

CANADA / JUDGMENT

MFSJ862 v. FFSJ862

2023 BCSC 273

COURT

Supreme Court of British Columbia

DECIDED

27 February 2023

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2023 BCSC 273 MFSJ862 v. FFSJ862 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: MFSJ862 v. FFSJ862, 2023 BCSC 273 Date: 20230227 Docket: E23862 Registry: Fort St. John Between: MFSJ862 Claimant And FFSJ862 Respondent Before: Master Muir (As Registrar) Reasons for Decision Counsel for the Claimant: P.S. Boles Counsel for the Respondent: A.M. James Counsel for the Attendee, Marti Katerberg: S. Cope (November 18, 2022 only) Place and Dates of Hearing: Fort St. John, B.C. November 17, 18, 2022 and January 24, 2023 Written submissions of the Claimant: November 22, 2022 and January 13, 2023 Written submissions of the Respondent: November 29, 2022 and January 16, 2023 Place and Date of Decision: Fort St. John, B.C. February 27, 2023 TABLE OF CONTENTS Introduction. 3 Costs Sought by the Claimant. 3 Respondent's Proposed Costs. 5 Background. 6 Legal Framework. 10 The Factors to be Considered per Rule 16-1(2) of the Rules. 12 The complexity of the family law case and the difficulty or the novelty of the issues involved. 12 The skill, specialized knowledge and responsibility required of the lawyer 12 The amount involved in the family law case. 13 The time reasonably spent in conducting the family law case. 13 The conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the family law case. 15 The importance of the family law case to the party whose bill is being assessed, and the result obtained. 16 The benefit to the party whose bill is being assessed of the services rendered by the lawyer 16 Rule 1-3 of the Rules. 16 Conclusion Regarding Fees Included in the Bill of Costs. 16 Disbursements. 17 Legal Basis. 17 Ms. Katerberg's sundry charges. 18 Interac and File Closing Fees. 19 Photocopying charges. 19 Mileage claimed by the claimant 20 Dr. Korpach's critique. 20 OnPoint Legal Research. 21 Legal Support 21 Conclusion Regarding Special Costs Included in the Bill of Costs. 22 The September 29, 2022 Hearing and Costs of the Assessment. 22

Introduction

- [1] This is an assessment of the special costs of the claimant for the entire proceeding herein as ordered by the trial judge, Justice Crerar, on July 22, 2022 and for her costs thrown away on a post-trial application of the respondent where the respondent failed to appear, also assessed as special costs, as ordered by Justice Church on September 29, 2022. The claimant also sought her costs of this assessment.

- [2] The claimant was represented by two counsel over the life of this action, first, Ms. Katerberg and later, Ms. Boles.
- [3] I had the benefit of extensive affidavits and oral evidence from both Ms. Katerberg and Ms. Boles. The respondent did not provide or call any evidence. Costs Sought by the Claimant
- a) Costs of the action: Katerberg & Associates Fees: \$124,385.44 GST: \$6,222.02 PST: \$8,500.08 Disbursements: \$32,807.99 GST on taxable disbursements: \$1,097.21 Sub-total: \$173,012.74[1] Pamela S. Boles Law Corporation: Fees: \$133,500.00 GST: 6,675.00 PST: 9,345.00 Disbursements: \$46,977.23 GST on taxable disbursements: \$1,730.03 Sub-total: \$198,227.26 Disbursements paid directly by the claimant: \$23,584.43 Total claimed: \$398,007.55
- b) Costs for the September 29, 2022 hearing before Church J.: Fees: \$16,800.00 Taxes: \$2,016.00 Disbursements: \$500.76 Total claimed: \$19,316.76
- c) Costs of preparation for the costs assessment: Ms. Boles' affidavit preparation fees: \$76,550.00 Taxes: \$9,186.00 Disbursements: \$2,220.00 Sub-total: \$87,956.00 Ms. Katerberg's affidavit preparation fees: \$45,000.00 GST: \$2,250.00 PST: \$3,150.00 Disbursements: \$722.30 Taxes: \$36.12 Sub-total: \$51,158.42 Total claimed: \$139,114.42
- d) Costs of attendance at costs assessment: Ms. Boles' fees: \$12,000.00 Taxes: \$1,440.00 Disbursements: \$3,262.21 Taxes: \$105.00 Sub-total: \$16,807.21 Ms. Katerberg's fees: \$7,500.00 Taxes: \$900.00 Sub-total \$8,400.00 Total claimed: \$25,207.21
- e) Costs of written submissions: Ms. Boles' fees for November 22, 2022 submission: \$10,000.00 Taxes: \$1,200.00 Sub-total: \$11,200.00 Ms. Boles' fees for January 13, 2023 submission: \$10,000.00 Taxes: \$1,200.00 Sub-total: \$11,200.00 Total claimed: \$22,400.00
- [4] The total special costs claimed are thus \$604,045.94. Respondent's Proposed Costs
- [5] The respondent claims that special costs should be reduced for various reasons, and proposes the following: Start of Proceeding to Order: Ms. Katerberg - \$124,385.44 x 80%: \$99,508.35 Ms. Boles - \$46,977.23 - \$15,799.52: \$106,800.00 Total: \$206,308.35 Disbursements: Ms. Katerberg - \$32,807.99 - \$9,535.13: \$23,271.83 Ms. Boles - \$133,500 x 80%: \$31,177.00 Total: \$64,232.83 September 29, 2022: Ms. Boles' fees: \$2,000 to \$3,000 Disbursements: \$58.75 Total: \$2,058.75 to \$3,058.75 Special Costs Assessment: Ms. Katerberg's fees \$45,000: \$8,000.00 Ms. Boles' fees \$76,500: \$17,000 Total: \$25,000.00 Disbursements: Ms. Katerberg: \$401.45 Ms. Boles: \$3,111.21
- [6] Thus, the respondent would allow \$302,112.59 for the special costs of the proceeding, roughly one-half of that claimed by the claimant.

Background

- [7] This costs assessment arose from an action which was plagued by the respondent's lies and, generally, harmful behaviour. Some of this behaviour undoubtedly stemmed from his psychiatric condition, which was diagnosed as jealous delusional disorder, paranoid personality traits, and cannabis-induced psychotic disorder. The respondent flatly rejected this diagnosis and indeed lied to his psychiatrist to attempt to convince him that his diagnosis was wrong.
- [8] Justice Crerar in reasons indexed as MFSJ862 v. FFSJ862, 2022 BCSC 1259 (the "trial reasons"), at para. 63, found:
- [63] Nor is there any suggestion in the expert evidence, or in his appearance at trial, either on the stand, or as a self-represented litigant, that the father's psychiatric diagnosis in any way contributed to his non-compliance with court orders and court rules, or affected his ability to understand the seriousness of his litigation and disclosure obligations.
- [9] The respondent's behaviour is directly relevant to the costs assessment that I must conduct. The BC Supreme Court Family Rules [Rules] require a consideration of all of the relevant circumstances and, specifically, Rule 16-1(2) provides: Assessment of special costs
- (2) On an assessment of special costs, a registrar must
- (a) allow those fees that were proper or reasonably necessary to conduct the family law case, and
- (b) consider all of the circumstances, including the following:
- (i) the complexity of the family law case and the difficulty or the novelty of the issues involved; (ii) the skill, specialized knowledge and responsibility required of the lawyer; (iii) the amount involved in the family law case; (iv) the time reasonably spent in conducting the family law case;
- (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the family law case; (vi) the importance of the family law case to the party whose bill is being assessed, and the result obtained; (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer; (viii) Rule 1-3.
- [10] The conduct of the respondent complicated the proceeding and required extensive efforts to deal with his lies, failure to make proper financial disclosure, and repeated breaches of court orders.
- [11] It is helpful to review Crerar J.'s findings to set the background for this assessment.
- [12] The claimant and Ms. Katerberg were confronted with the respondent's lies from the outset, when the respondent fabricated a story about the claimant's alleged infidelity, going so far as to question the children's paternity. Justice Crerar concluded:

- [72] Even without the diagnosis of Dr Ohiaeri confirming that these accusations are the manifestation of a jealous psychotic disorder, the Court is satisfied that the father's allegations are glassy-eyed, green-eyed, monstrous delusions with no basis in fact. The Court encourages the father, an intelligent man, for the sake of his children, to review the manifold deficiencies in his alleged proof with an objective eye, in light of and consistent with the diagnosis of a qualified psychiatrist.
- [13] Justice Crerar deals with the respondent's lack of financial disclosure at paras. 85 to 101 of the trial reasons. He noted that the respondent's behaviour required multiple court applications, resulted in company records (which I note from Ms. Boles' evidence amounted to approximately 5,000 pages) being produced only mid-trial pursuant to a subpoena issued to the respondent's accountant, and that those records showed that the respondent was actively resisting production and encouraging his accountant to not cooperate with claimant's counsel.
- [14] The respondent swore several false Form F8 Financial Statements (trial reasons at para. 86).
- [15] The respondent refused to reasonably respond to six notices to admit. And his refusal to admit facts and documents resulted in the need to call three healthcare professionals as witnesses--which Crerar J. noted was an unnecessary expense and a waste of the court's and the professionals' time (trial reasons at para. 96).
- [16] Justice Crerar noted that the respondent's actions required two follow up examinations for discovery, three adjournments of trial dates and prolonged and disrupted the trial itself (trial reasons at para. 97).
- [17] At para. 101 of the trial reasons, Crerar J. concluded:
- [101] In summary, the father's approach to this most basic obligation of document production, to use the Colucci [v. Colucci, 2021 SCC 24] phrase, has been deplorable and disruptive. Even after multiple court orders directly ordering production of specific broad categories of documents, including the sanctions of a fine and costs payable forthwith, many categories of documents were not disclosed until mid-trial, and many documents remain undisclosed today. This persistent failure cannot be attributed to his periods of self-representation. The father is an intelligent man who runs his own business, assisted by corporate counsel and a well-established accountancy. His actions with respect to the Company, and their books, and document production in general evidence a wilful and deceitful strategy to deny information from the mother. []
- [18] Justice Crerar noted that the respondent also attempted to financially pressure the claimant, in part, by never paying any direct spousal support and being inconsistent and sporadic with child support (trial reasons at para. 102). This ties into this assessment as, in her evidence, Ms. Boles said that she had drastically reduced her accounts to the claimant because the claimant was in such dire financial circumstances. Ironically, the respondent ultimately benefits from his unseemly tactics because although special costs are objective, in that they

are to capture what a reasonable client would pay a competent lawyer for the services rendered, practically they are limited by the accounts rendered.

- [19] Justice Crerar found that the respondent's behaviour in lying to Dr. La Torre, who was retained as a joint expert, tainted his s. 211 report to the point where it was essentially useless. Crerar J. concluded:
- [134] Dr La Torre's report and recommendations were prepared without the benefit presently enjoyed by the Court, of cross-examination and contradiction of the father's claims. With considerable credulity, Dr La Torre took at face value the father's unreliable (and, at times, patently incredible) reports about himself and the mother, and seems to have treated these on the same plane of credibility and reliability as the reports of the mother and her nominees. As Dr La Torre states in his report: "my opinions, conclusions and recommendations will necessarily be limited by the accuracy, completeness and reliability of the information provided to me." Dr La Torre properly acknowledged in cross that had he known that certain facts were false, he likely would have reached a different conclusion in his report. To employ a colloquialism, urged by counsel for the mother, the reports were "garbage in, garbage out," and of very limited use to the Court.
- [20] Challenging Dr. La Torre's conclusions required the claimant to obtain a critique report by Dr. Korpach and to retain Dr. Elterman to assist with cross-examination of Dr. La Torre.
- [21] The respondent's actions also impacted issues surrounding the children. Justice Crerar noted:
- [139] With an eye to all of the relevant factors set out above (and, in particular, (a), (c), (d), (e), (f), and (i)), it is in the best interests of the children to remain under the present parenting time arrangements. The mother has been a force of stability for the children, providing primary parental care, consistently and calmly, since the father's mental breakdown and departure from the marriage. The children, still young, continue to need a bedrock of routine and predictability provided by the present parenting schedule, which still permits meaningful parenting time with the father. While the father's life has somewhat normalised, perhaps thanks in part to his new relationship and reduced cannabis use, it remains to some degree unstable. He has recently become a new father, with another infant due to arrive. He still has not accepted or sought treatment for his mental illness as diagnosed by Dr Ohiaeri, which causes him to continue to make monstrous allegations against the mother, and cause unnecessary tension in communications, and around transfer times. It is inevitable that the children will notice and be psychologically harmed by his actions and demeanour.
- [22] Justice Crerar found that the respondent complicated the issues around the valuation and division of property and debt. He noted:
- [165] Property division in the present case is complicated by several factors. First, the father, even while assisted by counsel, adduced almost no admissible evidence with respect to the value of assets or the amount of debt, or the payments thereof. With respect to real estate,

he attached appraisals without calling their authors. With respect to personal effects, he sought to enter into evidence reams of printouts from Kijiji and other online shopping pages for similar products. His arguments contest assets and debts in minute detail, but these for the most part are unsupported by evidence.

[23] Justice Crerar also commented that there was no formal valuation of the company--nor could there have been given the incomplete document production from the respondent and the delivery of company documents from the accountant mid-trial (trial reasons at para. 167).

[24] Finally, Crerar J. concluded with the following orders regarding costs:

[229] The mother has been successful in almost all aspects of this trial, and shall have her costs. Those costs shall specifically include the costs of production of Dr La Torre for cross-examination.

[230] The mother seeks an order for special costs. The Court grants the order. As reviewed throughout these reasons, and, in particular, the final two subsections of the "Facts" section above, the father's litigation conduct has been "reprehensible" and "deserving of rebuke" in the sense set out in the special costs jurisprudence: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 BCLR (3d) 242 (CA) at para 17; *Sull v. Pengelly*, 2019 BCSC 1565 at paras 30-33; *Sebok v. Babits*, 2022 BCCA 2; and *Kim v. Hong*, 2013 BCSC 2248 at paras 7-10. His multiple and persistent attempts to delay and deceive, viewed as a whole, were indeed exceptional, to employ that term as used in the jurisprudence. His actions sought to stymie the mother at every step of the litigation, forced the mother and the Court to commence the trial without full knowledge of critical financial facts, and significantly disrupted and prolonged the trial.

Legal Framework

[25] In *Bradshaw Construction Ltd. v. The Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.), Justice Bouck noted at 318-319: Special Costs, as a division of Party and Party Costs, are now assessed under the 1990 rules; Rule 57 (3). When taxing Special Costs, there is no detailed scale corresponding to the scale that applies to Ordinary Costs in App B. Instead, fees are allowed "that the registrar considers were proper or reasonably necessary to conduct the proceedings to which the fees relate"; Rule 57 (3). When examining the circumstances, the registrar exercises his or her discretion by applying the provisions of Rule 57 (3) (a) to (g). As I understand the notion of Special Costs under Rule 57 (3), they are meant to provide a much higher indemnity than Ordinary Costs where the circumstances warrant. They are assessed under paragraphs (a) to (g) of Rule 57 with a view to the relationship between the successful party and his or her own solicitor. But they are not necessarily the fees that she successful solicitor would recover from his or her client. Those fees arise from a review of a solicitor's bill under the Legal Profession Act, S.B.C. 1987 ch. 25, Part 10, as amended by the Justice Reform Statutes Amendment Act, 1989, s. 26; in force 1 September 1990; B.C. Reg. 267/90.

Instead, Special Costs are the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill. On the other hand, fees payable by the client to the solicitor pursuant to a bill taxed under the Legal Profession Act represent fees for work done by that solicitor for that client. In the usual course of events, a bill taxed as Special Costs will be less than a bill taxed under the Legal Profession Act. This is because Special Costs still fall under the category of party and party costs, whereas fees due under the Legal Profession Act are assessed in a similar way to the old method of solicitor and own client costs. A taxation of Special Costs is objective in nature while a taxation under the Legal Profession Act is subjective. Put another way, a losing party should not have to pay for the cost of the most experienced and qualified lawyer if that kind of service was not necessary. However, in most instances, a bill for Special Costs will usually be about 80% to 90% of a similar bill assessed under the Legal Profession Act.

- [26] I note that the "rule of thumb" referenced of 80% to 90% of a bill assessed under the Legal Profession Act, now S.B.C. 1998 c. 9, has been commented on by the Court of Appeal in *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107 as follows:
- [47] I see no reason why, in a proper case, a trial judge may not adopt a similar approach when the actual fee is the result of a contingent fee agreement. However, a trial judge is not required to apply the rule of thumb and trial judges should not lose sight of the fact that the rule of thumb is merely an aid to a proper assessment. Each case will turn on what is proper or reasonably necessary in the particular circumstances within the meaning of the words in Rule 57(3). []
- [49] In my view, the legislative intention is clear that special costs under Rule 57(3) are in their nature to resemble closely the reasonable fees that would be charged by a lawyer to his or her own client. It may be that, in some cases, they will be equal in amount. However, special costs and lawyers' reasonable fees are not identical.
- [27] The Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414 noted that an award of special costs might be made on the basis of actual costs or some percentage of actual costs, they concluded:
- [155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).

- [28] In addition, as Crerar J. awarded special costs of the proceeding to the claimant, the claimant is also entitled to her special costs of the costs assessment: 567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc., 2020 BCCA 69 at para. 141. The Factors to be Considered per Rule 16-1(2) of the Rules The complexity of the family law case and the difficulty or the novelty of the issues involved
- [29] As is evident from the excerpts from Crerar J.'s trial reasons set out above, although this case may not have involved any particularly novel issues, it was made extraordinarily difficult by the actions of the respondent. The skill, specialized knowledge and responsibility required of the lawyer
- [30] Both counsel for the claimant are experienced litigators. Ms. Katerberg has been practicing in family and general litigation for 20 years. She speaks of her interest and training in high conflict family disputes. Ms. Boles has been practicing litigation for more than 30 years and has developed a practice focused on high conflict cases, including family cases. It is fair to say that both Ms. Katerberg and Ms. Boles are experienced senior counsel.
- [31] It is also fair to say that this case required a considerable level of knowledge regarding high conflict cases and a certain doggedness in pursuing the truth in the face of the respondent's many lies. Both counsel acknowledged the responsibility they felt towards the claimant, who found herself in such straightened circumstances and facing what Ms. Boles referred to as the respondent's "scorched earth" tactics. The amount involved in the family law case
- [32] There was a considerable amount of property at issue, worth perhaps \$1.5 to \$2 million. In addition, there were significant issues of ongoing and retroactive child and spousal support. The time reasonably spent in conducting the family law case
- [33] This was a large focus of the respondent's argument on special costs. Both Ms. Katerberg and Ms. Boles billed on a fair-fee basis. Neither bills according to an hourly rate and neither keeps time records for all matters.
- [34] Both Ms. Boles and Ms. Katerberg gave evidence that the amounts charged to the claimant on this case were less than what they would have charged as a fair fee to a client in different circumstances.
- [35] In a lengthy affidavit prepared for this hearing (208 paragraphs, 432 pages) Ms. Katerberg deposed:
6. My billing on litigation matters is based on various factors. I do keep in mind my hourly rate at the time of billing when issuing a bill. However, it would be a rare occasion that a client could afford to pay for every hour worked, particularly where there is high-conflict or complex litigation. In this case, I and my staff felt a tremendous amount of sympathy for [the claimant]. We were aware of her low income, small children, and sometimes fragile state due to [the respondent's] failure to financially support them. I tried to reduce fees where possible while still maintaining sufficient cashflow for the firm. When I started working on the file, my hourly rate for hourly work was \$400 per hour. My rate increased to

\$450 per hour by the October 9, 2019 bill. Since then, my rate increased to \$500 per hour.

- [36] Ms. Katerberg also noted that she quotes daily rates for court proceedings of \$4,000 to \$5,000 per day.
- [37] For trial and preparation or other full day matters, Ms. Boles has a rate of \$6,000 per day. Her hourly rate, when she charges by the hour, is \$500 per hour. Her evidence was that her hourly rate has been at \$500 for some time and that she should be charging more.
- [38] She expects to require one-and-a-half to two days of preparation for each trial day, but noted in this case, preparation often exceeded two days given the issues raised by the respondent's actions. She points out that at that rate, the amount billed to the client for preparation and attendance at the 18-day trial would have been \$324,000. Even at Ms. Katerberg's daily rate of \$4,000 to \$5000, the fee would have been \$216,000 to \$270,000.
- [39] The respondent challenged the hourly rates charged by both claimant's counsel, using reported decisions as guidelines. No expert opinion evidence was called. I do not consider the referenced cases compelling. Ms. Boles referred to other cases with different, mostly higher, hourly rates. I conclude that Ms. Katerberg's rate of \$400 to \$450 per hour and Ms. Boles' rate of \$500 per hour were both entirely reasonable. I tend to agree with Ms. Boles that, given her experience and the general climate for fees in BC, that this rate is likely lower than what she could reasonably command.
- [40] Of course, it is not proper for a client to utilize and charge for a Cadillac when a Volkswagen would do. Here, however, given the behaviour of the respondent, I agree that counsel with experience in this kind of high conflict litigation was necessary.
- [41] Ms. Boles' evidence was that her accounts to the claimant were discounted very heavily--sometimes a third and sometimes more than half of what she would consider to be a fair fee.
- [42] Both counsel were challenged on the basis that time must have been wasted when there were two counsel involved. Ms. Boles was retained for some matters as early as January 2020, but did not assume full conduct of the file until approximately October 2020.
- [43] I was satisfied by the evidence provided that the matters for which Ms. Boles was retained were, for the most part, discrete from those handled by Ms. Katerberg. Any overlap is more than amply dealt with by the reduction counsel made to the fees charged.
- [44] Ms. Katerberg was challenged on her affidavit in that it was based on a reconstruction of the events covered by the accounts to the claimant, which was done from an electronic version of the file. Ms. Katerberg acknowledged that she was reconstructing her estimates of time spent on activities, but she flatly denied that it was impossible to estimate her time without the benefit of time entries.

- [45] Ms. Boles and Ms. Katerberg were both challenged repeatedly in cross-examination as to how they could substantiate the amounts billed when they do not keep time entries. I found their evidence convincing and am satisfied that the fees charged by both counsel were rationally connected to the work done.
- [46] Further, it is clear that both counsel discounted their time significantly. One only has to look at the daily rate charges of \$216,000 to \$324,000 that could have been levied based on the number of trial days, and compare that to the total fees charged by both counsel for conduct of the entire action, which were slightly less than \$260,000. The conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the family law case
- [47] Justice Crerar's findings confirm the evidence of both Ms. Katerberg and Ms. Boles that the actions of the respondent unnecessarily and dramatically lengthened this case. The importance of the family law case to the party whose bill is being assessed, and the result obtained
- [48] The respondent conceded that this case was of extreme importance to both parties. The benefit to the party whose bill is being assessed of the services rendered by the lawyer
- [49] The result obtained was essentially a total victory for the claimant. She obviously benefited from the services of both counsel. Rule 1-3 of the Rules
- [50] While the cost to the claimant of conducting this action may seem out of proportion to the issues, it is surely not for the respondent to claim that the accounts should be reduced as a result. It does not lie in his mouth to so argue, when the work done and resultant costs were driven virtually entirely by his approach to the claimant and this action. Conclusion Regarding Fees Included in the Bill of Costs
- [51] The respondent submitted that the fees charged were objectively unreasonable.
- [52] Counsel for the respondent pointed to J.M.C. v. Y.S., 2018 BCSC 915 as a comparator case and urged me to conclude, on the basis of the special costs awarded in that case, that an objectively reasonable fee here for both counsel would be \$191,567.
- [53] The respondent brought no expert opinion evidence in support of his position.
- [54] I do not accept that the order made in J.M.C. should be taken as a comparator without some expert opinion comparing the work involved in both cases. It is not enough to point to the fact that there was an 18-day trial and that the respondent's actions were considered outrageous.
- [55] Further, the trial in J.M.C. commenced in 2014 and concluded in 2015. Here the trial was in 2021 and 2022. Much has changed in seven years.
- [56] Based on the evidence provided to me and on my experience in assessing costs, I have concluded that the fees charged here were not only reasonable, they are considerably less than I would have expected.

- [57] The fees charged by both Ms. Katerberg and Ms. Boles are allowed in full, with appropriate taxes. Disbursements Legal Basis
- [58] Rule 16-1(4) of the Rules sets out the obligation of a registrar when considering disbursements: Disbursements
- (4) When assessing costs under subrule (1) or (2) of this rule, a registrar must
- (a) determine which disbursements have been necessarily or properly incurred in the conduct of the family law case, and
- (b) allow a reasonable amount for those disbursements.
- [59] In *Cooknell v. Quinn*, 2013 BCSC 1653, Master Bouck (as registrar) helpfully set out many of the applicable principles on an assessment of disbursements:
- [33] Collectively, the parties rely on more than one dozen authorities. With respect to the approach to be taken by the registrar on this particular assessment, the following tests or principles are most applicable:
1. A disbursement will be disallowed if determined to be a result of extravagance, negligence, mistake, excessive caution or zeal, as judged by the situation at the time when the disbursement was incurred: *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.) at para. 109;
 2. The Supreme Court Civil Rules (the "SCCR") "have placed new emphasis on the caution against expenses that are extravagant or the result of excessive caution or zeal ...": *Stapleton v. Charambidis*, 2010 BCSC 1642. The concept of proportionality has always been alive in the costs assessment process: *Kern Chevrolet Oldsmobile Ltd. v. Canadian Pacific Ltd.* (1986), 7 B.C.L.R. (2d) 170 (C.A.)
 3. In cases where factual assumptions must be made before costly expert opinions can be obtained, the disbursement for that opinion must be premised on a thorough and reasonable attempt to ascertain the assumed facts in order to give efficacy to that report. This is particularly so if it is sought to charge those costs against the other party on what really amounts to an almost agency of necessity basis: *Fung v. Berkun* (1982), 36 B.C.L.R. 352 (S.C.) at para. 8;
 4. A "necessary" disbursement is one which is essential to conduct the litigation. A "proper" disbursement is one which is not necessary but is reasonably incurred for the purpose of the proceeding: *MacKenzie v. Darke*, 2003 BCSC 138 at para. 18;
 5. When considering whether a disbursement is proper, the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what, in light of his then knowledge, is reasonable in the interests of his client: *Francis v. Francis and Dickerson*, [1955] 3 All E.R. 837 at p. 840. Also, taxing officers ought not to second guess a competent counsel doing a competent job, solely on the grounds that other counsel might

have been more sanguine or less cautious in determining how the job ought to be done: MacKenzie v. Darke at para. 7;

6. Disbursements incurred based on reasoning that is equivalent to "just in case" or "you never know" will not be found to have been reasonably incurred, or to put it another way, they will be found to be extravagant or the result of excessive caution or zeal: Phelan v. Newcombe, 2007 BCSC 714; and
 7. A disbursement will be disallowed when it appears that its only purpose is to shore up an unsubstantiated claim: Dulay v. Sahl, [1990] B.C.J. No. 76 (S.C.). Ms. Katerberg's sundry charges
- [60] The disbursements charged by Ms. Katerberg initially included a 5% "office sundry" fee, which increased to 8% during the retainer.
- [61] Ms. Katerberg, in cross-examination, said that this charge covers paper, toner, fax charges, and other office supplies that they would not get an invoice for. She said it does not cover overhead items--items that are required to run an office--only things that are file specific. Her evidence was that the increase to 8% was necessary as they were losing money on disbursements.
- [62] I agree with the respondent that it is difficult to assess the reasonableness of these charges without knowing specifically what they were for. I am satisfied on Ms. Katerberg's evidence that much of the amount charged was justifiable, however. Out of an abundance of caution, I will reduce the office sundry charges by \$2,500. Interac and File Closing Fees
- [63] The respondent also took issue with Interac Fees of \$78.56, \$30.00, and \$4.50. He also objected to a file closing fee of \$50. I agree those are office overhead and they are disallowed. Photocopying charges
- [64] The respondent then took issue with the charges for some photocopying at \$0.45 per page.
- [65] The respondent relies upon the BC Supreme Court's Administrative Notice #5: Photocopy and Fax Charges Guideline, published in 2010. That notice reads: Direction:
1. The following charges may be allowed on a party/party bill of costs:
 - a. photocopying 25¢ per page
 - b. faxes 35¢ per page.
 2. Parties are reminded that these amounts are a guideline only. If it is shown that the actual cost was or should have been different from the guideline charges, the amounts allowed on an assessment may differ from the guideline amounts.
- [66] Ms. Katerberg's evidence was that the \$0.45 charged by her was due to the cost of paper and toner.

- [67] Ms. Boles charged \$0.50 per page for photocopies. Her evidence similarly was that paper and toner costs were much higher than they were in 2010. She pointed out that courthouse copies are now \$1.00 per page.
- [68] I am satisfied that there is sufficient evidence that the actual costs for photocopies is now higher than in 2010 and that the rates charged by Ms. Katerberg and Ms. Boles are reasonable. Mileage claimed by the claimant
- [69] The respondent submits that mileage cannot be claimed by a party for attendance at court. Counsel referenced the Provincial Court decision in *Knittel v. Hazco Environmental Services Ltd.*, 2009 BCPC 158.
- [70] Counsel for the claimant points out that the costs regime in Provincial Court is quite different and that I should not consider this an appropriate precedent.
- [71] In her argument, Ms. Boles essentially provided evidence that the claimant had driven her to Dawson Creek for a hearing.
- [72] Further, Ms. Boles noted that the respondent, in setting out the issues taken with the accounts as required by the pre-hearing conference order of Master Robertson, cited virtually everything. There was no way for counsel to know precisely what was in issue and she noted that many things were not put to her by respondent's counsel citing the rule in *Browne v. Dunn* (1893), 6 R. 67. H.L.
- [73] Given that, and the failure of counsel for the respondent to cross-examine Ms. Boles on this issue, I am not prepared to disallow these charges. Dr. Korpach's critique
- [74] As noted above, it was necessary for the claimant to retain Dr. Korpach to do a critique of the reports of Dr. La Torre. There were various reasons for that--all the responsibility of the respondent. He lied extensively to Dr. La Torre about the claimant and about himself. He provided Dr. La Torre with a communication he somehow obtained where Ms. Katerberg told his counsel that she was concerned that Dr. La Torre was evidencing some bias. Later the respondent sent Dr. La Torre a copy of Dr. Korpach's critique report which apparently resulted in Dr. La Torre doing a further supplemental report at his own instance. There was a concern that Dr. La Torre, probably as a result of the respondent's lies, was using the wrong tests on the claimant--tests directed at patients with psychiatric conditions (trial reasons at paras. 121 to 134).
- [75] Dr. Korpach's report is referenced in the trial reasons, although not by name, at para 124. Although the respondent flatly stated that it was not admitted as an exhibit at trial, Ms. Boles sought leave to have the exhibit produced to me from the court file and I am satisfied that it was admitted as evidence at the trial.
- [76] The respondent submits that the claimant should have known that s. 211 critique reports are rarely used and rarely admitted in evidence and hence that the retainer of Dr. Korpach by Ms. Katerberg was unnecessary and the costs should be disallowed.

- [77] I disagree. It is obvious that counsel was presented with a very unique circumstance when Dr. La Torre's report was produced. It was perfectly reasonable to obtain a critique report in the circumstances.
- [78] The respondent also points out that Ms. Boles then retained Dr. Elterman to assist with her cross-examination of Dr. La Torre. That too, in my view, is unobjectionable. I am satisfied that the work of Dr. Elterman did not duplicate the work of Dr. Korpach and that it was reasonable to retain both experts in the unique circumstances here.
- [79] The costs of both Dr. Korpach and Dr. Elterman are allowed as presented. OnPoint Legal Research
- [80] The respondent questioned the necessity for this research. Ms. Boles satisfied me that it was reasonable and appropriate to retain OnPoint to do the research in issue and the cost is allowed. Legal Support
- [81] The respondent submitted that the accounts rendered for legal support services were lacking in a description of the services rendered, were unnecessary, and, therefore, should be disallowed.
- [82] Ms. Boles gave evidence about her legal assistant, Heather Cunningham, who is a retired lawyer. She was called to the bar in 2001 and retired in 2017 and has extensive experience in family law matters. Ms. Boles' evidence was that Ms. Cunningham undertakes work for clients as directed by her and is charged out at \$100 per hour.
- [83] Many of Ms. Cunningham's timesheets were in evidence and Ms. Boles was asked about the services rendered on her cross-examination. I am satisfied that the services were reasonable and they are allowed in full. Conclusion Regarding Special Costs Included in the Bill of Costs
- [84] The legal fees in the bill of costs are allowed in full.
- [85] The disbursements charged are reduced by \$2,500 for Ms. Katerberg's sundry office expenses and \$163.06 for Interac charges and the file closing fee.
- [86] I am satisfied that the balance of the disbursements are reasonable and they are allowed in full. The September 29, 2022 Hearing and Costs of the Assessment
- [87] The respondent took issue with assessing the costs of the September 29, 2022 hearing before Church J. on the basis that no account had been tendered and, indeed, no appointment had been taken out regarding those costs. The bill of costs, which is the basis for this assessment, is only for work up to August 15, 2022. It did not include costs of the hearing before Justice Church or of this assessment.
- [88] Ms. Boles did indicate in an October 17, 2022 letter to counsel for the respondent that: I will also provide a Bill of Costs and separate appointment for the Special Costs awarded against your client by Justice Church on September 29, 2022. I expect those will exceed \$30,000.

- [89] She did not do so, however. Ms. Boles' evidence was that she had not yet billed the claimant for this work as that would incur GST and PST and further that the claimant could not afford it.
- [90] Regardless, Ms. Boles presented both affidavit and oral evidence regarding the work done and was cross-examined thoroughly on this work.
- [91] The Court of Appeal considered the requirement for a bill in *Gichuru*:
- [115] In *Buchan [v. Moss Management Inc., 2021 BCSC 121]*, an objection was made that there was not a proper "bill of special costs before the court". In that case the successful party had filed the affidavit of a legal assistant exhibiting the law firm's statements of account. Bauman C.J.S.C., as he then was, agreed with the comments in *Fraser, Horn & Griffin, The Conduct of Civil Litigation in British Columbia*, 2d ed. (Markham: LexisNexis, 2007) that a bill for special costs is presented in the same form as a bill between a solicitor and client under the Legal Profession Act. Importantly, he did not suggest that an assessment should take place in the absence of any bill.
- [116] The need for a bill of a lawyer to tax his account against a client has been long recognized. In the absence of a bill a registrar does not have jurisdiction to conduct a review of a solicitor's account: *Kelly v. McMillan and Harbottle & Co., 2003 BCSC 307*.
- [117] The Rules clearly indicate the need for an account. Since 1961 taxing officers have had the power to assess a solicitor-client bill in the form permitted for lump sum charges by the Legal Profession Act (MR 983a). Marginal Rule 983b required that every lump sum bill should contain a description of the nature of the services and of the matter involved as would in the opinion of the taxing officer afford any solicitor sufficient information to advise a client on the reasonableness of the charges made. Marginal Rule 983c allowed any party to a taxation of a lump sum bill to put into evidence the opinion of a solicitor as to the nature and importance of the services and the reasonableness of the charges.
- [118] The provisions in the 1961 Rules have been carried forward and are found today in Rules 14-1(30), 14-1(31) and 14-1(32). Rule 14-1 (30) sets out that a bill for special costs may be rendered on a lump sum basis. Rule 14-1(31) sets out that a party is entitled to a sufficient description of the nature of the services provided so that another lawyer can advise on the reasonableness of the charges. Absent a bill there is nothing to advise on. Rule 14-1 (32) allows a party to an assessment to put into evidence the opinion of a lawyer as to reasonableness of the charges made. Absent a bill there is nothing to opine on.
- [119] A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services and of the matter involved to afford any lawyer sufficient information to advise a client on the reasonableness of the charge made. This will usually be provided in the same form as a bill between a solicitor and client under the Legal Profession Act. Those cases, such as *Bradshaw [v. Stenner, 2013 BCCA 61]*, that have held that a court can assess special costs absent evidence of actual legal

costs were wrongly decided and should not be followed. []

- [156] A special costs assessment, whether before a judge or a registrar, cannot proceed in absence of evidence of the amount of legal fees incurred. Usually this will be provided in the same form as a bill between a solicitor and client under the Legal Profession Act. This is necessary to allow a court to inquire as to the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. Where production of a bill of special costs would lead to a loss of solicitor-client privilege, the party seeking special costs must either waive privilege or can elect to preserve privilege by having its costs assessed after all appeals are exhausted
- [92] In considering whether the evidence given at the assessment hearing itself was sufficient to satisfy the requirement for "evidence of the amount of legal fees incurred", I had to consider the foundation for my jurisdiction as a registrar.
- [93] Rules 16-1(19) and (20) of the Rules provide: Form of bill of costs
- (19) A bill of costs must be in Form F71. Appointment to assess costs
- (20) A person who seeks to have costs assessed must
- (a) obtain a date for an appointment before a registrar,
- (b) file an appointment in Form F55 to which is attached the bill of costs to be assessed, and
- (c) at least 5 days before the date of the appointment, serve a copy of the filed Form F55 appointment and any affidavit in support in accordance with subrule (24).
- [94] In *Bayshore Law Group v Watton*, 2011 BCSC 1297, Justice Stromberg-Stein determined as follows:
- [25] Rule 14-1(21)(b) requires that a copy of the accounts to be reviewed be attached to the appointment. Bills that are not attached to the appointment cannot be the subject matter of the review to which the appointment relates (*McGarvey v. MacKinnon*, 2001 BCSC 88, [2001] B.C.J. No. 59, 2 C.P.C. (5th) 287 (Registrar), at para 30. A registrar's jurisdiction is limited to a review of the material attached to the appointment.
- [95] As a result, I have concluded that I have no jurisdiction to assess the costs for anything other than what was included in the bill of costs attached to the appointment.
- [96] The fact that the parties called evidence and appeared to agree that these costs should be assessed is not sufficient to clothe me with jurisdiction to do so.
- [97] That is obviously a conundrum when it comes to the costs of the assessment itself. The actual costs of the assessment cannot be known until the assessment is completed. And if they are put over, there will need to be a further hearing for which the claimant will be entitled to her costs--which presumably would have to be then assessed separately. It would be a never-ending process.

- [98] The only solution that I can see is for a party who is entitled to special costs to predict, as closely as possible, the amount for the assessment and include that in the bill of costs. I note that this is commonly done where ordinary costs are awarded in civil matters. Counsel usually include future costs in the tariff amounts claimed (e.g., for the hearing and for entering the order).
- [99] Thus, the application for both the costs of the September 29, 2022 hearing and the costs of this assessment are dismissed with liberty to file and serve a new appointment with respect to those costs.
- [100] As I have heard a significant amount of evidence regarding both, unless counsel agree otherwise, I will seize myself of any future appointment required to deal with those costs.
"Master Muir"
- [1] This was erroneously calculated in the bill of costs presented as \$176,195.86
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