IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: McInnes Cooper v. McNeil, 2006 NSSM 20

Date: 20060915
Claim: SCCH 269014
Registry: Halifax

Between:

McInnes Cooper

Applicant

v.

Dougas A. McNeil

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: September 12, 2006 in Halifax, Nova Scotia.

Counsel: Alexander E. Benitah, for McInnes Cooper, Claimant
Dougas A. McNeil, for himself

By the Court:

[1] This taxation or assessment of a solicitor's account came on before me on September 12, 2006. I heard the evidence of Mr Timothy Rorabeck, a tax solicitor with the claimant who was called to the Ontario bar in 2001 and the Nova Scotia bar in October 2004; his submissions and those of Mr Benitah; and the evidence and submissions of Douglas A. McNeil.

[2] This taxation raised several issues:

a. who was the client?

b. who was the legal firm?

c. what was the value of the work performed (or, in other words, was the account reasonable)? and

d. is a disbursement charge for microfilming a lawyer's file when it is closed a reasonable disbursement that can be charged to a client?

Issue 1: Who Was the Client?

[3] At the outset I should say that it was clear on the evidence that the work in issue was performed not for Mr McNeil personally, but for his company McNeil & Co., Public Accountants Limited, which operates under the business style "McNeil Porter Hétu." I accordingly made an order that the company McNeil & Co., Public Accountants Limited be added to the claim as a defendant. For the same reason, I will dismiss the claim in respect of the account as against Mr McNeil personally.

Issue 2: Who Was the Law Firm?

[4] To understand this and the following issues it is necessary to place them in a factual context.

[5] Mr McNeil is a financial advisor. He had a long standing relationship with Mr Gerard M. Tompkins, QC. Mr Tompkins was not present to give evidence for either party. Mr McNeil's evidence was that over the years they had each provided small services to the other, and had never charged for such work. From time to time Mr McNeil would refer his clients to Mr Tompkins, and they would be charged for any legal work.

[6] The services in issue were performed in March 2005. At that time Mr Gerard M. Tompkins, QC was a lawyer with the firm "Patterson Palmer" in Halifax. I place the firm name in quotation marks, because the evidence was that the name "Patterson Palmer" was at that time simply a "brand" or "operating name" that was used by several different and distinct partnerships, each of which was located in a different city. The partnership of Patterson Kitz was the entity in Halifax that operated under the brand "Patterson Palmer."

[7] It appears that Mr Tompkins and Mr McNeil were at a social function. On the way home Mr McNeil questioned Mr Tompkins about a particular financial plan he (Mr McNeil) was considering putting together for his clients. Mr Tompkins told him to send him something in writing, and he would look at it. On January 25, 2005 Mr McNeil sent an email to Mr Tompkins, attaching the financial plan. The email bore the subject line "Opinion request" and was brief: "The attached word document is self explanatory."

[8] The document that was attached was a letter, dated January 25th, and addressed to Mr Tompkins at Patterson Palmer. It explained the plan's outline and sought his opinion as to whether there might be any problems with it from the viewpoint of the Canada Revenue Agency.

[9] Mr Tompkins did not provide the review and opinion directly. Rather, he went to Mr Rorabeck and asked him to "have a look at it." Mr Rorabeck did. He had several telephone conversations with Mr McNeil, and then sent him a one page email on March 8, 2005.

[10] Mr Douglas replied to that email by email on March 8th. He thanked Mr Rorabeck. He stated that "[f]rom our discussions and this correspondence, it doesn't appear that there is any

obvious contravention of the act nor is it clear that 15(1) or 56(2) would apply." He concluded with the observation that this "covers my 'Due Diligence.'"

[11] There matters stood until roughly May 2005. At that time Mr Tompkins went to Mr Rorabeck and, according to Mr Rorabeck, "asked me if we should bill it. I said you could *if you want*. He said *he'd wait*" (emphasis added). And he did.

[12] I pause here to note that Mr Tompkins was clearly the solicitor "of record" for Mr McNeil (or rather his company). The relationship was between the two of them. Mr Tompkins was the billing lawyer. Mr Rorabeck was an associate who took his instructions from Mr Tompkins. Mr Tompkins was clearly the lawyer who had the responsibility to decide what if anything to bill (as Mr Rorabeck quite properly acknowledged).

[13] Time passed and it was eventually announced that the Halifax office of the "firm" Patterson Palmer (that is, Patterson Kitz) would merge with McInnes Cooper. Mr Tompkins was not one of the lawyers who joined in the merger. He departed Patterson Kitz in August 2005 and ended up with "Patterson Palmer," being a Truro partnership.

[14] Mr Rorabeck was not privy to the separation agreement (assuming there was one) between Mr Tompkins and Patterson Kitz. He could not say for sure what the agreement or arrangement was with respect to any unbilled work-in-progress ("WIP") of Mr Tompkins; what was to happen to it; who was to take it; and whether it was to be billed and, if so, by whom.

[15] It is not necessary however for me to determine what any such arrangement was. It is enough to know (as admitted by Mr Rorabeck) that Mr Tompkins did not bill the March WIP when he left the firm in August 2005. Indeed, the WIP appears to have been "lost" until Mr Rorabeck found it as part of the "cleaning up" of the files of Patterson Kitz that took place towards the end of 2005, as the firm got ready to finalize its merger with McInnes Cooper. Having found the WIP, Mr Rorabeck decided to bill it. On December 29, 2005 he caused a bill to be issued in the name of McInnes Cooper for the value of his March 2005 WIP in the amount of $1,350.00, plus a "microfilming/admin fee" of $30.00, and HST for a total of $1,587.00.

[16] Mr Rorabeck made the account out to Mr McNeil personally. This of course was wrong. All of the materials provided to me make clear that the work was done for Mr McNeil's company, and that is the way the account should have been rendered.

[17] On January 6, 2006 Mr McNeil emailed Mr Rorabeck and stated facetiously that:

a. the decimal point was misplaced, and the amount should be $135.00, not $1,350.00; and

b. he had never ordered or received any microfilmed documents, nor file administration.

[18] The account was re-submitted by the claimant in June 2006, charging an additional 35 cents in interest. At that point Mr McNeil replied (on June 22nd) that he did not "acknowledge any liability in this matter." The within Notice of Taxation was then issued.

[19] With that backdrop we can now return to the second issue: who was the law firm?

[20] The above facts provide the answer: Patterson Kitz, not McInnes Cooper.

[21] Mr Rorabeck argued strenuously that Mr Tompkins did not take the unbilled WIP with him; and that it was transferred to McInnes Cooper as part of the merger between Patterson Kitz and McInnes Cooper.

[22] There was no evidence that that is in fact the case. Mr Rorabeck had no direct knowledge of what the arrangement if any was with respect to Mr Tompkins's unbilled WIP. That being the case, there is nothing to support the claimant's contention that it, as opposed to Patterson Kitz, is entitled to render an account in respect of this WIP.

[23] Assuming for the sake of argument that the WIP did pass to McInnes Cooper, there is a second problem with the claim. Mr Tompkins was clearly the lawyer in charge. He was the one responsible for making a decision as to whether any particular WIP could or should be billed. Mr Rorabeck quite properly acknowledged that billing lawyers often reduce or even eliminate WIP on an account, and that that is done for any one of a number of valid business and professional reasons. The only evidence we have of Mr Tompkins's view of the matter is that:

a. when the matter came up in May 2005 he specifically decided against billing it at that time; and

b. when he left the firm in August 2005 he did not bill it either.

[24] Mr Tompkins knew about this taxation but did not come. Neither party saw fit to summons him. What I am left with then is the evidence that when confronted with the issue of whether he should bill the WIP, at a time when it could be logically billed, he chose not to. I also have the uncontradicted evidence of Mr McNeil that Mr Tompkins had provided legal advice to him in the past without ever billing for it. In these circumstances I am driven to the conclusion and I so find that Mr Tompkins had decided not to bill the WIP and, in effect, to write it off. McInnes Cooper is in my opinion bound by the actions of the lawyer who was the billing lawyer in respect of this WIP.

[25] Even if the WIP was Patterson Kitz's time to bill as *it* rather than Mr Tompkins saw fit, the firm had a duty to bill the WIP, at the very latest, at the time of Mr Tompkins' departure (or preferably before it). Doing it then would provide the client with the opportunity to challenge the account (if he or she was so inclined) while the lawyer was still there to speak to the matter. To wait until months later, when the lawyer was long gone, puts the client in a difficult position.

[26] I am accordingly of the opinion that:

a. the law firm that provided the services was Patterson Kitz, not McInnes Cooper;

b. McInnes Cooper has failed to establish that it had the right to bill Patterson Kitz's WIP in this matter; but

c. even if McInnes Cooper did have the right to bill the WIP, it is bound by Mr Tompkins's decision not to bill it.

Issue 3: Was the Account Reasonable?

[27] None of the above is to be taken as an acceptance by me of the defendant's submission that the WIP of Mr Rorabeck was valueless–or less worth than what he charged. Having considered the evidence of both Mr NcNeil and Mr Rorabeck as to what was involved in researching and providing the opinion, and Mr Rorabeck's experience, I am satisfied that the fees of $1,350.00 were entirely reasonable. Were it not for the fact that Mr Tompkins had decided, in effect, to write it off; and were it not for the problem associated with which firm was entitled to bill the time; I would have allowed it as reasonable.

Issue 4: The Disbursement for Microfilming/Administration

[28] The last issue concerns the charge of $30.00 for microfilming/administration. Mr Rorabeck stated that all McInnes Cooper files are microfilmed on closing. The charge of $30.00 is intended to recapture part of that expense. In my opinion this is pure overhead. The law is clear that overhead, which is intended to be caught by the hourly rates charged by a lawyer, is not to be billed to clients–at least not without an express agreement to that effect: see, for e.g., *Boyne Clark v. Steel* 2002 NSSM 1; *McInnes Cooper v. Slaunwhite* 2004 NSSM 3 at para.244; *Bank of Montreal v. Binder* 2005 NSSM 2 at para.24, and the law cited therein.

[29] I would accordingly have disallowed the disbursement charge for microfilming and administration in any event.

Dated at Halifax, this 15th day of September, 2006

Original: Court File)
Copy: Claimant)
Copy: Defendants)

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W. Augustus Richardson, QC
ADJUDICATOR