

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Burchell MacDougall LLP v. Nicholson. 2016 NSSM 49

BETWEEN:

BURCHELL MacDOUGALL LLP

Claimant

- and -

ERINN MICHEL NICHOLSON

Defendant

AMENDED REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on July 26, 2016

Decision rendered on August 22, 2016, amended August 30, 2016 (see para 9)

APPEARANCES

For the Claimant

Judy Schoen

For the Defendant

self-represented

BY THE COURT:

[1] This matter was commenced as a regular claim for an outstanding balance owing on an account for legal services. The claim was defended on the basis that the client believes she has been unreasonably overcharged.

[2] Under such circumstances, I propose to treat the matter as if it were a taxation commenced under the *Small Claims Court Taxation of Costs Regulations*. Exercising my powers as a taxing master, I have a duty to determine whether the account is reasonable, applying all of the factors that taxing masters commonly consider. These principles derive from a number of sources, including the Nova Scotia Civil Procedure Rules, the Code of Professional Conduct of the Nova Scotia Barristers Society, and the common law both in Nova Scotia and elsewhere in Canada. I have distilled those principles to the following non-exhaustive and occasionally redundant list:

- a. A lawyer's fees must be fair and reasonable. This is an overriding principle.
- b. The onus of proving reasonableness rests with the lawyer, regardless of who initiates the taxation.
- c. The fairness and reasonableness of an account must be assessed in light of all of the relevant circumstances, including (as set out in Civil Procedure Rule 77.13):
 - (a) counsel's efforts to secure speed and avoid expense for the client;
 - (b) the nature, importance, and urgency of the case;
 - (c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;

- (d) the general conduct and expense of the proceeding;
 - (e) the skill, labour, and responsibility involved;
 - (f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.
- d. The taxation may disallow fees charged for proceedings taken that were unnecessary (such as by overcaution or merely error);
 - e. Fees may be disallowed if, objectively speaking, too much time was spent on any particular step, or overall, which reflects poorly on the lawyer's skill;
 - f. The results achieved may be considered, but in some instances may be totally irrelevant;
 - g. The client's ability to pay may be relevant;
 - h. The client's expectations may carry some weight, for example where the lawyer's fees significantly exceed an estimate given;
 - i. The degree of skill demonstrated may, in some cases, be important, though the lawyer may not have had to exercise all of his or her skills to achieve the result.

[3] The Defendant (who I shall hereafter refer to as the "client") was in the early stages of a marital separation in March 2016 and was looking for legal counsel. She consulted, and eventually retained, Judy Schoen of the Claimant firm (hereafter sometimes referred to as the "lawyer.")

[4] There was real urgency for the client in that she and her husband were still both residing in the matrimonial home, and the atmosphere was tense. The client instructed the lawyer to seek exclusive possession of the home, along with other relief relating to the parties' young child. There was a flurry of activity early on in

the retainer, as documents needed to be drafted and filed for court. The lawyer testified that this particular client required a lot of communication, which occupied more time than might otherwise have been the case. She also described this particular file as “high energy,” which suggests that a lot of things had to be done and accomplished in a short time.

[5] In the middle of all this, the client and her husband bypassed their lawyers and negotiated an interim agreement that was drafted by the husband’s lawyer. By then, an interim hearing in court had been scheduled. Ms. Schoen reviewed the agreement and thought it was a reasonable solution to the parties’ immediate needs, though it was ambiguous on a fairly key issue. Because the parties were still in the same home, the father got to spend time with the child including taking responsibility for him some overnights, which was OK with the client because she was also in the home. Part of the agreement was that the matrimonial home would be sold, and it was unclear whether the father would continue to have the child overnight once the parties were in different residences. The client wanted the agreement to be revisited once the home was sold, as she intended to resist overnights for the child with the father. The father and his lawyer’s position were different.

[6] The parties agreed to go forward with the interim hearing and ask the judge to decide that one point; i.e. whether the sale of the house should trigger a review of the overnight provision. Ms. Schoen believed that the language already in the agreement supported her view. That was the advice she gave to the client: that they had a good chance of having the judge endorse their interpretation.

[7] On the 19th of May 2016, the parties put their positions before a Judge of the Supreme Court, Family Division, who unfortunately for the client agreed with the position argued by her husband's counsel.

[8] By then, the client was losing faith in the lawyer. Apart from the fact that she did not get what she wanted in court, the client had other grievances about the lawyer. She testified that she felt that the lawyer was perhaps "too fiery" in the beginning, and may have spent too much time responding to correspondence from the lawyer for her ex-husband.

[9] She was also troubled by the way things turned out in connection to two short trips to Ontario that she took with the child. The lawyer advised her that the other party's consent was not technically necessary to take the child out of Nova Scotia, but that it would be wise to provide the father with her itinerary. On one or both occasions, the lawyer advised her "just to go" without seeking any form of advance consent, but the father's reaction was extreme and apparently created more conflict and cost than was perhaps anticipated.¹ The client feels that her lawyer was wrong to have so advised her. The lawyer's testimony on this was that the husband's reaction was exaggerated, and unanticipated.

[10] The client also complained that the lawyer was not always available when she needed her. The lawyer's answer was that she has a busy practice and cannot answer every call, but that she always returned her messages promptly.

¹This paragraph has been altered from the original, to correct some factual errors pointed out after the fact by Ms. Schoen. These changes do not affect the result.

[11] The client also complained that the lawyer did not always send her draft correspondence to be vetted before being sent out. The lawyer said that there were times when it was urgent to get out a piece of correspondence and there was no time to run it by the client. There were no specific examples cited where any correspondence contained errors or was ill-advised.

[12] The client also complained that she showed up for a meeting once, only to be told that there was a mix-up and there was no actual meeting required. The lawyer conceded that there had been an error made, for which she had apologized at the time.

[13] Perhaps most seriously, the client believes she is now bound to an interim agreement that does not give her all of the protection that she wants, and that it will cost her money to try to get changed.

[14] In mid-June 2016, the client terminated the lawyer's services and obtained other counsel. The lawyer commenced this claim promptly thereafter.

The accounts

[15] The total number of hours docketed by the lawyer from March 7 to June 15, 2016, was 17.1. The lawyer testified that toward the end of the relationship, where it was clear that the client was losing confidence, she stopped docketing her time even though there were still lengthy conversations occurring with the client and her father.

[16] The lawyer charged her time at \$310 per hour. She has been in practice for 23 years and practices exclusively family law.

[17] There were three bills issued, totalling \$6,682.33:

- a. April 27, 2016 for \$3,145.98
- b. May 16, 2016 for \$1,483.60
- c. June 20, 2016 for \$2,052.75

[18] In that total were fees of \$5,301.00. The balance was made up of HST and disbursements. The client takes no issue with the disbursements. Obviously, were I to reduce the fees, that would also reduce the HST.

[19] The bill has been partially paid (\$2,750.00) and the amount claimed outstanding is \$3,958.43. It appears that there is a small amount of interest (\$26.10) included in that amount. I propose to strip that out, as interest is a matter within my discretion. The amount claimed, excluding interest) is accordingly \$3,932.33.

Decision

[20] I am left with the impression that this retainer was a bit of a misfit. Ms. Schoen was the wrong lawyer for the client, and vice versa.

[21] I believe that the client was in a crisis situation, which was in part caused by living under the same roof with her husband during the early stages of separation, which is an inherently volatile situation. The husband and his lawyer

may well have been unreasonable and/or unusually hostile, although it is important to note that they were not part of this taxation proceeding and may well see things differently. But what is important is that they were perceived that way by both the client and the lawyer.

[22] I have reviewed Ms. Schoen's work and see nothing to suggest that she did anything that is objectively worthy of criticism. She jumped right into this dispute and got proceedings going in a very timely way. She did not spend an inordinate amount of time on anything. If the client was someone who needed additional communication or reassurance, she has to realize that this comes at a cost. A lawyer's time spent advising and reassuring a client has value.

[23] I believe that the results were a bit disappointing for the client, in that she did not get the result she wanted in court. Also Ms. Schoen's advice to travel to Ontario without prior approval appears to have backfired, in the sense that it generated more grief than expected, as well as some extra cost as the client had to change a ticket to come back from Ontario earlier than expected.

[24] However, in both cases the lawyer exercised her professional judgment, based on her considerable experience in these matters. Lawyers are not guarantors of results. Their job is to provide the best advice and representation that they can. The actual result, whether a court decision or another party's reaction, is inherently uncertain.

[25] In situations where there is a misfit between the client and the lawyer, it is not uncommon to see the lawyer discount the bill as a gesture of goodwill and an acknowledgement of his or her part in the failure of the professional relationship. I would suggest that this is the lawyer's way of making sure that the

account is reasonable, knowing that the client will likely incur extra expenses to change lawyers.

[26] I believe that as a taxing master, I am in a good position to adjust the account to ensure that the final result is reasonable, and taking into account all of the circumstances I have determined that a discount of fees representing three hours of time (\$930.00) plus HST, would properly reflect a reasonable result. As such, the sum of \$1,069.50 shall be deducted from the amount claimed.

[27] The lawyer is therefore entitled to recover \$2,862.83 from the client. Because the lawyer has been substantially successful, she shall also be entitled to the cost of commencing this claim, namely \$99.70, for a total owing of \$2,962.53. I do not believe it is appropriate to award any interest, as it has been a very short time since the accounts were rendered and it was appropriate that the bills be taxed.

Eric K. Slone, Adjudicator