A PRIMER ON PARTY AND PARTY COSTS AND THE TAXATION OF LEGAL ACCOUNTS IN NOVA SCOTIA[1]

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1. The intent of this paper is to provide an introductory guide to both party and party costs, and the taxation of legal accounts. It is hoped that this guide will provide some assistance to practitioners in dealing with these two areas.

2. It is now more than a decade since the introduction of the "new tariff" on party and party costs. There is a fairly well development jurisprudence concerning the tariff. It is clear that there are areas where the tariff conflicts with the underlying philosophy of the law of party and party costs. That conflict has been noted and, to some extent successfully, dealt with by the courts.

3. It is also almost a year since the jurisdiction of small claims court adjudicators was enlarged to include the taxation (or assessment) of solicitor's accounts. Those same changes did away with taxing masters. The intent of those changes was to regularize and reform the old taxation process, and to open the process up and make it more accessible to ordinary individuals (*i.e.* clients). As a result, solicitors may find themselves having to justify their accounts before adjudicators in a forum that is both more open and more adversarial than was usual under the former practice.

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PART I: PARTY AND PARTY COSTS

4. It is important always to remember that an award of costs represents a balancing of policy concerns.

5. On the one hand is the concern that the cost of litigation ought not to be borne entirely by the successful party, who after all was put to such expense by the "wrongdoer" – that is, the unsuccessful party. The balancing concern is that the risk associated with defending or prosecuting a case ought not to be put so high as to drive poor litigants out of the courts.

6. An award of party and party costs (as opposed to solicitor and client costs) to the successful party is generally thought to represent a reasonable compromise between these two concerns:

> "The expense of litigation is a matter of concern for all those interested in the administration of justice, but one must have regard for the burden which such costs place on all parties. Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser."[2]

7. The compromise lies in the fact that an award of costs on a party and party scale is to represent only a contribution – albeit a significant contribution – to the legal costs of the

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[2] *Foulis v. Robinson* (1978) 92 DLR (3d) 134 (Ont CA), per Dubin, JA at p.142.

successful party. It is not intended to provide a complete or full reimbursement of those costs.[3]

8. Prior to the introduction of the tariff, a successful party would produce a Bill of Costs. The bill was a detailed itemization of all of the tasks and services provided by the successful party's solicitor. A taxing master (or the court) would "tax" or assess the bill, reducing the amounts claimed on the basis of various criteria which had been developed over the years.

9. The tariff system[4] was developed to deal with complaints that the old approach was cumbersome, and resulted in awards of costs that fell far short of the underlying philosophy of an award of costs.[5] But while tariff system was new in *form*, it was not new in *substance*. The underlying philosophy remained that of balancing the cost of litigation with accessibility to the court. As has been noted several times in Nova Scotia decisions, "[t]he recovery of costs [under the Tariff] should represent a *substantial contribution* towards the parties' *reasonable*

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[3] Full contribution or indemnity is found only in an award of solicitor and client costs, which is rarely awarded (though frequently requested). The taxation of costs on a solicitor and client basis is discussed at paras. 151*ff* below.

[4] The new Tariffs were introduced as of January 1, 1989.

[5] J. W. S. Saunders (as he then was), "The Costs and Fees Act: 'The Old and the New'," CLE Society of NS, *Insurance Law, 1989* (presented Sept 23, 1989); Pizzo, "The New Tariff System of Taxation" (1989) 16 NSLN 37; W. A. Richardson, "The New Tariff: Three Years Later (1992) 18 NSLN nos. 1, 2 and 4.

expenses in presenting or defending the proceeding, *but should not amount to a complete indemnity.*"[6] Practitioners should keep this statement close to heart, since it can provide counsel with an argument to increase (or decrease) an award of costs or a particular disbursement.

Trial Costs

10. The general rule in any proceeding is that costs "shall follow the event."[7] In other words, the successful party is generally entitled to his or her party and party costs (which includes their disbursements).

11. The costs to be awarded are as a rule "fixed by the court in accordance with the Tariffs."[8] There a several tariffs:

    a. Tariff A – applicable at trial;

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[6] Emphasis added; the statement can be found, for example, in *Landymore v. Hardy* (1992) 112 NSR (2d) 410, per Saunders, J (as he then was). This passage has been cited numerous times by the courts in Nova Scotia. See, for e.g., *Keddy v. Western Regional Health Board* [1999] NSJ No. 464 (TD), per Oland, J (as she then was) at para.5; and *Williamson v. Williams* 1998] NSJ No. 498 (CA), per Freeman, JA at para.24.

[7] CPR 63.03(1); and see *Bent v. Farm Loan Board (NS) et al* (1978) 30 NSR (2d) 552 (CA). There are certain exceptions to the general rule, which are set out at CPR 63.03(2)-(4); and as well, the court always retains the discretion to depart from the general rule – but this discretion must always be exercised judicially: see *Bent, supra.*

[8] CPR 63.04(1).

b. Tariff B – applicable on default judgments;

c. Tariff B1 – uncontested foreclosures or foreclosures and sale;

d. Tariff C – applicable where matter is settled or discontinued without trial;

e. Tariff D – disbursements.

12. Most of what follows will deal with Tariffs A and D, since those are the ones most often dealt with by litigators (and hence are most often found to be problematic).

Tariff A – Costs of Trial: Where the Judgment Results in a Monetary Award

13. The fixing of an award of party and party costs under the Rules and the tariffs is a two-step process involving the following:

a. determination of the "amount involved;" and

b. selection of the appropriate scale (of which there are five, with scale 3 being the "basic" or usual scale).

14. The AI determines the range of the eventual cost award; the scale determines the actual award.

15. The determination of the AI and the scale is subject to various considerations or factors, which grants the court (and counsel) great latitude in fashioning an appropriate award of costs.

Step 1: Determining the "Amount Involved"

16. The form and the rules governing Tariff A require the parties (or the court) to first determine the "amount involved" (the "AI").

17. There are two types of cases under the tariff: those which involve a claim for a "monetary claim;" and those involving "a substantial non-monetary issue."[9]

Where There is a "Monetary Claim"

18. Strictly speaking, the AI is *not* identical to the amount of the monetary claim. Rather, it is a figure which is set "having regard to:"

    a. the amount of damages awarded (or provisionally assessed where the action is dismissed);

    b. the complexity of the proceedings; *and*

    c. the importance of the issues.[10]

19. In the usual case, however, the courts have in determining the AI almost always chosen a figure equal or close to the amount awarded (or provisionally awarded) in judgment.[11]

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[9] See the preamble to Tariff A.

[10] See the preamble to Tariff A.

[11] For example, in *Timmons v. Parkes* (1998) 175 NSR (2d) 145 (TD), Goodfellow, J stated at para.5: "[the successful party] is entitled to costs ... based on the 'amount involved,' which I equate with the amount recovered."

As noted by Freeman, JA in *Williamson v. Williams,*[12] "the practice appears to [be] adopting the amount awarded as the amount involved."

20. Accordingly, it is often appropriate to accept the amount of the judgment as the AI for purposes of calculating a party and party award. However, as discussed below, one should always consider whether the resulting award does in fact represent a "significant contribution" towards the client's actual legal expenses. If it does not, then one should look to other approaches or measures to increase (or decrease) the award otherwise calculated.[13]

PJI

21. The fact that PJI is often added to the amount awarded does not mean that the AI should similarly be increased. In ordinary course the approach seems to be that only the actual amount awarded, not including the PJI, is to be used in determining the AI.[14]

Prepayments

22. The fact that a without prejudice prepayment was made prior to trial should not ordinarily be taken into account in

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12 *Williamson v. Williams* [1998] NSJ No. 498 at para.22.

13 This point is discussed and elaborated upon below, at paragraph 21*ff.*

14 *Gay v. MacDonald* (1998) 170 NSR (2d) 322 (TD); see the cases cited at para.24 thereof.

setting (or reducing) the AI otherwise calculated unless, *semble*, those payments were made (and accepted) on the express condition that they be so used.[15]

23. Of course, any such prepayment could be considered if it had an affect on the proceeding that was "relevant to the question of costs."[16] So, for example, if the prepayment pertained to a particular head of damage (thereby removing the need to prove it) one could reasonably argue that the prepayment should be considered when fixing the AI.[17]

Where the Proceeding Involves "A Substantial Non-Monetary Issue"

24. Not all actions or judgments result in monetary awards. Many seek a declaration of some kind respecting the rights of the parties – for example, the property line between them; or the entitlement to the exercise of a contractual right; or a legal question;[18] or issues concerning an estate.[19]

25. When initially confronted with this problem the response was to suggest that the court look

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15 *Skeffington v. McDonough* (1992) 114 NSR (2d) 181 (TD) at pp.182-83.

16 CPR 63.04(2)(j).

17 CPR 63.04(2)(c) or (d).

18 *Rowan Companies v. Di Persio* (March 28, 1991; 309/13).

19 *Re MacIntosh* Estate (1982) 41 NBR (2d) 156; Veinot *v. Veinot Estate* (1998) 172 NSR (2d) 111 (TD).

> "to the issues involved as they are derived from the pleadings and framed by the court and set out in its decision or reasons for judgment. The court will not normally look to the effect or consequences of these issues."[20]

26. However, almost immediately pressure set in to relate the non-monetary issue to some form of dollar amount, in order to then trigger the "usual approach" of relating the AI to a monetary figures.

27. The courts have approached this problem in a number of ways:

    a. Attempt to value the issue in question by relating it to some monetary claim or asset that *can* be valued in some way; or

    b. Look to the actual legal costs, and then generate an AI that would produce a cost award which would provide a substantial but not complete contribution towards those costs; or

    c. Develop a rough "rule of thumb," based on the time in court.

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[20] *Hawker Siddeley Canada Inc v. AG (NS); USA, Intervenor* (1991) 110 NSR (2d) 426 (TD), per Nathanson, J at p.430.

A: Relating the "Non-Monetary" Issue to Its Impact on a Monetary Claim, Right or Asset

28. In some non-monetary cases the AI determined by the court appears to relate to a monetary award, or penalty or asset that may be affected by the issue in the action. For example, *Ripley v. Pommier*[21] involved an issue concerning a potential fine under securities legislation in the range of $400,000, and an actual fine of $100,000. The AI chosen was $100,000. *Hawker Siddeley* involved a pension fund worth $645,000; an AI of $600,000 was chosen. And in *Veinot v. Veinot Estate* the approximate value of the successful party's interest in an estate was chosen as the AI.[22]

B: Looking to the Actual (and Reasonable) Legal Expenses Incurred

29. Another approach to determining the AI is to look to the *reasonable* fees spent on a matter as a way in assisting the court in arriving at the AI. In *Landymore v. Hardy* the court looked to the $31,700 spent on legal fees, and chose an AI

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21 *Ripley v. Pommier* (1990) 101 NSR (2d) 108 (TD).

22 As in *Veinot v. Veinot Estate* (1998) 172 NSR (2d) 111 (CA), at paras.27-29, where the value of the successful party's interest in an estate worth approximately $800,000 was in the range of $125,000, which the Court of Appeal considered to be a "reasonable approximation" of the amount in issue for him.

of $350,000, producing a cost award of $16,375 on scale 3.[23]

30. One should be careful about assuming that this approach would justify an assumption that a successful party would be entitled to, for example, 50% of their actual costs.

31. First, it has to be emphasized that what is being awarded is a *substantial but not complete* contribution towards the *reasonable* legal costs of the successful party. The reasonable costs will be determined by the number and complexity of the issues involved; and the importance of the issues to the parties involved.

32. Second, the suggestion that a party need only submit their actual costs to receive a particular percentage of them (at least on analogy to what happened in *Landymore*) was subsequently rejected by the court. In *Mathers v. Mathers* Glube, CJTD (as she then was) rejected the suggestion that *Landymore* stood for the proposition that a successful party was entitled "to any particular percentage of their fee as a determining factor in fixing the amount involved."[24] Her Ladyship was concerned that any such "'rule of thumb' could clearly lead to severe abuses."[25]

33. Having said this, it is respectfully submitted that more recent case law, and in particular the increasing concern

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[23] See *Landymore v. Hardy* (1992) 112 NSR (2d) 410 (TD) at paras.16-28. It should be emphasized that the analysis was more complicated than set out above.

[24] *Mathers v. Mathers* (1992) 113 NSR (2d) 284 (TD), at para.136.

[25] *Ibid.*, para.136.

about the growing gap between party and party awards and the actual costs of litigation, will lead to a resurrection of the *Landymore* approach.[26]

C: The "Rule of Thumb" Approach

34. In a series of decisions Justice Goodfellow developed a rule of thumb to be employed in some non-monetary cases (particularly those involving boundary disputes or complex chamber applications) "so as to develop a real measure of consistency in determining the "amount involved" where the non-monetary aspects are significant."[27] This "rule of thumb" called for the calculation of the AI by treating each day or part of a day in court as equal to $15,000 of AI; so that, as in *Veinot*, a 6 day trial translated into an AI of $105,000, and a cost award of $7,525.

35. This approach was a commendable effort to create an informal tariff that mirrored the more formal one in place for monetary awards. It had the benefit of enabling counsel to determine what the award might be without the cost of applying to the court.

36. The Court of Appeal expressly rejected any such rule of thumb as being "arbitrary." The late Justice Pugsley was of the view that such a rule of thumb was "an arbitrary classification which in most cases, except by happenstance,

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[26] See, for example, the comments of Goodfellow, J and Freeman, JA, cited at para. 23, and the discussion which there follows.

[27] *Veinot v. Veinot Estate* (1998) 167 NSR (2d) 101 (TD) at para.23.

would be of little relevance."[28] Unfortunately, the Court of Appeal did not provide an alternative guide; and indeed, it dismissed the appeal of the costs award on the grounds that even though the rule of thumb was wrong, the AI the rule had generated was "reasonably approximate [to] the amount in issue."[29]

37. Counsel would appear to be left then to some combination of the first and second approach, with the easiest perhaps being a reference to the actual time (and cost thereof) in prosecuting or defending the particular matter.

Where Damages and Liability are Severed

38. Actions involving monetary claims are sometimes bifurcated, with liability being tried first. When the matter is decided (either by a finding of liability or a dismissal of the claim) the question then arises as to how one is to determine the AI. Should one use the potential claim? Or should one adopt a different approach?

39. In *Young v. Hubbards Food Services Ltd*[30] the issue of damages and liability had been severed. The plaintiff's claim was dismissed. The defendant submitted that the AI should be calculated with regard to the claim which had been made; the plaintiff argued that the amount claimed "should not be determinative in assessing costs." The trial

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28 *Veinot v. Veinot Estate* (1998) 172 NSR (2d) 111 (CA), per Pugsley, JA at para.26.

29 *Ibid*, at para.26.

30 *Young v. Hubbards Food Services Ltd* (1995) 146 NSR (2d) 70 (TD).

judge agreed with the plaintiff, at least in a case where the parties had agreed to sever liability and quantum, primarily on the grounds that such a result "would be a disincentive to litigate the two issues separately and would defeat the objects of securing a just, speedy and inexpensive determination of the proceeding."[31] An AI of $50,000, on scale 3, was accordingly used to generate costs of $4,875.[32]

40. However, in *Slaunwhite v. Little and Slaunwhite*[33] the court held that it *was* appropriate to look at the damage potentially involved, at least where it was very likely that the quantum could have been agreed upon had the liability issue not required a trial.

41. On balance, one may conclude that in determining the AI in a case where liability has been severed, the court may look to the ultimate claim as one factor; but the factor should not be that important, unless it can be said that there was little likelihood that quantum would be in dispute if liability were determined. Even here, however, some discount in the AI would still have to be allowed to take into account that there was no trial time associated with the need to prove quantum.

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31 *Ibid*, per Saunders, J at para.12. See also *Seabord Construction Inc v. ACOA* (1998) 165 NSR (2d) 316 (CA), where the Court of Appeal reduced a cost award from $55,375 to $25,000 in a liabilty-only trial at least in part on similar grounds.

32 The matter involved a four day trial and expert evidence.

33 *Slaunwhite v. Little and Slaunwhite* (1998) 172 NSR (2d) 141 (TD) at para.7.

Step 2: Determining the Scale

42. Once the court determines the AI, it must then determine the scale to be employed. The normal scale is scale 3.

43. A scale of less than 3 may be used where the court wishes to "punish" a successful party for inappropriate conduct; or for forcing the unsuccessful party to deal with unsubstantiated as well as reasonable claims. For example, where the plaintiff claimed $476,871, but only received $83,000 (a figure, which after Section B benefits were deducted, reduced to $61,000), the Court awarded her costs on scale 1 only.[34]

44. A scale greater than 3 may be used where the court wishes to "punish" the unsuccessful party for inappropriate conduct;[35] or to recognize that the matter was more

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[34] *Gay v. MacDonald* (1998) 170 NSR (2d) 322 (TD) at paras.26-27.

[35] In *Chaddock v. Chaddock* (1993) 121 NSR (2d) 274 the successful wife was awarded costs on scale 5 because of the conduct of the unsuccessful husband, which had obstructed and delayed the proceedings. In *Turner-Lienaux v. NS (AG)* (1992) 115 NSR (2d) 200 (TD) costs on scale 4 were awarded against an unsuccessful plaintiff where her solicitor's conduct "had the effect of significantly increasing the costs of the successful party:" see para.89. See also *Landymore v. Hardy* (1992) 112 NSR (2d) 410 (TD), per Saunders, J at para.30, where scale 5 was awarded to the successful party because the defendant's advancement of unsubstantiated counterclaims; and failure to admit facts until the last moment; put the successful party to "wholly unnecessary expense."

complex or more costly to the successful party, thereby entitling it to a higher award.[36]

Offers to Settle

45. The fact that either or both parties, whether successful or unsuccessful, have made offers to settle can have a significant impact on the eventual costs award.

46. CPR 41A.09 deals specifically with two types of offers (each of which must be made at least 7 days before trial and must not have been withdrawn prior to trial):

    a. where *the plaintiff* makes an offer which is equal to or less than his or her eventual judgment;[37] and

    b. where the *defendant* makes an offer which is better than the eventual judgment obtained by the plaintiff.[38]

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36 See, for example, *Walker v. Walker Estate* (1998) 169 NSR (2d) 336 at para.14, per Goodfellow, J, where scale 5 was awarded because it was "an extremely time consuming matter pretrial."

37 CPR 41A.09(1).

38 CPR 41A.09(2).

Plaintiff's Offer is Equal to or Better than Judgment

47. In the first case, the successful plaintiff is entitled to party and party costs to the date of the offer; and double party and party costs thereafter.[39]

48. In such cases the court usually calculates the entitlement as follows:

    a. first, the party and party costs are calculated under Tariff A without reference to the offer;

    b. second, some attempt is made to determine the proportion of the actual legal fees incurred by the plaintiff before and after the date of the offer;

    c. third, that proportion is used to allocate the party and party costs otherwise calculated between the normal and the double scale.

49. So, for example, if roughly half the plaintiff's legal fees were incurred after the offer was made, then 50% of the plaintiff's party and party costs under Tariff A were doubled.[40]

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[39] CPR 41A.09(1).

[40] *Armstrong v. Baker* (1992) 113 NSR (2d) 420 (TD) at para.11. See also *Killorn v. Health Vision Corp* (1997) 158 NSR (2d) 357 (CA). In *Burton v. Howlett* [1999] NSJ No. 457 (TD), the court found that 62% of the time charges were incurred after the offer, and accordingly doubled 62% of the costs otherwise calculated under Tariff A on scale 3; see also *Canadian Airlines International Ltd v. Hudson General Aviation Services Inc* (1994) 131 NSR (2d) 210 (TD) to the same effect.

Defendant's Offer is Better than Plaintiff's Judgment

50. In the second case, the plaintiff is entitled to his or her party and party costs up to the date of the offer; and the *defendant* is entitled to his or her party and party costs thereafter.[41]

51. It has been suggested that in this case the defendant is treated unfairly, because he or she only gets their party and party costs; not the double costs that the plaintiff gets under CPR 41A.09(1).[42]

52. However, it is submitted that what is missed in this analysis is the fact that in normal course a successful plaintiff is entitled to his or her party and party costs. In this case, however, not only is the successful plaintiff deprived of their party and party costs from the date of the offer forward (which is a benefit the defendant would not ordinarily receive); he or she is required to pay the unsuccessful defendant's party and party costs from the date of the offer forward (which in effect *doubles* the benefit to the defendant).. In other words, the defendant in such a case is in fact in a better position than the plaintiff under CPR 41A.09(1).

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41 CPR 41A.09(2).

42 This appears to have been the argument made by the defendant in *Hudgins v. Danka Business Systems Ltd* [1998] NSJ No. 293 (TD) at para.16. The court only allowed the defendant its party and party costs from the date of the offer.

Defendant Makes an Offer to Settle, but the Plaintiff's Claim is Dismissed

53. CPR 41A.09(1) and (2) deal only with cases where the plaintiff is *successful* at trial. It does not deal with the case where a defendant makes a substantive offer to settle which is not accepted, and the plaintiff's claim is subsequently dismissed.

54. Presumably, the rules committee decided that the "normal" result in a case where the plaintiff's claim is dismissed (that is, party and party costs to the defendant) was a sufficient deterrent to the plaintiff to achieve the ends of encouraging settlement that are found in CPR 41A.09.

55. However, some cases have suggested that, by analogy to CPR 41A.09(1), a defendant in such a situation should enjoy some form of premium on, or even doubling of, their party and party costs "to follow the same philosophy for determining a reasonable award of party and party costs."[43]

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[43] *Wheel Ranch Ltd v. Sun Alliance Insurance Co* (1995) 142 NSR (2d) 154 (TD), per Goodfellow, J at paras.5-6, where the defendant's party and party costs after the offer to settle were increased by 50%. See also *MacWilliams Engineering Ltd v. DMLP Holdings* (1995) 139 NSR (2d) 84 (TD), where costs of a defendant who had offered to settle a counterclaim which was dismissed were doubled from the date of the offer, and then discounted by 25%: see the discussion in *Gilfoy v. Kelloway* (2000) 184 NSR (2d) 226 (TD) at p.236.

Offers Which Do Not Comply With CPR 41A.09(1) or (2)

56. *Any* offer to settle, even those which which only "come close" to triggering CPR 41A; or which are late but which are still better than the judgment; can be taken into account by the court "in exercising its discretion as to costs."[44]

"All-In" Offers to Settle

57. One often sees offers to settle made on an "all-in" basis. That is, the offer is said to be inclusive of all damages, interest and costs. They are often time-limited, in the sense that they either expire on a fixed date, or are withdrawn before trial. Such offers are of mixed utility.

58. On the one hand, their simplicity enables the client to know exactly what the offer exposes them to. As well, their time-sensitive nature is seen as provided a psychological incentive to encourage settlement.

59. On the other hand, they are difficult if not impossible to compare with an eventual judgment, which usually takes the form of three elements: damages; interest; and costs and

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[44] CPR 41A.11. So, for example, in *Manzer v. Lines* (Glube, CJTD, Nov 27, 1990; NSLN 17:33), where an offer to settle that was better than the judgment but delivered less than 7 days before trial was used to warrant the use of scale 5, rather than scale 3; see also *Landymore v. Hardy* (1992) 112 NSR (2d) 410 (TD), where a similar offer was a factor used to warrant the use of scale 5. In *Annand v. Cox Enterprises* (1992) 111 NSR (2d) 196 (TD) the defendant made an offer to settle two days before trial. The offer matched the eventual judgment, and the court awarded costs to the defendant of $750.

disbursements. Moreover, if they are withdrawn before trial they remove some of the overall incentive to settle that CPR 41A is attempting to foster.

60. Because of the above-noted difficulty the courts have usually concluded that "all in" offers (at least those which are not *clearly* better than the eventual judgment) are not sufficient to trigger the costs consequences of CPR 41A. As noted by Goodfellow, J in *Walker v. Walker Estate,*[45] the "better method of advancing an offer to settle is for $xxxxx, plus prejudgment interest, costs in accordance with Tariff "C" and disbursements."

Commentary: Where the Usual Approach Falls Short of Representing a "Substantial Contribution" Towards "Reasonable Expenses"

61. It has become increasingly apparent that in many cases the practice of equating the AI with the monetary judgment would result in an award which fails to comply with the overriding principle that costs represent "a substantial contribution" towards the successful party's reasonable legal expenses. In these cases simply using the amount of the judgment as the AI would produce a Tariff A figure that was unreasonably low;[46] or unreasonably high.[47]

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[45] *Walker v. Walker Estate* (1998) 169 NSR (2d) 336 (TD) at para.339; see also *Dedrick (Alden) Fisheries v. Legay Fibreglass* (1994) 134 NSR (2d) 264 at paras.68-69.

[46] As in *Matheson & Sons Contracting Ltd v. Canada (AG)* [1999] NSJ No. 267 (TD), where a 9 day trial resulted in a judgment of $433,000 for the successful plaintiff. The "usual" approach would have resulted in an award (on scale 3) $17,365, a

62. This difficulty arises primarily because the Tariff does not on its face make any allowance for the actual amount of time (and hence the actual cost) necessary to defend or prosecute a case. Nor in particular does it allow for any consideration of one of the biggest single components of a legal account, which is the time associated with the actual trial. The tariff's failure to consider time has resulted in a growing gap between costs as calculated under Tariff A and the actual cost of litigation in this province. As noted by Goodfellow, J in *Cashen v. Donovan*,[48]

> "[L]egal fees have escalated beyond any capacity for the existing Tariffs to provide a reasonable and substantial contribution toward a successful party's solicitor and client costs. This is particularly so where the present Tariffs give no specific direction as relates to the length fo the trial or proceeding."

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figure which clearly would not have represented a "significant contribution" towards legal expenses that were estimated to be in the range of $100,000.

47 As in *Founders Square Ltd v. NS (AG)* [2000] NSJ No. 220 (TD), where the defendant successfully defended itself in a 12 day trial against a claim in the range of $7 million. Applying the usual approach on scale 3 would have produced a cost award in the range of $220,000.

48 *Cashen v. Donovan* (1999) 174 NSR (2d) 320 (TD) at para.16.

63. The disparity becomes so great in some cases that a court which simply applies the usual approach runs the risk of falling into error, as in *Williamson v. Williams*.[49]

64. The courts, as noted, are sympathetic to the plight of a party who will obtain (or exposed to) a costs award under the Tariff which is either unreasonably low or unreasonably high.

65. In *Cashen v. Donovan*[50] Goodfellow, J noted that in the days before the tariffs party and party costs were recognized as being in the range of 30% to 40% of most solicitor's final accounts – and that the tariff had been intended in part to address "the inadequacy of the previous approach to party and party costs." In *Williamson v. Williams*[51] Freeman, JA stated that the phrase "'substantial contribution' no amounting to a complete indemnity must initially have been intended to mean *more than 50% and less than 100%* of a lawyer's *reasonable bill* for the services involved," and went on to state:

> "A range for party and party costs *between two-thirds and three-quarters* of solicitor and client costs,

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49 *Williamson v. Williams* [1998] NSJ No. 498 (CA), where Freeman, JA noted that a costs award of $14,180 (as calculated under Tariff A) in respect of a case involving a $74,614 judgement was "manifestly unjust" in a proceeding involving a five day trial on liabiliy; an appeal; a trial on damages; and another appeal: see paras.21 and 32.

50 *Supra*, at para.15.

51 [1998] NSJ No. 498 (CA) at para.25.

objectively determined, might have seemed reasonable."[52]

66. These passages suggest that where costs calculated under the tariff fall outside the range of 50% to 75% of the actual (but reasonable) legal fees of the successful party, then counsel ought to object to the tariff; and ought instead to urge the fixing of either a lump sum; or the modification of the AI; so as to produce a final figure more in line with this range.

67. It should be noted that the Courts will usually be guided by records of the actual time spent by counsel in a proceeding in determining whether or not the tariff can produce a reasonable result. As noted by Moir, J in *Matheson & Sons Contracting v. Canada (AG),*[53] the number of hours spent by counsel (and the dollar extension), "if apparently reasonable, is useful for determining whether an award under Tariff A will meet the purpose of a substantial but incomplete contribution." Similarly, Saunders, J (as he then was) stated in *Landymore v. Hardy*[54] that the tariff could not hope "to attain its goal of providing a 'substantial contribution' to the successful parties' reasonable expenses if those expenses are not disclosed to the court."

Modifying the AI

68. One option open to the court is to look to the complexity of the matters before the court, and the importance of the

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[52] *Ibid.*, emphasis added throughout.

[53] [1999] NSJ No. 267 (TD) at para.6.

[54] (1992) 112 NSR (2d) 410 (TD) at para.19.

issues, in part as evidenced by the actual time expended by counsel. These factors can be used to generate an AI that is higher than that amount of the judgment, which in turn would result in a cost award under Tariff A which is a more reasonable contribution to the successful party's costs.

Lump Sum

69. The other option open to counsel (and the court) is to rely on CPR 63.02(1)(a), which provides that the amount of costs is always ultimately "in the discretion of the court," and more particularly, that the court may "award a gross sum in lieu of, or in addition to any taxed costs."

70. This provision has been used (and is being increasingly used) by courts where a Tariff A award would have clearly failed to provide a "substantial contribution but not complete indemnity" in respect of a party's actual costs.

Where AI Produces an Unreasonably High Award

71. For example, in *Founders Square v. NS (AG)*[55] the defendant successfully resisted a claim in excess of $7 million after a 12 day trial. Tariff A would have produced an award in excess of $220,000; Moir, J awarded a lump sum of $60,000.[56]

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55 [2000] NSJ No. 220.

56 He actually awarded $50,000, to reflect the fact that a small portion of the claim was in fact found owing and ought to have been paid by the defendant; and hence the defendant's failure to admit it had added "some unnecessary expense to trial preparation:"

Where AI Produces an Unreasonably Low Award

72. In *Matheson & Sons Contracting Ltd v. Canada (AG)*[57] the plaintiff succeeded in its claim for $433,000 after a 9 day trial. Tariff A would have produced a figure in the range of $30,000, in respect of legal fees that were estimated to have been in excess of $100,000. Justice Moir awarded a lump sum of $50,000, noting that "where the reasonable cost of counsel's labour is at least quadruple the tariff amount, the tariff could not serve the overriding purpose of a substantial though incomplete indemnification."[58]

73. *Campbell v. Jones*[59] involved two weeks of pretrial preparations and motions; 25 days of jury trial; and 4 days of further submissions before the trial judge alone. The plaintiff was awarded a judgment of $240,000. Costs under the Tariff, no matter how vigorously massaged, would have produced an award of no more than $26,600, in respect of legal fees that were said to be in excess of $210,000. The trial judge did not consider such fees surprising in the circumstances, and considered them to be "one piece of evidence" justifying his decision to award a lump sum of $75,000 for party and party costs.[60]

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see paras.7-8.

57 [1999] NSJ No. 267 (TD).

58 *Ibid.*, para.7.

59 [2001] NSJ No. 373 (TD).

60 *Ibid.*, paras.70 and 72.

Where Liability is Split or Apportioned Between the Parties

74. On occasion, particularly in personal injury cases, liability will be apportioned between the plaintiff and the defendant because of the contributory negligence of the former. In such a case the general rule is that costs should be apportioned on the same basis as liability is apportioned between them. So, for example, where the plaintiff is found 20% contributorily negligent, the plaintiff is entitled to 80% of his or her party and party costs from the defendant; and the defendant is entitled to 20% of his or her party and party costs from the plaintiff[61]

75. However, the rule is not absolute. Where there are circumstances justifying a departure from the rule, an apportionment of costs different than on liability may be used.[62]

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61 See the usual discussion in *Mader v. Lahey and Mailman* (1997) 176 NSR (2d) 143 (TD) at paras.16-33; see also *Crawford v. Royal Flush Services Ltd* (2000) 189 NSR (2d) 137 (TD) at paras.2-20.

62 *Ibid.*, at para.27 and 32; see also *Fowler v. Schneider National Carriers Ltd* (2000) 185 NSR (2d) 193 (TD), where the court awarded the defendant only 20% of its costs, even though the jury had found the plaintiff 42.5% contributorily negligent. (Note that the Court of Appeal subsequently reduced that percentage, finding it perverse).

Commentary Regarding the Gap Between AI-Based Cost Awards and Actual Legal Costs

76. It is respectfully submitted that, as the following table illustrates, the tariff has produced and continues to produce awards that are not in line with its underlying philosophy.

LENGTH OF TRIAL	JUDGMENT (OR POTENTIAL CLAIM AT RISK)	COSTS AWARDED	COST PER DAY OF TRIAL
13 days (liability only)	$2.7 million	$25,000[63]	$1,923
9 days (with thousands of documents)	$433,000	$50,000[64]	$5,555
8 days (liability alone)	wrongful dismissal	$18,000[65]	$2,250

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63 *Seabord Construction Inc v. ACOA* (1998) 165 NSR (2d) 316 (CA). The trial was on liability only; the claim, for something in the range of $2,750,000 was dismissed. The trial judge awarded costs of $55,375. Justice Freeman in the Court of Appeal was of the view that such an award, while perhaps justified had the trial included damages, "was wrong in principle and inordinately high when only liability was decided:" para.15. The costs were accordingly reduced to $25,000.

64 *Matheson & Sons Contracting Ltd v. Canada (AG)* [1999] NSJ No. 267.

65 *Keddy v. Western Regional Health Board* [1999] NSJ No. 464 (TD).

LENGTH OF TRIAL	JUDGMENT (OR POTENTIAL CLAIM AT RISK)	COSTS AWARDED	COST PER DAY OF TRIAL
6 day jury trial (liability only)	$460-$700,000	$16,375[66]	$2,729
11 days (liability only)	$1 million (policy limits)	$114,375 $64,375[67]	$10,397 $5,852
12 days (with many documents)	approx. $7 million	$60,000[68]	$5,000
7 day jury trial + 3 additional days judge alone	in excess of $2.3 million	$130,335[69]	$13,033
6 days	estate assets worth $800,000	$7,525[70]	$1,254

66 *Slaunwhite v. Little and Slaunwhite* (1998) 172 NSR (2d) 135 (TD) – I have calculated the costs based on Tidman, J's ruling that costs were to be awarded on scale 3 on an AI of $400,000. This was a personal injury action.

67 *Conrad v. Snair* (1996) 150 NSR (2d) 214 (CA).

68 *Founders Square Ltd v. NS (AG)* [2000] NSJ No. 220 (TD); Moir, J would have awarded $60,000 had the defendant not refused to admit and pay a relatively small amount – its refusal to do so led him to reduce the award to $50,000.

69 *Armstrong v. Baker* (1992) 111 NSR (2d) 239 (TD) and (1992) 113 NSR (2d) 420 (TD). The AI was set at $2.5 million; costs were awarded on scale 5. The costs actually awarded were in fact higher, because of an offer to settle.

70 *Veinot v. Veinot Estate* (1998) 172 NSR (2d) 111 (CA). Note that while the Court of Appeal disagreed with *how* the trial judge arrived at his costs award, it did not disagree with the result: see paras.11-26.

LENGTH OF TRIAL	JUDGMENT (OR POTENTIAL CLAIM AT RISK)	COSTS AWARDED	COST PER DAY OF TRIAL
25 day jury trial + at least 10 days of pre-trial and post trial submissions and applications	$240,000	$75,000[71]	$2,142
12 days	$1,800,000	$105,000[72]	$8,750

77. While it is not to be suggested that all proceedings which result in, for example, a 6 day trial should be awarded the same amount in costs (since each matter will have required different amounts of time for discoveries, interlocutory applications and the like), it is difficult to accept that the awards should be so wildly at variance with each other.

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71 *Campbell v. Jones* [2001] NSJ No. 373 (TD). Note that the trial judge was not surprised that the actual fees in this case would have been in the range of $210,000: see para.72.

72 *1874000 Nova Scotia Ltd v. Adams* (1996) 148 NSR (2d) 1 (TD). Costs were awarded on scale 5, which would have increased the amount otherwise determined. The Court of Appeal subsequently reduced the damage award, and consequently also reduced the costs of trial, to $93,325. In addition, since the unsuccessful party at trial was substantially successful on the appeal on the damages issue, *it* received appeal costs of 40% of the trial costs (that is, $37,330), which it was entitled to set off against the trial costs, resulting in a total *effective* costs award to the successful plaintiff of $55,995: see the appeal decision at (1997) NSR (2d) 260 at para. 102.

78. The willingness of the courts to attempt to close the potential gap between tariff costs and costs that represent a "substantial contribution" to the expense of litigation is a welcome development. Unfortunately, until the tariff is amended to provide for some meaningful way of evaluating (if only in a general way) the reasonableness of the time spent by solicitors on a file it will be difficult if not impossible to bridge that gap consistently or fairly.

Costs on Interlocutory Applications

79. The general rule under CPR 63.05(1) is that costs on an interlocutory application, "unless the court otherwise orders ... are costs in the cause and shall be included in the general costs of the proceeding."

80. However, concern that the cost of interlocutory applications are "lost" by the time one arrives at the conclusion of a proceeding has led to a practice of fixing those costs (and determining who is to pay them) at the conclusion of the application.[73] Thus, as was observed by Goodfellow, J, costs of interlocutory applications should be dealt with by the judge hearing the application because he or she "is in a far better position than the trial justice in determining whether judicial discretion should be exercised on a particular interlocutory application."[74]

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[73] See *Wilson v. Cross Roads et at* (NSTD, Chambers, Goodfellow, J, released Sept 28, 2001) at para.22.

[74] *Gilfoy v. Kelloway* (2000) 184 NSR (2d) 226 (TD) at para.18. It should be noted that the fact that costs are fixed does not mean that the costs are to be paid *forthwith*.

81. It would appear that when costs are fixed in interlocutory matters, they are generally fixed in the range of $250 to $750, depending on the complexity of the issues and the length of the application.[75]

Tariff D – Disbursements

82. Unless the court orders otherwise, "a party entitled to costs ... is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs."[76]

83. A successful party who is awarded his or her taxable disbursements can look to Tariff D.

84. The overarching requirement is that the disbursement be reasonable and necessary. Since the number and types of disbursements which may be claimed are numerous, I have decided to highlight only some of the more commonly disputed items.

Technicalities: Matters of Proof

85. Strictly speaking, a claim for taxable disbursements "shall not be allowed unless the liability therefor is established

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[75] *Hi-Fi Novelty Co. v. NS (AG)* (1993) NSR (2d) 70 (TD) at para. 19. See also *McLaughlin v. Halifax-Dartmouth Bridge Commission* 122 NSR (2d) 310 (TD) where Goodfellow, J fixed costs of $450 for a chambers application that took no more than 1 hour; and involved no *vive voce* cross-examination.

[76] CPR 63.10A.

either by the solicitor conducting the matter, or by affidavit."[77] So, for example, a claim for book binding (as well as photocopying) was not allowed in the absence of an affidavit of proof, because in its absence the court could not determine whether the charge was reasonable and did not included an element of profit.[78]

Expert Fees

86. The fees of experts are governed by items 2(3), (4) and (13) of Tariff D. These provide that the disbursements which may be recovered from an opposite party include the "reasonable cost of" expert reports; the "reasonable fees" paid to an expert who gives evidence "up to $600 for each day examined," as well as "for each additional day authorized by the taxing officer;" and include "all other reasonable expenses necessarily incurred, when allowed by the taxing officer."

87. Accordingly, while there is a *prima facie* limit of $600 per day of examination, the taxing officer may allow additional days; or may allow a fee in excess of $600 if such additional expense was reasonable and necessarily incurred.[79]

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[77] CPR 63.30; and see *Wyatt v. Franklin* [1993] NSJ No. 624 (TD).

[78] *Halifax Shipyard Ltd v. MOTEU, Local 28* [1997] NSJ No. 242 (TD) at paras. 25-27.

[79] See *Landymore v. Hardy* (???) 126 NSR (2d) 205 [check cite].

88. So, for example, in *Elliott v. Nicholson*[80] a disbursement of $5,000 a day was allowed for a highly qualified medical expert as both reasonable and necessary.[81]

89. However, where the expert's report or evidence is of little or no relevance to the issues at trial the court is liable to allow only part of the claim;[82] or disallow it entirely.[83] *A fortiori,* the cost of an expert's report that pertained entirely to a portion of a claim that was dismissed (although the plaintiff was successful on other points) is not allowable either.[84]

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80 *Elliott v. Nicholson* (1999) 179 NSR (2d) 264 (TD).

81 Similarly, in *Cashen v. Donovan* (1999) 174 NSR (2d) 320 (TD) a useful actuarial report was permitted as a taxable disbursement of $5,971 where it was found to be useful.

82 In *MacNeil v. Borden* (Robertson, J, SN No.102488, 30 June 1999, NS Law News S446/19) the court allowed a disbursement of $3,100 (Cdn) plus travel expenses for a doctor whose evidence it did not find helpful, where the court accepted the successful party's claim that she had felt it necessary to call the doctor to give evidence. However, that the doctor's total bill was for $8,144 US. See also *Knox v. Interprovincial Engineering Ltd* (1993) 120 NSR (2d) 288 (TD) at 302.

83 *Osborne v. Osborne* (1994) 130 NSR (2d) 283 (TD); see also *Kelly v. Hadley* 138 NSR (2d) 272, where an actuarial report, which was found to have been of no benefit at all, was disallowed in its entirety as a taxable disbursement.

84 *Dedrick (Alden) Fisheries Ltd v. Legay Fibreglass* (1994) 134 NSR (2d) 264 (TD) at para.71.

90. Even where a court feels that the expert's evidence was not particularly helpful, it may still allow some part of the expert's fee as a disbursement.[85]

91. Having said that, the more likely response of a court to such a claim will be to disallow it.

Photocopying

92. Section 2(7) of Tariff D permits as a disbursement the "reasonable costs of copies of documents or authorities prepared for the use of the court and supplied to the opposite party." Not all photocopying fits this definition. Those which fall outside its scope must fall under s.2(13), which provides for reasonable expenses necessarily incurred.

93. It seems clear that claims for photocopying expenses are governed by several requirements:

    a. They must be reasonable;

    b. They must be in respect of documents supplied to the court *and* the other party; or

    c. They must be a "reasonable expense *necessarily* incurred."

94. It is also clear that it is a rare case in which *all* photocopying, or the charge for it, will satisfy these criteria.

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[85] See *MacNeil v. Borden*, *supra*, fn. 82.

For example, in *Balders Estate v. Nova Scotia*[86] the successful party sought photocopying at 25 cents a page for a total of $903.75, which translated into 3,600 pages. The trial judge thought this unreasonable and excessive, and reduced the claim by half to $452.

95. Indeed, the courts have on a number of occasions expressed the concern that some limit must be placed on photocopying. A charge of 50 cents a paged has been called "unreasonable."[87] The charge of 25 cents a page has been termed "more reasonable," but even that charge would in ordinary course "be subject to a 25% reduction to remove costs of overhead xeroxing that was done solely for the benefit of reporting to the client."[88]

Postage, Long Distance and Fax Charges

96. In evaluating taxable disbursements one has to distinguish between those costs incurred by the client directly or personally; and those incurred by his or her solicitor (and billed to the client). Only the latter are generally considered taxable, since an award of costs is primarily intended to

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86 [1999] NSJ No. 471 (TD).

87 *Osbourne v. Osbourne* (1994) 130 NSR (2d) 283 (TD) at p.290.

88 *Ibid*; see also *Knox v. Interprovincial Engineering Ltd* (1993) 120 NSR (2d) 288 (TD); *Wyatt v. Franklin* (1993) 123 NSR (2d) 347 (TD) at 351; and *Day v. Day* (1994) 129 NSR (2d) 186 (TD). In *Hudgins v. Danka Business Systems Ltd* [1998] NSJ No. 293 (TD), only 40% of the claimed photocopying charge was allowed as a disbursement.

indemnify a party for his or her legal costs, not their personal costs. So, for example, the travel costs of the party; or his or her long distance charges in talking to their lawyer, are not taxable disbursements. On the other hand, the long distance charges that the lawyer incurs and charges to the client *are* recoverable (if reasonable).[89]

97. A claim for postage and long distance charges ($21.30 and $4.86 respectively) has been allowed as "appropriate and reasonable."[90] In *Knox v. Interprovincial Engineering Ltd*[91] Justice Goodfellow noted that "[t]here has always been an allowance for postage of some kind," and that in his view the principle extended to faxes, at least insofar as the charges incurred are within the bounds of "reasonable" (as a charge of $70 was felt to be).

98. It should be noted, however, that not all long distance charges will be considered as a reasonable expense. For example, long distance charges between a client and her solicitor will not be allowed as a taxable disbursement, at least where "there are no circumstances indicated that

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89 *Allto-Imports A. Larson AB v. Fairbanks* [1991] NSJ No. 328 (CA).

90 *Wyatt v. Franklin* [1993] NSJ No. 230 at paras.70 and 87; see also *Gillespie v. Barter* [1994] NSJ No. 655 at para.16; and *Inrich Business Development Centre Ltd v. LeBlanc* [1997] NSJ No. 183 (TD). See also *Balders Estate v. Nova Scotia* [1999] NSJ No. 471 at para.28, where the long distance charges claimed (though not specified) were thought to be "reasonable and legitimate."

91 [1993] NSJ No. 103 (TD).

would make it appropriate" for a losing party to reimburse for that particular disbursement.[92]

99. The use of a fax machine has become almost a necessity in today's practice, and the reasonable cost of its use has been allowed as a recoverable disbursement.[93] However, and by analogy to the case of photocopying, one might question the charges one sometimes sees for faxes. Faxes in the "old days" were slow and cumbersome, and usually required personal attendance. Now they can be sent (or indeed received) directly from an assistants desktop computer. In such a case one is entitled to question whether a charge of, for example, 25 cents a page (or indeed a fax) is reasonable.

Computerized Legal Searches

100. There appears to be some disagreement in the caselaw as to the reasonableness of this disbursement. The disagreement seems to be over whether the charge is part of normal overhead (which is normally *not* taxable); or is a particular charge specific to the client's file (which may be taxable, if reasonable).

101. In *Keddy v. Western Regional Health Board* Oland, J (as she then was) was of the view that QuickLaw searches were reasonable "as this method of legal research is generally

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92 *Day v. Day* [1994] NSJ No. 112 at para.29, per Goodfellow, J.

93 *Knox v. Interprovincial Engineering* (1990) 120 NSR (2d) 288 (TD).

cost-effective;" but she only allowed $500 of the $700 claimed.[94]

102. On the other hand, in *Ellitt v. Nicholson* Hall, J was of the view that such charges, for work "that the lawyer would have to have done herself had the legal research service not been available;" it was "part of the lawyer's office overhead expense and thus not allowable."[95]

103. An argument can be made on both sides of the issue. Clients are not normally charged for library expenses, since they are part of the normal overhead which is reflected in the hourly rate charged to the client. If a law firm replaces its library with a computerized legal data base (or online research service) it is difficult to see why the client (or the unsuccessful party) should be billed for the charges associated with such services.

104. On the other hand, if there was something about the client's case that required access to specific legal materials not normally used by lawyers in a general litigation practice (for example, access to US or Australian law) then such a charge, which was specific to the client's case, might be a reasonable disbursement.

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94 *Keddy v. Western Regional Health Board* [1999] NSJ No. 464 (TD) at para.18.

95 *Elliott v. Nicholson* (1999) 179 NSR (2d) 264 (TD) at para.7.

HST

105. HST is payable by a client on both his or her legal fees; and on the disbursements incurred by his or her lawyer on their behalf.

106. A party *can* tax, as a disbursement, HST that was payable by him or her on a taxable disbursement. So, for example, if $5,000 on an expert report is allowed, HST on that $5,000 may also be awarded.[96]

107. The issue of whether the successful party is also entitled to recover the HST (or some portion of it) payable on *fees* has proved more contentious; and is not (at least in this author's view) entirely settled.

108. In *Landymore v. Hardy*, and again in *Armstrong v. Baker*, Saunders, J (as he then was) held that HST payable on fees could be claimed as a taxable disbursement, primarily on the grounds that since the client had to pay HST on his or her legal bills, HST was a "reasonable expense necessarily incurred" under s.2(13) of Tariff D..[97] However, in a series of decisions Goodfellow, J held that it could not be claimed, primarily on the grounds that since the costs awarded to a party belonged to the party they were not subject to HST by the government.[98]

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96 See, for example, *Keddy v. Western Regional Health Board* [1999] NSJ No. 464 at para.18.

97 (1992) 126 NSR (2d) 205 (TD) at paras.13-18.

98 See *Cardenas v. Clock Tower Hotel Limited Partnerships* (1993) 120 NSR (2d) 49; *Wyatt v. Franklin* (1993) 123 NSR (2d) 347 (TD); and *Day v. Day* (1994) 129 NSR (2d) 186 (TD).

109. A subsequent decision of the Court of Appeal[99] has been interpreted as coming down on the "not taxable" side of the argument.[100]

110. However, at the risk of being accused of tilting at windmills, I would like to submit that the Court of Appeal's decision in *Roose v. Hollett* ought not to be taken as the final word on the subject.

111. *Roose* involved a claim by an appellant that the trial judge had erred by not adding GST to the party and party costs which had been awarded at trial. Justice Flinn, who wrote the principal one of three decisions rendered in the Court of Appeal, indicated that it was not clear how the issue had arisen on appeal, since it had not been argued before the trial judge; indeed, costs had been agreed by the parties. However, he approved the decision of Goodfellow, J in *Day v. Day* on the issue.[101]

112. However, it is noted that the HST award which had been attacked was HST *in respect of the party and party award.* It was not HST that had been paid by the party from time to time on his or her legal fees.

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99 Being *Roose v. Hollett* (1996) 154 NSR (2d) 161 (CA).

100 See the comments of Oland, J (as she then was) in *Keddy v. Western Regional Health Board* [1999] NSJ No. 464 at para.18; and Saunders, J in *MacDonnell v. M & M Developments Ltd* (1997) 164 NSR (2d) 81 (TD) at para.99.

101 See *Roose v. Hollett* 1996) 154 NSR (2d) 161 (CA), per Flinn, JA at paras.195-99.

113. It is conceded that since HST is not payable on a party and party award it ought not to be awarded as a disbursement *in respect of that award* since the party is not under an obligation to pay it. However, that reasoning may not apply in respect of HST *which has been paid* on the legal fees of the client during the course of the proceeding. Since such HST *has* been paid (and since indeed the client *is* under compulsion to pay it), it is submitted that the decision in *Roose v. Hollett* ought not to be taken as determinative as to whether HST paid on legal accounts can be obtained as a taxable disbursement on a taxation.

Travel Time of the Successful Party's Solicitor

114. It has been held that the successful party is responsible for placing "his solicitor at the place of trial and that travel for this purpose was not a proper disbursement on a party and party bill."[102]

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[102] *Fraser v. Wilson's Fuel Co* [1978] NSJ No. 33 (Co Ct), per McLellan, Co Ct J. at para.12

PART II: THE TAXATION OF SOLICITOR AND CLIENT COSTS

115. It may come as no surprise to learn that clients are not always prepared to pay the accounts that are rendered to them by their solicitors. A solicitor faced with such a client must have his or her account "taxed" or assessed before he or she can obtain judgment.

Who Assesses (or "Taxes") a Solicitors' Account?

116. In response to various recommendations made by committees of the bar and bench, the Legislature enacted significant changes to the ***Barristers and Solicitors Act*** ("BSA")[103] and the ***Small Claims Court Act*** ("SCCA")[104] the design and intent of which were to enlarge and rationalize the system of taxation in Nova Scotia. The system had already been changed to some extent by changes to the BSA and SCCA in 1999.[105] The more recent changes came into effect on November 30, 2000.[106]

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103 RSNS 1989, c.30, as amended.

104 RSNS 1989, c.430, as amended.

105 For example, by the grant of the jurisdiction to tax a legal account, under s.42 of the BSA, by virtue of the amendments contained in s.3 of the *Justice Administration Amendment (1999) Act*, SNS 1999 (2nd session), c.8 (the "*Reform 1991 Act*"). However, the latter Act had not made all of the changes necessary to give procedural effect to this extension of the adjudicator's jurisdiction.

106 Being the date the ***Justice and Administration Reform (2000) Act***, SNS 2000, c.28 (the *Reform 2000 Act*") came into effect.

117. These changes can be summarized as follows:

a. *Any* bill for fees, costs, charges or disbursements may be taxed by an adjudicator of the SCCNS;[107] or by a judge of the Supreme Court of Nova Scotia;

b. An adjudicator has "all the powers that were exercised by taxing masters" appointed under the *Taxing Masters Act* before the repeal of that Act,[108] and in particular may carry out "any taxation of fees, costs, charges or disbursements" that a taxing master had jurisdiction to perform pursuant to *any* enactment or rule;[109]

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107 Section 42, *BSA*, as amended by s.3 of the *Justice Administration Amendment (1999) Act*, SNS 1999 (2nd session), c.8 ("*Reform 1991 Act*"), and by s.11 of the *Justice and Administration Reform (2000) Act*, SNS 2000, c.28 ("*Reform 2000 Act*"). These changes had the effect of reversing the decision in _____, in which MacAdam, J had held that adjudicators of the SCCNS lacked the jurisdiction (under the legislation *then* existing) to tax solicitor's accounts.

108 The *Taxing Masters Act* was repealed by s.97 of the *Reform 2000 Act*. Following that Act's repeal, anyone holding appointments under the Act were appointed adjudicators of the SCCNS "only for the purpose of conducting taxations of bills for fees, costs, charges or disbursements pursuant to the *Barristers and Solicitors Act*: s.98, *Reform 2000 Act*.

109 Section 9A(1) of the *SCCA*, as enacted by s.92 of the *Reform 2000 Act*.

c. An adjudicator may tax an account for an amount *greater than* the monetary limit on the small claims' court's jurisdiction (currently $10,000);[110]

d. However, an adjudicator may not grant judgment on an account greater than $10,000; he or she may grant judgment only in respect of accounts which are within the small claims court's monetary jurisdiction;

e. Where any question arises as to "the amount *or reasonableness*" of a lawyer's fees, costs, charges or disbursements arises in any action in which the lawyer is a party, a judge may order that the fees, costs, charges or disbursements be taxed before an adjudicator;[111] and

f. A certificate issued by an adjudicator after a taxation before him or her "shall be binding on the parties."[112]

118. These more recent changes represent the Legislature's response to the decision of Justice MacAdam in *Carruth v. Singleton Murphy*.[113] In that case His Lordship had held that absent changes to the BSA, or other applicable legislation,

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110 Section 9A(2) of the *SCCA* as amended by s.92 of the *Reform 2000 Act*.

111 Section 47, *BSA*, as amended by s.12(a)-(c) of the *Reform 2000 Act*.

112 Section 48, *BSA*, as amended by s.14 of the *Reform 2000 Act*.

113 (1998) 169 NSR (2d) 170 (TD).

adjudicators of the Small Claims Court did not have the power or jurisdiction to tax legal accounts.

Rules, Legislation and Principles Governing Taxations of Solicitors' Accounts

119. The common law, legislation and practice all make clear that a solicitor not entitled to *any* fee, cost, charge or disbursement. Rather, he or she is only entitled to "*reasonable and lawful*" fees, costs, charges and disbursements.[114] This provision merely codifies the common law position, for as noted by Haliburton, Co. Ct. J. (as he then was), "[w]hile tradesmen such as plumbers or carpenters may be entitled to be paid in accordance with the terms of their employment, a lawyer's right to be paid is subject to judicial review."[115]

120. The "reasonableness" of the fee, cost, charge or disbursement is to be determined "having regard to:

a. The nature, importance and urgency of the matters involved;

b. The circumstances and interest of the person by whom the costs are payable;

c. The fund out of which they are payable;

d. The general conduct and costs of the proceeding;

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114 BSA, s.41; emphasis added.

115 *Llewellyn v. Cook* [1991] NSJ No. 665 (Co. Ct.), per Haliburton, Co. Ct. J at para.5.

e. The skill, labour and responsibility involved; and

f. All other circumstances, including the contingencies involved.[116]

121. In *Cohen v. Kealey & Blaney*, the court noted that the considerations "normally applicable" to the taxation of a solicitor's account included "the time expended by the solicitor, the legal complexity of the matters to be dealt with, the degree of responsibility assumed by the solicitor, the monetary value of the matters in issue, the importance of the matter to the client, the degree of skill and competence demonstrated by the solicitor, the results achieved, the ability of the client to pay and the client's expectation as to the amount of the fee."[117]

122. The Court of Appeal in *Lindsay v. Stewart, MacKeen & Covert*[118] is an important summary of the applicable principles, in part because it appears to have been self-consciously intended to serve as a guide for solicitors and the public.[119] The Court set out a number of principles that should govern the taxation of a solicitor's bill, as follows:

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116 CPR 63.16(1).

117 [1985] OJ No. 160 (CA)

118 [1988] NSJ No. 9 (CA).

119 Justice Jones at p.7 noted that there were "few decisions in this province setting out the principles applicable to the taxation of solicitor and client costs," and then went on to discuss the law in other provinces as well as Nova Scotia.

a. The provisions of CPR 63.16(1) and s.42 and s.43 of the *BSA* were "primarily for the protection of the client and must be enforced;"

b. Such protection is not ensured by a "cursory examination" of the solicitor's bill;

c. The "ultimate test" in all cases, even where there is an express agreement regarding the basis of remuneration, is whether the account is "reasonable;" and

d. Any suggestion that a lawyer "may charge what the traffic will bear is contrary" to that principle.[120]

123. The incorporation of these principles means that a taxing officer's assessment is not restricted to determining whether the work billed was actually performed. He or she may also consider "the fruits of professional labour as it relates to the benefit achieved by the client."[121]

124. Having said that, it should also be noted that a client is not entitled to "perfection" from his or her lawyer. A taxing

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120 *Ibid.*

121 *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD), per Goodfellow, J at para.23. The case involved an expropriation matter that eventually resulted in an "award" of $20,000 to the property owner. The property owner's solicitor submitted an account for $19,400, which the taxing officer reduced to $14,000. Justice Goodfellow stated that the taxing officer was "not in error in stating that as a generalization, legal charges must bear some reasonable relationship to the value of the matter in issue:" para.24.

master ought not to measure and examine each individual step taken with the benefit of hindsight, since that would be to measure the steps taken against a scale of perfection. "The test is whether the acts [of the solicitor] were reasonable in the circumstances at the time they were done."[122]

The Existence of a Written "Agreement" Respecting the Lawyer's Retainer

125. The courts have stressed on innumerable occasions the importance of a written agreement (or at least record) of the scope of the lawyer's retainer and his or her expected remuneration. Such agreements do not and cannot oust the jurisdiction of the court to vary, reduce or disallow a bill;[123] but they do provide an important justification for the fee or cost that is being taxed.

126. Moreover, in the absence of any such *written* agreement or record the burden will be on the lawyer to establish the scope of his or her retainer and the basis for remuneration; and where there is a conflict in the evidence "weight must be given to the version advanced by the client rather than that of the lawyer."[124]

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122 *MacLean v. Van Uninen* [1994] NSJ No. 206 (TD), per Grant, J at para.32.

123 CPR 63.16(2).

124 *Ross, Barret & Scott v. Simanic* [1997] NSJ No. 357 (TD), per Moir, J at para.25; see also *MacGill & Grant v. Chin Yow You* 19 BCLR 241 (BCCA), cited in *Lindsay, supra.*, at p.7. This rule does not mean that the lawyer's version "never prevails;" but it does mean that the onus is on the lawyer to

Fee Estimates

127. The lawyer's duty to keep his or her client adequately advised as to the projected and actual fees brings with it a duty to provide reasonably accurate, and timely, estimates of the fees to be charged. A lawyer "is obliged to advise the client without delay of any developments that are likely to increase the fee beyond the estimate."[125] Lawyers are not bound by their estimates, but they cannot ignore them; their estimates will be considered by the taxing officer in determining whether an account is "reasonable."[126] A lawyer who fails to warn his or her client that the fees are

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establish that the client's version is, for whatever reason, mistaken: *Ross, Barret, ibid.*, per Moir, J at para.28.

125 *Cohen v. Kealey & Blaney* [1985] OJ No. 160 (CA), per Robins, JA at p.3.

126 *Re Cogen and Irving Weisdorf & Co Ltd* (1984) 28 ACWS (2d) 153 (Ont SC, Taxing Officer). In *Re Meagher, Shaw and* Kirsch (1981) 12 ACWS (2d) 288 (Ont SC, Taxing Officer) a law firm estimated that two property transactions would cost $500 if uncomplicated. In the end two lawyers submitted two accounts, totalling $4,040. While the transactions ended up being a little more complicated than anticipated, the client was entitled to be warned, especially when the fee surpassed the estimate by a substantial amount. The account was reduced to $1,600. See also *Atlantic Nurseries Ltd v. McInnes Cooper & Robertson* [1991] NSJ No. 190 (TD), per Roscoe, J (as she then was) at p.5.

surpassing the estimate risks a substantial reduction of their account.[127]

Time Dockets

128. A lawyer should keep accurate and detailed records of the services provided and the time required for such services. This statement in the caselaw comes close to being a rule of law, and applies "[n]o matter what the fee arrangements, contingency, flat fee, [or] hourly service charge."[128] The account "must disclose in detail the name of each person who rendered services, the dates on which those services were rendered, the time expended each day, the rate charged, and the total charge for each item of services actually rendered."[129]

129. The account details, and the supporting time dockets (if there are any), must be sufficiently "identified to the client so the bill can be intelligently appraised by the client and/or

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127 For example, in *Atlantic Nurseries, ibid.*, the solicitor had estimated the cost of an appeal to be in the range of $10,000; it ended up costing in the range of $33,000. When the client complained, the solicitor reduced his bill to $25,000. The client still complained and the solicitor had his account taxed. The taxing officer taxed the account at that amount, but on appeal Roscoe, J (as she then was) reduced the account to $15,000.

128 *Binder v. Murrant* [2001] NSJ No. 251 (TD) at paras.17-18.

129 *The Toronto-Dominion Bank v. Park Foods Limited* (unreported, 1986, SH No.55800), per Nathanson, J at p.2, cited in *Lindsay v. Stewart, MacKeen & Covert* at p.10.

someone on his or her behalf to determine if they are fair and reasonable."[130]

130. Indeed, there is some suggestion that to conduct a taxation without billing records of some kind would be to deny natural justice to the client.[131]

131. Dockets do not by themselves alone justify an account; they should be supported by evidence from the solicitor of record. Law firms who tax accounts without presenting the lawyer who docketed the time may fail to satisfy the enquiry that is required under CPR 63.16(1);[132] and in such a case the account may be reduced even where there are supporting dockets for the time.[133]

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130 *Re Toulany*, per Grant, J at p.4. See also *Binder v. Murrant* [2001] NSJ No. 251 (TD), Schedule "A".

131 See the comments of Justice Goodfellow in the first taxation appeal in *Binder v. Murrant*, which appears as Schedule "A" to *Binder v. Murrant* [2001] NSJ No. 251 (TD). The comment is significant, because a denial of natural justice is a ground of appeal from the decision of a taxing officer; for which see the decision respecting appeals, below.

132 For example, in *Fraser Beatty v. Banting* (1991) 29 ACWS (3d) 920 (Ont Assessment Officer), only the solicitor of record attended the taxation. The client was not able to cross-examine the work of other lawyers in the firm who had done work on the file, which resulted in a reduction of the account of $8,000 by $2,220.

133 See, for example, *Roebuck, Garbig v. Albert* (1992) 33 ACWS (2d) 1021 (Ont Assessment Officer), where an account of $44,105 was reduced by $8,000 because the firm only presented the lawyer's dockets on the taxation. This principle applies even in the case of the taxation of a solicitor-and-own-

132. This is not to say that the absence of time dockets, or other form of computerized time records, will in and of itself justify the reduction of a solicitor's account. "There are many ways to record time expended on a file," and as long as some form of *accurate* accounting is kept, whether by computerized time docket or written notes in the file, the solicitor's obligations in this regard will have been met.[134]

133. However, where the failure to keep time dockets forced the court to retain an independent expert to provide it with evidence as to what the bill ought to be, the cost of that expert must be borne by the solicitor.[135]

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client taxation of costs, where an account of $15,000 was reduced to $8,250 in a case where the matter was not complex and the counsel spent excessive time in preparation: see *Re Mark and Mark* (1981) 8 ACWS (2d) 495 (Ont SC, Taxing Officer).

134 *Goodman MacDonald Patterson v. Fraser (Guardian of)* [1998] NSJ No. 350 (TD), per Scanlon, J at para.3.

135 *Boyne Clark v. Noftell (Guardian ad litem of)* [1994] NSJ No. 604 (TD) at paras.46-51. The law firm had not kept time dockets, or any other form of account, because the matter had been taken on a contingency agreement. Justice Grant strongly disapproved of this practice, stating that in his view "there was a duty on the solicitors to have an account which they could present to the court in a form which the court could readily analyze:" see para.46.

134. There is no requirement that a taxing officer review every individual item on an account, at least in a case where he or she accepts that the work was done.[136]

Erroneous Accounts

135. A solicitor who submits an account cannot, once the client requests taxation, submit a new and higher account, absent some mathematical slip or error, or absent some "exceptional circumstances."[137] The fact that the solicitor practices on his own, or has been under stress, does not constitute such an exceptional circumstance.[138]

136. One suspects that the concern here in part is to prevent solicitors from attempting to discourage their clients from requesting a taxation of their fee account by submitting a higher account on that taxation.[139]

Excessive Preparation, or Worthless Work

137. CPR 63.33(1) provides that the taxing officer "*shall not allow* the costs of any proceedings:

a. Unnecessarily taken;

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136 *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD) at para.25.

137 *Binder v. Murrant* [2001] NSJ No. 251 (TD) at para.4.

138 *Ibid.*, at para.5.

139 See, for example, *Re Solicitor* (1977) 22 NSR (2d) 168 (TD), per Cowan, CJTD at p.177, paras.12-13.

b. Not calculated to advance the interests of the party on whose behalf the proceedings were taken;

c. Incurred through overcaution or mistake;

d. That do not appear to have been necessary or proper for the attainment of justice or defending the rights of the party.

138. This rule, as well as longstanding caselaw, requires the taxing officer to determine not just whether the work was done; but whether it should have been done – and hence whether it is "reasonable" for the solicitor to seek payment for it.

139. If the taxing officer is satisfied that too much time has been spent on a file the account may be reduced.[140] A taxing officer is entitled to consider whether the issues warrant the amount of time spent on them. For example, a charge of more than 100 hours to research the law respecting an issue (*to wit*, summary judgment applications) that is "completely uncomplicated" and found in three decisions of the Court of Appeal will not be accepted as "reasonable" on a taxation.[141] Similarly, a solicitor who spent "an extensive amount of time briefing damages before receiving a final

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140 See *Roebuck, Garbig v. Albert* (1992) 33 ACWS (2nd) 1021 (Ont Assessment Officer), where $3,500 was deducted from an account for excessive preparation; see also CPR 63.16(1)(d) and (e).

141 *Canada Trustco Mortgage Co. v. Homburg* [1999] NSJ No. 382 (TD) at paras.17-18, where an account of $69,515 was reduced to $40,000.

medical report in an accident case would likely have a difficult time justifying such a position."[142]

140. An account that demonstrates that a large number of lawyers, law clerks or students have worked on it will be closely scrutinized to ensure that the client is not being billed for duplicitous work.[143]

141. As well, the solicitor's account may be reduced where he or she pursues a course of action that is not only of no benefit to the client, but may even be harmful to her case.[144]

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142 *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD), per Goodfellow, J at para.22.

143 See, for e.g., *Canada Trustco Mortgage Co v. Homburg* [1999] NSJ No. 382 (TD), where Davison, J noted, as a factor in his decision to reduce an account from $69,515 to $40,000, the fact that "there was an abundance of staff working on this file," including a total of nine lawyers; four of whom engaged in research on summary judgment applications: see para.16.

144 *Carruth v. Singleton Murphy* 1998] NSJ No. 163 (TD) at paras.15-18. Strictly speaking, given the decision in *Carruth* that the small claims court adjudicator lacked jurisdiction to tax the solicitor's account, the decision may be *obiter* on this point. However, the issue was raised before Justice MacAdam, and His Lordship was at pains to emphasize that the adjudicator's only error was in assuming jurisdiction; and that her findings on the taxation did not amount to an error of law: see para.18.

Overhead

142. It has been said that a solicitor is not entitled "to make an additional charge to the client, over and above the solicitor's normal charges, for items which properly form part of office overhead."[145]

143. The line between overhead (which is not billable) and work which replaces (at a lesser rate) work normally done by a solicitor is difficult to determine. One measure might be to ask oneself what the division would have been between a lawyer and an assistant in a sole practioner's office. If the work is traditionally work that would have been done by a lawyer it may be charged out; if, on the other hand, it is work that would ordinarily have been done by his or her assistant, it is overhead and cannot be billed out.

144. So, for example, word processing charges may be disallowed as being part of normal overhead.[146] Similarly, work that is done by the lawyer's secretary; or which ought to have been done by him or her, may not be charged to the client.[147]

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[145] Mark Orkin, *The Law of Costs* (Toronto, 2nd ed., 2000), §311.12.

[146] *Shrum Liddle & Hebenton v. Seagull Ventures* Inc (1990) 19 ACWS (3d) 132 (BCSC Master); *Goodman and Carr v. Tempra Management Ltd* (1991) 25 ACWS (3d) 169 (Ont Assessment Officer).

[147] *Blaier & Albert v. Iuglio* (1992) 35 ACWS (3d) 772 (Ont Assessment Officer), where an account of $7,052 was reduced to $3,302 for this and other reasons; and see *Goodman and Carr v. Tempra Management Ltd* (1991) 25 ACWS (2d) 169 (Ont TO) to the same effect. See also *Re Brookes and*

Law Clerks, Students and Junior Associates

145. The time of a law clerk or student may be charged as a separate fee *if* that clerk or student has "the brains or experience, or both, to successfully undertake certain services normally or traditionally performed by solicitors."[148] On the other hand, a client should not be required to pay for the learning experience of a junior.[149] Similarly, work that could have been done by a solicitor's secretary may not be charged to the client.[150] The test is simply whether the charge for their time is "fair and reasonable and stand the test of taxation, if requested."[151]

Alpine Foods Ltd (1982) 14 ACWS (2d) 457 (TO), where taxing master stated that the cost of a secretary was solicitor's overhead and a charge for her time could not be charged to the client; and see *Shrum Liddle & Hebenton v. Seagull Ventures Inc* (1990) 19 ACWS (3d) 132 (BCSC), where word processing charges were dis-allowed.

148 *Re Solicitors* (1971) 3 OR 470 at p.473, cited in *Re Toulany* [1989] NSJ No. 99 (TD) at p.3.

149 *Goodman and Carr v. Tempra Management Ltd* (1991) 25 ACWS (3d) 169 (Ont Assessment Officer).

150 *Blaier & Albert v. Iuglio* (1992) 35 ACWS (3d) 772 (Ont Assessment Officer), where an account of $7,052 was reduced to $3,302 for this and other reasons.

151 *Re Toulany*, at p.4.

The Ultimate Value or Benefit of the Work to the Client

146. Solicitors, as professionals, must accept that their accounts, regardless of the amount of time expended, will be measured in part by the ultimate value or benefit of that work to the client. A matter that is worth $20,000 to the client may not support an account of $19,000, even where all the work billed was done.[152]

Persons Under a Disability

147. A solicitor should expect that his or her account will *and should be* taxed by the court.[153]

Taxation of Accounts Which Have Already Been Paid

148. Section 42 of the *BSA* "confers the widest possible right on a client to have a bill taxed in Nova Scotia," and a client is not deprived of that right "simply because he has made payments on account."[154] A lawyer who attends a taxation should be prepared to justify not only the account in issue, but *all* the client's accounts (at least with respect to the matter for he or she was retained).

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152 *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD) at paras.22-23.

153 *Boyne Clark v. Noftell (Guardian ad litem of)* [1994] NSJ No. 604 (TD) at paras.11-12.

154 *Lindsay v. Stewart, MacKeen & Covert*, per Jones, JA at p.6.

The Taxation of Costs on a Solicitor and Client Basis

149. Taxations of "solicitor and client" costs may arise in one of two ways.

150. First, a solicitor's account may be taxed in the context of the solicitor and client relationship itself. That is, either the solicitor or the client requests the former's account to be taxed.

151. Second, a solicitor and client account may be taxed because some person other than the client is required to pay it. The most common example of this situation occurs when an unsuccessful party litigant is ordered to pay the successful party's costs on a "solicitor and client" basis.

152. The question which then arises is this: are both accounts subject to the same approach on a taxation? Or should there be a difference and, in particular, should the losing party be expected to pay *all* of the successful party's solicitor and client costs?

153. On balance, the answer is that there should be *no* difference. As noted by Goodfellow, J in *Halifax Regional Municipality v. Joudrey,*[155] "[a]n award of solicitor and client costs is not a determination that the responsible party pays **whatever** the solicitor and client costs bill happens to be." To put it another way, a person who has the benefit of such an order is to receive from the party against whom the order is made "payment for all costs relating to the

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[155] *HRM v. Joudrey* (Goodfellow, J; released December 10, 2001; 2001 NSSC 185) at para.14. emphasis in original.

litigation that ... [the former's] solicitor could properly ... [have asked him or her] to pay:"[156]

154. Accordingly, a party who has been ordered to pay another party's solicitor and client costs is entitled to raise any objection that that party could have raised to the "reasonableness" of the charges on a taxation. Hence a taxing officer (whether a small claims court adjudicator or a supreme court judge) is obligated to tax a solicitor and client costs costs award as though a client were the one resisting the bill.[157]

155. There are of course certain distinctions between a client who undergoes a solicitor and client taxation, and a party who has been ordered to pay another party's solicitor and client costs. One such distinction occurs with respect to charges in respect of unreasonable steps that a client insisted be taken. In such a case, the resulting charges might be "reasonable" if the client was the one expected to pay; but not if the other party were expected to pay.[158] Similarly, a party charged with another's solicitor and client costs cannot be expected to pay in respect of costs and disbursements incurred *before* the action in which the order is made is commenced.[159]

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156 *Mintz v. Mintz* (1983) 43 OR (2d) 789 (HCJ), per Trainor, J.

157 *Harwood v. Harwood* [1998] AJ No. 217 (Taxing Officer); aff'd [1998] AJ No. 296 (QB).

158 *Magee v. Trustees RCSS Ottawa* (1962) 32 DLR (2d) 162 (Ont HC), per McRuer, CJHC at pp.165.66.

159 See *Gordon's Law of Costs* (1884) at pp.187-88, cited in *Magee, ibid.*, at p.163.

156. On balance, it appears that the answer is to be found in the facts of each particular case, and whether the account, based on the circumstances of the case, is "reasonable and lawful." What is "reasonable" in a particular case will depend on the facts of the case. It may be "reasonable" to permit a solicitor to charge a client who insists (against the solicitor's advice) on a course of conduct which is likely (in the solicitor's view) to be unsuccessful; but highly "unreasonable" to force the unsuccessful party to pay for such time. Indeed, permitting such charges could lead to oppressive conduct on the part of the successful party.

CONTINGENCY FEE AGREEMENTS

157. The fact that a solicitor and client have a contingency fee agreement does not prevent or bar a court, on application of the client or the solicitor, from taxing that account. Nor does it prevent the court from assessing whether the overall fee, as calculated by the agreement, is reasonable.[160]

Procedural Requirements

158. Courts will tend to scrutinize contingency fee agreements carefully. An ambiguities will be construed in favour of the client. For example, a contingency agreement which failed to satisfy four of the six requirements spelled out under CPR 63.18(2) was held not to be a valid contingency

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[160] See, for example, *Oatway v. Bannister* [1988] NSJ No. 458 (TD), where the court concluded that a contingency fee of $141,643 on a settlement of $30,000 cash and $70,000 structured was unreasonable.

agreement, which threw the solicitors back onto a "normal" taxation under CPR 63.19(2).[161]

159. Similarly, failure to file the contingency fee agreement with the Prothonotary (as required by CPR 63.19(1)) means that the solicitor will be entitled only to "the compensation as would have been payable in the absence of any contingency agreement *and without regard to the contingency.*"[162]

160. A contingency fee agreement may also be set aside (or ignored) if the court feels that the agreement was entered into at a time when the solicitor and the client lacked enough information to be able to determine whether a contingency; or the proposed contingency percentage; was reasonable.[163]

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161 *Boyne Clark v. Noftell (Guardian ad litem of)* [1994] NSJ No. 604 (TD) at paras.16-17. The firm's account of $171,800 (which appears to have represented roughly 25% of the proposed settlement) was reduced to $120,000, after an independent expert (hired by the court and charged to the law firm's account) concluded that on a *quantum meruit* basis the fee should have been $120,000.

162 CPR 63.19(2); and see *Costello (Guardian of)v. MacKenzie* [1997] NSJ No. 32 (TD), where the contingency fee agreement was ignored because it had not been filed.

163 *Re Usipuik v. Jensen, Mitchell & Co* (1986) 39 ACWS (2d) 265 (BCSC). And see *Raphael Partners v. Lam* (2001) 55 OR (3d) 289 (SCJ), discussed at para.164 below.

Where the Client Terminates the Retainer Before the Matter is Concluded

161. Regardless of the provisions of the agreement, a client who terminates his or her lawyer's retainer is entitled to receive from the lawyer a bill of costs (or account) and all justifying information so that the client can move to have the bill taxed. The lawyer is not entitled to insist that the taxation be postponed until the matter reaches a conclusion with the new lawyer "unless the just fee cannot be determined without knowing the outcome."[164] On the other hand, *liability to pay* any such account following taxation may be postponed until the matter is resolved; indeed, a provision that required payment upon discharge would be contrary to CPR 63.22(2) and 63.22(6).[165]

Particular Terms in Contingency Agreements (and Whether They are Valid)

162. As noted above, provisions in a contingency agreement that:

a. Purport to waive the right to a taxation of the account; or

b. Require immediate payment of the account upon the discharge of the solicitor,

are not valid and will not be enforced by the court.

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164 *Evans v. Richey* [2000] NSJ No. 2000 (TD), per Moir, J at para.7.

165 *Ibid.*, at para.3.

163. Contingency agreements may provide for a higher percentage return when the matter proceeds to action (*i.e.*, when a statement of claim is issued). However, where the action is commenced simply to enable the solicitor to apply for court approval of a settlement he or she should "not count on the extra fees which commencing an action may trigger under the agreement."[166]

"Fair and Reasonable"

164. Where a contingency fee is supposed to represent the *maximum* that a client may be expected to pay, it is neither fair nor reasonable to expect the client to pay the maximum where the matter settles after mediation.[167] Where a client in a catastrophic injury case settles a claim for a total of $2.5 million, it is unreasonable to charge him $417,000 in respect of fees. This is the maximum that the solicitor could have expected to receive after trial and all appeals; to permit it where the matter settles before trial is not reasonable. Here the solicitors were allowed $250,000 (which represented a premium over the docketed time of almost $97,000).[168]

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166 *Boyne Clarke v. Noftell (Guardian ad litem of)* [1994] NSJ No. 604 (TD), per Grant, J at para.20.

167 *Raphael Partners v. Lam* (2001) 55 OR (3d) 289 (SCJ).

168 *Ibid.*

APPEALS FROM TAXATION

165. Appeals are not re-taxations. An appellant must show that the taxing officer has fallen into error, as by operating under a wrong principle, before the Court will interfere.[169]

166. A denial of natural justice, as when the taxing master makes his or her mind up before hearing from the solicitor, is a reviewable error.[170] Similarly, a taxing officer who hears from one side without permitting the other to make representations commits a denial of natural justice giving rise to a right of appeal.[171]

167. The allowance of a "highly unreasonable" fee by a taxing master "may itself be evidence of the exercise of a wrong principle."[172]

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169 *O'Connell v. Romney* 111 NSR (2d) 268 (CA); *Cape Breton Landowners v. Nova Scotia Forest Industries* (1983) (2d) 193 (CA) at pp.197-98.

170 *Goodman MacDonald Patterson v. Fraser (Guardian of)* [1998] NSJ No. 350 (TD) at para.2.

171 *Walker, Dunlop v. Connolly* [1995] NSJ No. 530 (TD) at paras.14-17.

172 *Re Isner* [1989] NSJ No. 415 (TD), per Tidman, J at p.3; 99 NSR (2d) 281.