Claim No SCCH: 455757

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**
**AND IN THE MATTER OF A TAXATION**
Cite as: Mowatt v. McCarthy Law Office, 2016 NSSM 58

BETWEEN:

MARCUS MOWATT

Applicant (Client)

- and -

McCARTHY LAW OFFICE

Respondent (Lawyers)

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# TAXATION DECISION

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**BEFORE**

Eric K. Slone, Adjudicator

Hearings held at Halifax, Nova Scotia on November 15, 2016

Decision rendered on November 29, 2016

**APPEARANCES**

| | |
|---|---|
| For the Applicant | self-represented |
| For the Respondent | Laura McCarthy, counsel |

**BY THE COURT:**

[1] This is a taxation initiated by the Client, who questions the total of a series of accounts rendered by the Lawyers.

[2] The Client found himself charged with two alcohol/driving offences in or about May 2016. He consulted and retained Halifax lawyer Lyle Howe to represent him. At the time, Mr. Howe was practising under the auspices of the firm McCarthy Law Office, the principal of which was Laura McCarthy, who is also the spouse of Mr. Howe. That firm has since become McCarthy Kuszelewski Law.

[3] A retainer agreement was signed on May 30, 2016 that, among other things, set out Mr. Howe's hourly rate of $350.00, with other lawyers in the firm possibly being used at lesser hourly rates. A retainer of $5,000.00 was provided to the firm.

[4] Over the next roughly three months Mr. Howe made two brief court appearances in Dartmouth Provincial Court, and he obtained and reviewed the Crown disclosure. At the last court appearance a trial date was set for early 2017. He also met with the Client at least three times, and spoke with him several times over the phone. Interim accounts were rendered totalling $2,511.92, leaving a balance in trust of $2,488.08. The last bill in the series was dated August 24, 2016, which the Client claims he never received, but which I am satisfied was issued, as shown.

[5] Unfortunately for everyone involved, on September 1, 2016, Mr. Howe's licence to practice law was suspended by the Nova Scotia Barristers

Society, pending the resolution of certain complaints against him. A Receiver was appointed to take custody of his files. I have no doubt that it was confusing and upsetting for the Client (among others) who opted to find new legal counsel and who was given a refund of the balance of his retainer.

[6] On September 23, 2016, the Client initiated this Taxation to question whether the amount he had been charged was proper.

[7] Many of his complaints were relatively minor and resulted from the confusing way the bills were presented. Most notably, the bills were made to look as if Ms. McCarthy had actually done the work, at different hourly rates from time to time. This was easily explained by the fact that the firm's software, PC-Law, put Ms. McCarthy's initials beside each entry because (at the time) she had the only licence to use the software. In fact, with the exception of a couple of minor tasks done by an associate, virtually everything was done by Mr. Howe himself. The Client actually questioned why Mr. Howe did not delegate some of the work to an associate charging at lower rates. While he might have done so, this would not necessarily have resulted in a saving to the Client as having multiple lawyers involved in a file as often as not will result in duplication of effort and extra cost, as each lawyer has to become familiar with the file.

[8] As the Taxation hearing progressed, I expressed to the parties that I did have some concerns with the accounts. Specifically, I had a concern with Mr. Howe's hourly rate, plus I was concerned about the value of Mr. Howe's services given that he will not be able to complete the file on the Client's behalf.

[9] Dealing with the latter point first, it is customary for a lawyer to spend time in the early stages of a file becoming familiar with the facts and the law, which gives him or her the necessary grounding to be able to advise the client and contest the eventual trial. When the lawyer is unable to continue with the file, it inevitably requires the new lawyer to duplicate some of that effort. I appreciate that in some types of cases, the file itself becomes the repository of that work, but I very much doubt that the physical file here would be of much use to successor counsel other than the fact that it contains (or should contain) the Crown disclosure.

[10] Where the client discharges the lawyer for no fault of the lawyer, it would be unfair to ask the lawyer to discount the bill simply because the client wishes to change lawyers. There the lawyer can credibly say that his or her time should be fully compensated. However, where the lawyer withdraws for his or her own reasons, or where (as here) an outside event intervenes that prevents the lawyer from continuing with the file, the client should not be penalized by having to pay two lawyers to go over the same ground. I have no doubt that the Client's new lawyer (who was not identified to the court) would insist upon meeting with the Client and coming to his or her own conclusions about the merits of a defence and trial strategy. These were things that Mr. Howe spent some of his billed time doing.

[11] I appreciate that Mr. Howe appears to have spent some time on this file that never made it into a bill, but overall I am satisfied that there should be some reduction to reflect the fact that the retainer could not be completed, through no fault of the Client.

[12] On the matter of hourly rate, I recognize that the market for legal services is something of an “open” market, where lawyers are free to place a value on their time and clients are free to shop around if they believe that the quoted rate is too high. But this principle must give way under the pressure of two other related considerations.

[13] One is the fact that many clients are not in an equal bargaining position, and (particularly in criminal and family matters) the urgency of needing a lawyer means that no meaningful shopping around takes place. Many clients simply agree to pay whatever is asked, which may lead to an unconscionable contract.

[14] As I recently stated in *H.S. v. Owen*, 2016 NSSM 44:

> 32. The fact that the client signed the Retainer Agreement which specified the hourly rate and hourly billing, is only a partial answer. Such agreements are common, and one of the commonalities is that they are heavily weighted in the lawyers' favour. It is an unequal relationship. Vulnerable clients will often sign whatever is put before them, because they feel that they have no choice. Clients rarely seek independent advice as to the fairness of the agreement they are contemplating signing. These retainer agreements are essentially contracts of adhesion. In the end, the principle of reasonableness will trump any provision in a retainer agreement.

[15] As mentioned above, the clear law is that lawyers must only charge fees that are “reasonable.” That overriding principle derives 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.

[16] This court - because of the taxations that come before it - has the benefit of knowing what hourly rates are typically being charged in Halifax and elsewhere in Nova Scotia.

[17] Simply stated, I find Mr. Howe's hourly rate to be on the high side for a lawyer with his years of experience. He was called in 2010.

[18] I believe that an overall reduction in the account is justified on both of the two above-mentioned bases, which will in the aggregate result in a reasonable bill. The accounts totalling $2,511.92 will be reduced by fees of $600.00, which amount (plus the HST thereon of $90.00) I direct be refunded to the Client. This is a reduction of approximately 27.5% of the fees charged.

[19] The firm's bills are accordingly taxed at $1,821.92 and the Client is to be refunded the amount of $690.00. There are no costs of this Taxation.

**Eric K. Slone, Adjudicator**