pursuant to the order of Dick A.J., Mr. Nicoletti offered to settle his outstanding fees for a further \$4,000, which is less than the amount I have ordered him to pay. In the circumstances of this reconsideration, I find that it is appropriate for me to exercise my discretion under s. 72(2) of the LPA and order that the parties are to bear their own costs of the reconsideration hearing before me, including the PHC before Vos A.J.
- [8] Dick A.J. ordered that the costs of the application before her were to be considered by the presider at the reconsideration. Mr. Nicoletti succeeded on the reconsideration application and I find that he is entitled to his costs on Scale B for that application. Given the length of the proceedings and the fact that Mr. Nicoletti represented himself, I find it unlikely the parties will be able to reach agreement on the amount of costs owing for the reconsideration application before Dick A.J. I am satisfied that it is appropriate in the circumstances that I determine the amount of costs payable by Clark Wilson to Mr. Nicoletti for the reconsideration application before Dick A.J., which I find should be \$500, inclusive of disbursements and applicable taxes.
- [9] I direct the Law Firm to prepare a certificate of fees in Form 65 of the Supreme Court Civil Rules [SCCR], showing that the amount owing to the Law Firm is \$10,000, inclusive of taxes and interest, and that the amount of costs awarded to Mr. Nicoletti for the reconsideration is \$500, leaving a balance owing to Clark Wilson of \$9,500. The Law Firm shall submit the Form 65 to the registry for my signature.

The Reconsideration Proceeding

- [10] As noted, Mr. Nicoletti did not attend the First LPA Review in June 2023 and it proceeded on an unopposed basis. The hearing record before me included the first affidavit of Jeannette Aucoin, then an associate at Clark Wilson in the family group and the lawyer who performed the bulk of the work on Mr. Nicoletti's file, which was filed June 9, 2023 for the First LPA Review ("Aucoin Affidavit"). The hearing record also included a copy of a letter Mr. Nicoletti

had sent to the opposing family counsel on January 24, 2023, after the solicitor-client relationship ended (the "Nicoletti Letter"), which was in evidence at the First LPA Review, and a transcript of the proceedings at the First LPA Review.

- [11] The pleadings before Dick A.J. at the reconsideration application, including Mr. Nicoletti's first affidavit filed August 4, 2023 ("Nicoletti Affidavit #1"), a copy of Dick A.J.'s order granting the reconsideration, and a copy of her oral reasons were also included in the hearing record. In her oral reasons, which are unreported (Clark Wilson LLP v. Nicoletti (22 November 2023) Vancouver S232270 (B.C.S.C.)), Dick A.J. described the evidence before her of the reason for Mr. Nicoletti's non-appearance at the First LPA Review as follows:
- [3] Mr. Nicoletti was served with the appointment on April 3, 2023 setting the hearing date for June 16, 2023. On June 9, 2023, the affidavit of Ms. Aucoin in support of the bill was sent to Mr. Nicoletti.
- [4] At 5:15 p.m. on June 15, Mr. Nicoletti emailed an assistant at Clark Wilson LLP asking what date the hearing was scheduled. In his materials, he alleges that he thought the hearing date was June 24. When he realized June 24 was a weekend day he contacted the firm to confirm the date of the hearing.
- [5] On June 16 at 7:40 a.m. (the date of the hearing) Ms. Aaron responded indicating that the hearing was set for that day. Mr. Nicoletti did not get back to Ms. Aaron until approximately 10:39 a.m. advising that he could not attend. He submits that he had left a message for Ms. Aucoin that day as well as the original member of the firm that he had contacted.
- [6] The matter proceeded as scheduled on June 16, resulting in the issuance of the certificate of fees. Mr. Nicoletti did not show up, nor did anyone appear on his behalf. Counsel indicated the firm had not heard from Mr. Nicoletti since he was served. The matter went on what we normally consider to be an "unopposed" basis. There is no issue that the registrar had the ability to proceed without Mr. Nicoletti appearing.
- [12] Vos A.J.'s order of May 21, 2024 was included in the record. Among other things, Vos A.J. had ordered the parties to exchange affidavits in advance of the hearing. Mr. Nicoletti's second affidavit, filed August 7, 2024 ("Nicoletti Affidavit #2") and the second affidavit of Erin Bertram, a paralegal at Clark Wilson, filed August 23, 2024 ("Bertram Affidavit"), which responds to Nicoletti Affidavit #2, were before me. The record also included affidavits of service and a copy of the judicial case conference ("JCC") brief Ms. Aucoin filed on Mr. Nicoletti's behalf in December 2022. Each party also tendered further exhibits during the hearing.
- [13] At the reconsideration, Daniel Gorelov represented Clark Wilson and Mr. Nicoletti represented himself. Ms. Aucoin spoke to her affidavit and was cross-examined by Mr. Nicoletti and Mr. Nicoletti spoke to his affidavits and was cross-examined by Mr. Gorelov. When he began his cross-examination of Ms. Aucoin, Mr. Nicoletti wanted to put three binders of documents in evidence on which to cross-examine her, many of which were

duplicative of the evidence in the hearing record, or prepared after the solicitor-client relationship had ended and were not relevant to the LPA review, and I did not allow the binders to be tendered. Mr. Nicoletti repeatedly argued that Clark Wilson had misled the court at the First LPA Review and I explained to him that on the reconsideration, the matter was considered afresh and I was not going to make determinations about the proceedings before Nielsen A.J.

Background

- [14] On June 29, 2022, a few years after they had separated after a 50-year marriage, Mrs. Nicoletti commenced family proceedings against Mr. Nicoletti and Agliotti. In the context of the family proceedings, Mrs. Nicoletti registered certificates of pending litigation ("CPLs") on three real properties: the family home held jointly by Mr. and Mrs. Nicoletti, and two properties held by Agliotti (the "Agliotti Properties"). Mr. Nicoletti's adult children were living in the Agliotti Properties rent free at the time. The evidence before me was that Mr. Nicoletti was estranged from his adult children and that, after they had separated, Mrs. Nicoletti was giving the children a lot of money from their joint account and he "wanted to stop the bleeding".
- [15] Mr. Nicoletti had family counsel, but he had previously retained Clark Wilson to provide advice for Agliotti, and he had a relationship with Don C. Sihota K.C., a senior corporate partner at the Law Firm. The evidence before me was that Mr. and Mrs. Nicoletti had agreed to an equal division of the family assets, which included the real properties, the shares of Agliotti, investments, vehicles and jewellery. Mr. Nicoletti contacted Mr. Sihota seeking assistance in the family matter, in particular, asking Mr. Sihota to review a separation agreement Mr. Nicoletti had personally drafted, in which he had equally divided the family property.

The Retainer Agreements

- [16] On July 15, 2022, Mr. Nicoletti and Mr. Sihota executed a retainer agreement under which Mr. Nicoletti retained Clark Wilson for the "provision of services" (the "Agreement"), which does not refer to the family matter or identify individual lawyers who would assist Mr. Nicoletti. Among other things, the Agreement provides that the Law Firm will charge interest on overdue accounts at 14% per annum (1.17% per month) and that the Law Firm could terminate the relationship for failure to pay accounts. Under the heading "billing procedures", it states that "it is our policy to bill monthly and you may expect to receive statements of account from time to time. The accounts may be sent by mail or email. The fee portion of our statements of account will generally be based upon our rates, adjusted from time to time, for actual time spent by our professional, paralegal and clerical staff on your behalf."

[17] In its Schedule A, the Agreement sets out the range of hourly rates for the Law Firm's partners (\$450 to \$825), associate lawyers (\$220 to \$495), and support staff (\$80 to \$350). Schedule A also states the following:

Services will be provided by any one of our firm's approximately 75 lawyers as well as by our staff. It will be our intention to have the most suitable person servicing each matter in order to keep the cost of legal services to you reasonable.

We bill monthly to ensure that our clients are kept informed of the ongoing costs and are able to budget for them. To ensure that you do not receive an account for an amount that you were not expecting, I will implement a credit limit system. The credit limit system enables us to keep you informed of unbilled fees and disbursements and outstanding accounts that have accrued on your account.

To implement this credit limit system, I have set your initial credit limit at \$5,000 (the "Threshold").

1. As we continue working on your behalf, when we reach or exceed 60% of the Threshold I will be notified by our accounting system. When I am notified of the 60% Threshold having been met or exceeded, I can send you an email to advise you of the cost so far and ask you for further instructions.
2. Once the A/R [outstanding accounts or accounts receivable] and WIP [work in progress] reach or exceed 100% of the Threshold, our accounting system will no longer allow any lawyer or staff to log time on the matter. When I am notified of the 100% Threshold having been met or exceeded, I will send you an email to advise you that we can not log any more time on the matter. I will advise you that we will increase the Threshold to a higher amount and ask that if you do not wish to raise the Threshold, that you immediately advise me of this. If I do not receive a response from you then I will increase the Threshold and continue working.

[Emphasis original]

[18] Mr. Nicoletti provided an initial \$5,000, the retainer Threshold under Schedule A of the Agreement.

[19] Mr. Sihota does not practice family law and there is no dispute that when he was contacted by Mr. Nicoletti about the family matter, Mr. Sihota told Mr. Nicoletti he would ask his colleagues who practice family law to assist.

[20] Pursuant to a second agreement dated August 3, 2022, which incorporates the terms of the Agreement, Mr. Nicoletti and Agliotti retained Clark Wilson to act on their behalf in the family matter (the "Family Agreement"). The Family Agreement identifies Chantal Cattermole, then a partner in the family group, as the lawyer primarily responsible for the family file, and provides that her hourly rate was \$525. Although it does not state that Ms. Aucoin will be working on the family file, the Family Agreement expressly provides that Ms.

Aucoin's hourly rate is \$400, and that the hourly rates of the paralegal and legal assistant helping Ms. Cattermole and Ms. Aucoin are \$195 and \$80 respectively. Ms. Cattermole and Mr. Nicoletti, on his own and on Agliotti's behalf, executed the Family Agreement on September 7, 2022, and Mr. Nicoletti provided a further \$5,000 retainer to Clark Wilson.

- [21] One of Mr. Nicoletti's objections to the fees charged by Clark Wilson was that he understood he would be retaining Ms. Cattermole and Mr. Sihota, and that he did not meet Ms. Aucoin in person until the application before Dick A.J. Mr. Sihota identified Ms. Aucoin as the family lawyer he had asked to review Mr. Nicoletti's draft separation agreement in July 2022 (discussed below) and the Family Retainer clearly indicates that Ms. Aucoin would be working on Mr. Nicoletti's family file. Further, Mr. Nicoletti did not deny that he communicated regularly with Ms. Aucoin by email and telephone, which is also reflected in her entries on the Pre-Bills (discussed below).
- [22] Based on the evidence before me, I am satisfied that Mr. Nicoletti agreed that Ms. Aucoin would be working on his family file and, although he may not have met her in person during the short retainer, he communicated with her regularly and knew she was the lawyer conducting the bulk of the work on his family file.

The Law Firm's bills

- [23] Clark Wilson issued the following bills to Mr. Nicoletti and Agliotti (all amounts include disbursements and applicable taxes):

- bill #2183120 dated August 1, 2022 for \$3,035.13;
- bill #2185579 dated September 1, 2022 for \$10,453.67;
- bill #2190405 dated November 1, 2022 for \$6,440.44; and
- bill #2192214 dated December 8, 2022 for \$8,157.57.

- [24] The \$10,000 held in trust was applied towards the first two bills, leaving a balance owing on the September 1, 2022 bill of \$3,488.80. Mr. Nicoletti did not pay anything further to Clark Wilson. At the First LPA Review and at the reconsideration, Clark Wilson confirmed that Mr. Nicoletti owes \$18,086.81 in outstanding legal fees, disbursements and applicable taxes, based on the September 1, November 1 and December 8, 2022 bills (together, the "Bills").
- [25] The Bills under review are attached to the appointment filed on April 10, 2024, and all of the bills rendered by Clark Wilson to Mr. Nicoletti and Agliotti are exhibited to the Aucoin Affidavit (Ex. C). Each Bill delineates the total of legal fees and disbursements, and the entries include a date and a description of the work performed on that date. However, the Bills do not indicate the identity of the lawyer or staff person performing the work, or the amount of time spent on the task and associated fee, or the hourly rates of the lawyers and support staff who performed the task. The Bills also list in general terms the disbursements incurred (identified as "administrative charges"), but no invoices are attached.

- [26] Ms. Aucoin deposed that she reviewed each of the bills issued during the retainer and that there were "no amounts charged as a premium or for 'value billing'" (Aucoin Affidavit, para. 7). The pre-bills upon which the Bills are based are exhibited to the Aucoin Affidavit (Ex. D) (the "Pre-Bills"). Ms. Aucoin also deposed that she reviewed them "prior to confirming the contents of invoices that were issued to the Clients" (Aucoin Affidavit, para. 10).
- [27] In his first affidavit, Mr. Nicoletti attested that he was "billed in a manner that I did not fully understand" (para. 5) and in his second affidavit, he attested that he did not receive invoices making clear to him how much Clark Wilson "had charged in total" and that if he had "understood the amounts that Clark Wilson was charging me and intended to charge in the future", he would have ended the retainer (para. 36). Clark Wilson had served the Aucoin Affidavit on Mr. Nicoletti the week before the First LPA Review, but the Law Firm does not provide its clients with pre-bills on a regular basis.
- [28] Mr. Nicoletti asserted that Clark Wilson had not, in fact, billed him on a monthly basis (as provided under the Agreement) and that he had never received some of the Bills. Under cross-examination, he agreed that he received the bill dated August 1, 2022, which was attached to an email from Jessica Mitchell (Mr. Sihota's assistant) sent to him August 16, 2022 (tendered as Ex. 4). Mr. Nicoletti also agreed that he had received emails sent to him by Mr. Sihota on September 13 and November 16, 2022 (tendered as Ex. 5 and 6). In these emails, Mr. Sihota advises that the Threshold (defined in the Agreement above) had been reached, and notes the amount of the accounts receivable and the amount of the work in progress. Mr. Sihota also attached the Bills dated September 1 and November 1, 2022 as pdf documents to these emails. Mr. Nicoletti could not recall if he opened the pdf Bills, but he was familiar with the contents of the emails. Mr. Nicoletti did not deny that he received the December 8, 2022 Bill, which prompted him to terminate the solicitor-client relationship with Clark Wilson.
- [29] Although Mr. Nicoletti may not have opened the pdf attachments to Mr. Sihota's emails, I am satisfied on the evidence before me that Clark Wilson delivered all of the Bills to Mr. Nicoletti.

The Work Performed

- [30] As he explained in the email he sent to Mr. Nicoletti on July 11, 2022 (Nicoletti Affidavit #2, Ex. A), Mr. Sihota had asked Ms. Aucoin to review Mr. Nicoletti's draft separation agreement and provide her comments, which Mr. Sihota summarized in the email. In her comments, Ms. Aucoin advised that the separation agreement was "poorly drafted and defective" and that Mr. Nicoletti should not sign it. The evidence before me was that Mr. Nicoletti had provided a copy of this draft separation agreement to Mrs. Nicoletti in early May 2022, and Mrs. Nicoletti (or her counsel) had pointed out several issues with it, which were also identified by Ms. Aucoin (Bertran Affidavit, Ex. A). Mr. Sihota concluded the email to Mr. Nicoletti advising that "Jeanette can assist you on this matter if you like" and that Mr. Nicoletti should let them know if he would like their assistance. Mr. Nicoletti executed the

Agreement and the Family Agreement after he received this email.

- [31] The Pre-Bill for the August 1, 2022 bill indicates that Ms. Aucoin recorded a total of 5.70 hours at \$400 per hour from July 11-29, which included reviewing and commenting on Mr. Nicoletti's draft separation agreement for Mr. Sihota, several telephone calls and emails with Mr. Nicoletti, and reviewing the file of Mr. Nicoletti's former family lawyer. Mr. Sihota recorded 2.10 hours at the rate of \$825 per hour for discussions with Mr. Nicoletti. The paralegals, Ms. Bertram and Nicole Aren, also recorded time to prepare a response to the family claim and counterclaim. The total fees on the Pre-Bill were \$4,468.50 (before taxes and disbursements), but this was reduced to \$2,576, with the note "balance of time deselected for later billing" (entries from July 25 through July 29 are included on the Pre-Bill for the September 1, 2022) (Aucoin Affidavit, Ex. D, p. 30). The total of the August 1, 2022 bill is \$3,053.13, which includes disbursements and relevant taxes. As noted, it was paid from the retainer funds held in trust.
- [32] On August 8, 2022, Clark Wilson filed a pro forma response to the family claim, as well as a counterclaim, both of which are signed by Ms. Cattermole. On Mr. Nicoletti's behalf, Clark Wilson registered a CPL on the family home on August 9, 2022, and a Judicial Case Conference ("JCC") notice was filed on August 15, 2022, both of which were signed by Ms. Cattermole. The Pre-Bill for this period indicates that this work was performed by paralegals, under Ms. Aucoin's supervision and review.
- [33] There is no dispute that Mr. Nicoletti wanted to conclude the family matter as quickly as possible, given his age and his health problems. As is often the case in LPA review proceedings, which frequently take place well after the matter for which the lawyer was retained has progressed and concluded, with the benefit of hindsight, the client will assert that the lawyer should have done things differently. In this case, Mr. Nicoletti submits that Clark Wilson did not follow his instructions to prevent Mrs. Nicoletti's access to their joint bank account, which he asserts would have prevented her from giving "tens of thousands of dollars" to their adult children. The counterclaim filed within the first month of the retainer sought orders restraining and enjoining Mrs. Nicoletti from disposing of the family assets and compensating Mr. Nicoletti if she had disposed of any of them.
- [34] The notice for a JCC, which is required in a family proceeding before an application can be heard, was filed on August 15, 2022, setting the JCC for early December 2022, the earliest date available (Bertran Affidavit, para. 17(a), Ex. L). Ms. Aucoin testified that in her view, Mrs. Nicoletti was "in no rush" to resolve the family claim, which made it difficult to secure early dates for hearings and that by filing the counterclaim and the JCC notice, they were taking reasonable steps to keep the matter moving forward.

- [35] Although Mr. Nicoletti was of the opinion the lawyers should have been able to quickly conclude the family proceedings through a separation agreement (repeatedly comparing the terms set out in the draft he provided in July 2022 to the final consent order reached in November 2023, well after the termination of the solicitor-client relationship), based on the evidence before me, I am satisfied that the filing of the counterclaim and the JCC notice were proper and necessary in the context of this family retainer.
- [36] Given Mr. Nicoletti's desire for a speedy resolution, Ms. Aucoin testified that Mr. Nicoletti agreed that she should prepare a comprehensive settlement offer to Mrs. Nicoletti, proposing a division of the family assets (among other things), which the parties referred to as the "Proposal". The Pre-Bill includes several entries of Ms. Aucoin regarding the Proposal, illustrating that she was communicating with Mr. Nicoletti about it as well as drafting it (see, for example, entry on August 8 of 1.70 hours "instructions to paralegal; draft settlement proposal per your instructions" and the entry on August 15 for 2.50 hours for "revise proposal and prepare Scott Schedule; email to you; emails to/from you re: proposal"). Ms. Aucoin testified that the Proposal was intended to be comprehensive and detailed so that the family matter could be concluded quickly. The Proposal is nine-pages, and it sets out the parties' assets and liabilities, including the three properties and their appraised value as at February 7, 2022 (the date of appraisals of all three by Bakerview Realty Appraisals ("Bakerview")). In the Proposal, among other things, it suggests that Mr. Nicoletti would retain the family home, purchasing Mrs. Nicoletti's half interest, and that Mrs. Nicoletti would retain the Agliotti Properties.
- [37] Ms. Aucoin testified that it was her practice to send copies of draft documents to her clients before they were finalized and she sent a copy of the draft Proposal to Mr. Nicoletti (which at the reconsideration, he referred to as a revised separation agreement). Mr. Nicoletti tendered a copy of an email he sent to Mr. Sihota on August 17, 2022 regarding the draft Proposal (Ex. 2), in which he advises Mr. Sihota that the draft Proposal was "not what I had envisioned and discussed with you and Jeanette, and already receiving a \$3,000 bill [the August 1, 2022 invoice] without having even spoken to my Supposedly expert Family lawyer (Chantal) So Don PLEASE!! Do what ever you deem necessary to draft this all important first letter that will leave the O/C no room to move, and possibly Sign! On a simple 50/50 split following to the letter The Family Law and Divorce Act of Canada [sic]. Thank you very much Don! But I truly am at a very frustrating juncture, and desperately wanting to complete." Ms. Aucoin testified that she, Ms. Cattermole and Mr. Sihota met to discuss strategy on moving the file forward given Mr. Nicoletti's concerns, but they did not record or bill Mr. Nicoletti for this time.
- [38] Ms. Aucoin sent the Proposal to Mrs. Nicoletti's counsel on August 25, 2022 (Bertram Affidavit, Ex. F). The Pre-Bill for this period (July 25 through September 1) (on which the September 1 Bill is based) indicates that Ms. Aucoin recorded 16.40 hours and that Mr. Sihota recorded 1.80 hours. The total amount on the Pre-Bill is \$10,452 (which includes disbursements and taxes) (Aucoin Affidavit, Ex. D, p. 38). The total of the September 1, 2022

Bill is \$10,453.67, and after the retainer funds held in trust were applied to it, a balance of \$3,488.80 was remaining.

- [39] On September 9, 2022, Mrs. Nicoletti's counsel wrote to Ms. Cattermole, advising that they had reviewed the Proposal and while they "appreciated the effort", they sought the immediate sale of the Agliotti Properties and "once they are sold, the parties will be in a better position to determine the proper division of the assets" (they did not consider the rest of the Proposal in the email) (Bertram Affidavit, Ex. G). Ms. Aucoin testified that she and her colleagues considered this an outright rejection of the Proposal by Mrs. Nicoletti and her counsel.
- [40] The Pre-Bill for the period from September 6 through November 1, 2022 includes entries of Ms. Cattermole and Ms. Aucoin on September 9, reviewing and discussing Mrs. Nicoletti's reply to the Proposal and advising Mr. Nicoletti about it. Ms. Aucoin testified that Mr. Nicoletti was extremely frustrated by Mrs. Nicoletti's rejection of the Proposal and she spent time communicating with him about it and responding to his suggested correspondence to Mrs. Nicoletti's counsel.
- [41] Ms. Aucoin testified that Mrs. Nicoletti's counsel had proposed mediation and that she suggested to Mr. Nicoletti they pursue it, but he did not agree (see also Bertran Affidavit, para. 17(b), Ex. I). Mr. Nicoletti sent many emails to Ms. Aucoin suggesting the language she should use in her emails with Mrs. Nicoletti's counsel regarding the resolution of the family matter (Bertram Affidavit, Ex. H is an example). The Pre-Bill during this period includes several entries of Ms. Aucoin for reviewing emails from Mr. Nicoletti and telephone calls with Mr. Nicoletti, as well as communicating with Mrs. Nicoletti's counsel by email and letter. Ms. Aucoin recorded a total of 11 hours on this Pre-Bill. The total amount on the Pre-Bill is \$5,748 (Aucoin Affidavit, Ex. D, p. 39). The total of the November 1, 2022 Bill (which includes work performed in September and October) is for \$6,440.44.
- [42] The final Pre-Bill is for the period from November 2 through December 7, 2022. Ms. Aucoin testified that by this point, nearing the end of the retainer, she and Mrs. Nicoletti's counsel had resolved most of the issues relating to the division of the family assets, and were negotiating the division of the real properties to finalize a separation agreement. She said that she and Mrs. Nicoletti's counsel agreed to obtain updated appraisals of the real properties. Ms. Aucoin's entries on the Pre-Bill include instructing Ms. Arens to prepare a joint retainer for Bakerview, which Ms. Arens did. Bakerview provided updated appraisals to both counsel (Ms. Aucoin and Mrs. Nicoletti's counsel) in early November 2022. Mr. Nicoletti was adamant at the reconsideration that updated appraisals of the real properties were unnecessary and a waste of money, given the February 2022 Bakerview appraisals. The undisputed evidence before me was that, at that time, Ms. Aucoin and Mrs. Nicoletti's counsel were negotiating acceptable terms of a separation agreement and they had agreed to jointly retain Bakerview for the updated appraisals. I am satisfied on the evidence before me that the disbursement was proper and necessary at that point in the family file retainer.

- [43] The paralegals and Ms. Aucoin were also preparing Mr. Nicoletti's property and financial statement (the "F8") (Aucoin Affidavit, Ex. E), which is required in family proceedings. His F8 was filed on December 6. Mrs. Nicoletti also filed her F8 in early December 2022. The preparation of Mr. Nicoletti's F8 involved communicating with financial institutions and the accountant for Agliotti, as reflected in the paralegals' entries in the Pre-Bill. At the hearing, Mr. Nicoletti asserted that it was unreasonable of Clark Wilson to wait until November 2022 to communicate with Agliotti's accountant and the financial institutions, that this should have been done earlier when he first retained them.
- [44] Ms. Aucoin testified that in mid-November 2022, in anticipation of the upcoming JCC on December 7, and to resolve the family matter, she prepared a revised separation agreement. She said that she relied on the updated Bakerview appraisals of the real properties, as well as information from the parties' F8 statements, when drafting it. The JCC brief included in the hearing record attaches at its Schedule A the separation agreement drafted by Ms. Aucoin, which largely mirrors the terms of the Proposal with updated information. The JCC was rescheduled by consent to January 30, 2023, after the retainer ended.
- [45] I noted above that Mr. Sihota had emailed Mr. Nicoletti in September and November 2022, attaching pdf copies of the Bills. Mr. Nicoletti tendered a one-page copy of an email thread showing his email to Ms. Aucoin responding to the November 28, 2022 email Mr. Sihota sent him as a courtesy notice that Clark Wilson had reached the \$15,000 Threshold the Law Firm had set for his file (Ex. 3). The email thread is incomplete, but it shows that Mr. Sihota advised Mr. Nicoletti that the accounts receivable was \$9,929.24 and the work in progress was \$5,270.50. In his email to Ms. Aucoin, Mr. Nicoletti states "I am in receipt of Don's conclusion of our work in progress bills, and it looks to me that if it's correct we are looking at almost 40 hours of strictly Lawyers fees of which I know for fact that you and I did not talk or messaged for that many hours! could you please Review carefully that it is truly the right amount of work and fees charged by you? please let me know asap because it it's correct I will promptly call in with new funds."
- [46] The Pre-Bill for this period is for a total of \$8,157.57 (Aucoin Affidavit, Ex. D, p. 49). The December 8, 2022 Bill is for \$8,157.57.
- [47] Mr. Nicoletti submits that he terminated the solicitor-client relationship in December 2022, shortly after he received the December 8 Bill, because he was upset by the amount that he was charged by the Law Firm and he refused to pay. Clark Wilson filed a notice of withdrawal in the family proceedings on January 23, 2023.
- [48] Mr. Nicoletti maintains that Clark Wilson charged him approximately \$28,000 over five months for what he considers to have been very little work (he stresses that there were no court appearances or a negotiated settlement with opposing counsel by the time he terminated the relationship). He says the fees are excessive and unreasonable in the circumstances.

Discussion and Legal Principles

- [49] On a review of a lawyer's bills under the LPA, the lawyer bears the onus to prove that the work done and the accounts issued for the work done were necessary and reasonable. In *Cao v. Tsui & Cao Law Corporation*, 2015 BCSC 2072 at para. 24 [*Cao v. Tsui*], District Registrar Nielsen (as he then was) reiterated that the lawyer "has the burden of proving what was done, why it was done, the time it took, and why it took the amount of time billed."
- [50] Section 71(2) of the LPA provides that the registrar must allow fees, charges and disbursements reasonably necessary and proper to the conduct of the proceeding, or those authorized by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
- [51] In the course of this analysis, the registrar must consider all the circumstances, including those enumerated in s. 71(4) of the LPA, which provides:
- 71 (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including
- (a) the complexity, difficulty or novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the lawyer,
 - (c) the lawyer's character and standing in the profession,
 - (d) the amount involved,
 - (e) the time reasonably spent,
 - (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
 - (g) the importance of the matter to the client whose bill is being reviewed, and
 - (h) the result obtained.
- [52] The authorities on LPA reviews hold that at the end of the day, the registrar "should allow a fair fee commensurate with the work performed in the retainer and taking into account all of the circumstances": *Kuo v. Waldmann*, 2020 BCSC 495, para. 57 (appeals dismissed 2022 BCSC 329 and 2023 BCCA 123).
- [53] As the circumstances set out in s. 71(4) of the LPA must be considered on a review, I will address each of them.

The Complexity, Difficulty or Novelty of the Issues Involved

- [54] Ms. Aucoin testified that the issues in this family matter (that is, issues related to the division of family property) were not particularly complex or novel, although she attested that practical resolution was complicated by the fact that the adult children lived in one or more of the properties "and the need to divide [Agliotti] in a tax-efficient way" (para. 12). She also reiterated that it was apparent that Mrs. Nicoletti did not appear to want to resolve the

family proceedings quickly, and that corresponding with opposing counsel about resolution "took longer than necessary".

- [55] For his part, Mr. Nicoletti submits that the resolution of his family matter was simple - that he asked Clark Wilson to assist him with the separation agreement he initially drafted and no other issues needed to be addressed and that it was not complex or difficult, but very simple and basic.
- [56] I find that because of Agliotti's ownership of the properties in which the adult children were living rent-free, and the need to divide Agliotti, the issues presented in this family matter were not as simple and basic as Mr. Nicoletti maintains and involved some complexity.

The Skill, Specialized Knowledge and Responsibility Required of the Lawyer

- [57] As noted, Ms. Aucoin had primary conduct of this family file. She was called to the bar in 2016 and at the time of this retainer, was in her seventh year of practice. She testified that she has practised family law almost exclusively throughout her career. Ms. Aucoin also testified that she communicated about the file with Ms. Cattermole, who was then a senior partner and chair of Clark Wilson's family law practice (both Ms. Cattermole and Ms. Aucoin have since left Clark Wilson), and with Mr. Sihota. I noted above the email in which Mr. Nicoletti expressed his dissatisfaction to Mr. Sihota that Ms. Cattermole was not performing the work on his family file. Stating the obvious, had Ms. Cattermole alone performed all of the work on Mr. Nicoletti's family file, I have no doubt that the bills would have been much higher.
- [58] The evidence before me confirms that Ms. Aucoin regularly discussed the file with the senior partners and I am satisfied that Ms. Aucoin had the requisite skill and knowledge to pursue Mr. Nicoletti's family matter and that it was appropriate in the circumstances that she have conduct of the file, with guidance from Ms. Cattermole and Mr. Sihota.

The Lawyer's Character and Standing in the Profession

- [59] I consider this factor to be neutral as Ms. Aucoin has no discipline record with the Law Society of BC.

The Amount Involved

- [60] Ms. Aucoin testified that, based on Mr. Nicoletti's F8, the amount involved in this family matter was in the \$4-6 million range, and I am satisfied on the evidence before me that this estimate is accurate.

The Time Reasonably Spent

- [61] I noted above that the Bills in issue do not provide details about the time spent on the tasks performed or the fees charged for each task. In my view, a great deal of Mr. Nicoletti's frustration with the way he perceives he was treated by Clark Wilson arises from the fact that this information is not readily set out on the Law Firm's Bills. At the reconsideration, Mr. Nicoletti said that if he had received the information on the Pre-Bills, he would have known how much he was being charged and likely ended the retainer sooner.
- [62] Mr. Nicoletti is clearly aggrieved by what he considers to be excessive time spent on his file, that he feels is not reflected in the work performed on his behalf. I reviewed above the work performed, noting the time recorded in some instances, but I will not drill down into each and every task undertaken and each and every time entry in considering whether the time the Law Firm has billed the Client was reasonably spent.
- [63] Mr. Nicoletti maintained throughout the reconsideration that the terms of his separation agreement were straight-forward and that the time Ms. Aucoin billed to prepare revised versions of a separation agreement was unnecessary (it was apparent at the reconsideration that Mr. Nicoletti considered the settlement Proposal to be another version of a separation agreement).
- [64] Based on my review of the Pre-Bills and the evidence before me, I am satisfied that the time recorded in August 2022 to prepare the Proposal was reasonably necessary and proper to conduct the proceeding.
- [65] Ms. Aucoin testified that she enlisted the assistance of an articling student to help draft the separation agreement that was attached to the JCC brief and this is reflected in the Pre-Bills. None of this time was discounted or reduced. In reviewing the Pre-Bills, I find that the time billed to prepare the JCC brief and the separation agreement included in it was excessive in the circumstances.

Whether the Hourly Rate was Reasonable

- [66] Ms. Aucoin's hourly rate at the time of the retainer was \$400 per hour and she performed the bulk of the work of this file. I am satisfied that it was reasonable of Mr. Sihota and Ms. Cattermole to delegate the conduct of Mr. Nicoletti's family file to her and that, for a lawyer of her level of call at the time working at a downtown Vancouver law firm, her hourly rate was reasonable.

The Importance of the Matter to the Client

- [67] There is no dispute that this matter was important to Mr. Nicoletti.

The Result Obtained

- [68] The Law Firm submits that although the retainer was of short duration, by the time it ended, they were close to concluding a separation agreement and Ms. Aucoin attested that by November 2022, she and Mrs. Nicoletti's counsel had "reached agreement on nearly all terms of an agreement settling the Divorce" and the only substantial item required Mrs. Nicoletti to receive tax advice (Aucoin Affidavit, para. 26). At the reconsideration, as Clark Wilson had at the First LPA Review before Nielsen A.J., the Law Firm pointed to the Nicoletti Letter in which Mr. Nicoletti advised Mrs. Nicoletti's counsel that he would be representing himself at the upcoming JCC, but questions whether the JCC was necessary "knowing that 95% of the [separation] agreement has already been accepted and agreed by myself and [Mrs. Nicoletti]."
- [69] Mr. Nicoletti disputes that his letter is evidence that Clark Wilson advanced his family matter to near completion. He disputes that the Law Firm achieved a favourable result for him during the retainer, submitting that he did not get good value for the money they are seeking from him. He maintains that he was able to settle the family matter with Mrs. Nicoletti on similar terms to those in his original draft separation agreement. Mr. Nicoletti admits that he wanted to reach a quick resolution of the family matter and he was frustrated that Clark Wilson was not able to get Mrs. Nicoletti to promptly agree to the terms of a separation agreement he had already drafted.
- [70] In my view, based on the evidence before me at the reconsideration, Clark Wilson advanced Mr. Nicoletti's family file to some degree, but I cannot conclude that resolution of it was 95% completed when the solicitor-client relationship was terminated. I consider the results obtained to be mixed.

Summary

- [71] I have detailed above the work performed by the Law Firm, and my consideration of the factors set out under s. 71(4) of the LPA. I have also considered Mr. Nicoletti's objections to the Bills under review and his submissions and arguments at the reconsideration, as set out above.
- [72] Although Mr. Nicoletti knew that Clark Wilson's services are expensive, I find that the total Mr. Nicoletti was charged over the five-month retainer was excessive in the circumstances of this case and that it should be reduced. In my view, "a fair fee commensurate with the work performed in the retainer and taking into account all of the circumstances" in this case is \$20,000, inclusive of disbursements and applicable taxes, a reduction of approximately \$8,000 of the total Mr. Nicoletti was charged by Clark Wilson.

Costs

- [73] Section 72 of the LPA addresses costs of a review, stipulating that where "1/6th or more of the total amount of the bill is subtracted from it", the lawyer must pay the costs. Costs of the LPA proceedings are awarded on a party-and-party basis, following the tariff set out in Appendix B of the SCCR.
- [74] One-sixth of the outstanding amount Mr. Nicoletti owes (\$18,086.81) is \$3,014.47, and I have subtracted more than this amount from the amount owing to reach the outstanding amount of \$10,000 (subtracting \$8,086.81).
- [75] The Law Firm included in the hearing record copies of the settlement offers it made to Mr. Nicoletti, as well as the offer he made in compliance with the order of Dick A.J. As I noted, Mr. Nicoletti offered to pay Clark Wilson an additional \$4,000 (for a total of \$14,000, including the \$10,000 he paid in retainers). Clark Wilson directed me to the settlement offer it made on January 2, 2025, the week before the reconsideration, in which it formally offered to settle the matter for an additional \$13,500, advising Mr. Nicoletti that it would bring the offer to my attention upon completion of the LPA review. I have ordered Mr. Nicoletti to pay the Law Firm \$10,000, which is less than the Law Firm's offer.
- [76] The parties did not make submissions to me on costs. I maintain my view that the amount in issue in this LPA review is disproportionate to the amount of time it has been before the court and my disappointment that the parties did not settle this earlier. I consider that both parties are responsible for the length of these LPA proceedings, and I am satisfied that in the circumstances, it is appropriate for me to exercise my discretion under s. 72(2) of the LPA and not order the costs as set out under s. 72(1). In the circumstances of this case, I order that the parties are to bear their own costs of the reconsideration before me and of the appearance before Vos A.J. when he converted the hearing to a PHC.
- [77] As noted, Dick A.J. ordered that the costs of the reconsideration application before her were to be determined by the registrar at the reconsideration review. Mr. Nicoletti was successful on that application and I find he is entitled to his costs on a party and party basis. However, in the circumstances I noted above, I find it is appropriate to order that Mr. Nicoletti's costs of the reconsideration application be set at \$500 to save these parties further time before the court on an assessment of those costs.

"Registrar Gaily"

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