

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the taxation of solicitor-and-client costs
between W. DONALD GOODFELLOW, Q.C., Barrister &
Solicitor, and KARL MUELLER CONSTRUCTION LTD.,
Client.

Appeal of taxation of solicitor's accounts.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on March 11, 1996

Reasons filed: March 26, 1996

Counsel for the Appellant (Client): Noel Sinclair

The Solicitor, W. Donald Goodfellow, Q.C.,
appeared in person

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REASONS FOR JUDGMENT

1 This is an appeal of a taxation of a solicitor's accounts to his own client.

2 The solicitor was retained by the client in late 1991 to launch proceedings against the Government of the Northwest Territories. The client's principal officer, Mr. Karl Mueller, complained of deliberate and malicious actions on the part of the government to deprive him of construction contracts. The substance of these allegations is not germane to the issues on this appeal but two facts are noteworthy as background information to place this dispute in context. First, Mr. Mueller is no stranger to litigation. His company had successfully sued the territorial government in an earlier case: see [1991] N.W.T.R. 1 (C.A.). Second, the solicitor, a member of four law societies, is a recognized expert in the field of construction law litigation and Mr. Mueller sought his services on that basis.

3 There is no dispute that Mr. Mueller knew that the solicitor would bill for his services at a rate of \$250.00 per hour. He was also warned early on by the solicitor that legal proceedings would undoubtedly be lengthy and costly.

4 Two actions were commenced on the client's behalf. The first sought damages for breach of contract, negligent and fraudulent misrepresentation, breach of fiduciary duty, loss of opportunity, plus exemplary and punitive damages. This claim related to 10 projects which were not awarded to the client. The second action related to two projects where contracts had been awarded to the client but subsequently allegedly breached by the government. The claims sought significant amounts in damages; they raised complex issues of fact and law; and they required the examination of hundreds of documents.

5 Examinations for discovery (in both actions) of the government's representative were held over three days in late March, 1995. An account for fees and disbursements was sent to the client on April 13, 1995. This account totalled \$16,669.12 (\$15,000.00 in fees and the balance for disbursements and tax). Prior to this, the solicitor had sent to the client 28 separate accounts (dating from February 7, 1992, to March 7, 1995) totalling \$25,920.00 in fees in relation to the first action and 9 accounts (dating from July 6, 1993, to September 3, 1994) totalling \$6,750.00 in fees in relation to the second action. All of these earlier accounts had been paid by the client. In response to the account of April 13th, however, the client wrote to the solicitor as follows:

I have reviewed your faxed letter of April 13, 1995. I find your charges are extremely high. I have noted overcharging.

Frankly, I can not afford to continue with this Lawsuit with you and your firm.

I am requesting that no further work be done in this action. This Lawsuit has to come to a standstill. I am requesting this be done immediately.

I am looking into this situation. I am familiar with the Taxation process and the Law Society of Alberta.

One option I would like to make is: to proceed on a Commission basis and terms negotiated that are satisfactory to both of us.

6 Mr. Mueller expressed no concerns about the solicitor's work or fees prior to this
letter.

7 Two further accounts were sent by the solicitor. One dated May 3, 1995, was for
a total of \$9,036.39 (\$5,075.00 in fees) while the other, dated May 31, 1995, was for a
total of \$228.76 (\$212.50 in fees). All three accounts dating since April 13th have not
been paid.

8 The solicitor eventually proceeded to tax his accounts before the taxing officer.
The total of the three accounts (\$25,934.27 inclusive of fees, disbursements, and tax) was
reduced by \$3,770.01 to a total of \$22,164.26. The reduction was to take into account
an error in billing a specific disbursement as well as a reduction of fees paid to a research
associate retained by the solicitor.

9 The client now appeals to this court on the following grounds:

- (1) the taxing officer erred by not granting the client's request for an adjournment of the taxation;
- (2) the solicitor failed to provide the client with services worth the amount billed;
- (3) the solicitor charged for services not done or for services that had already been paid by the client;
- (4) the solicitor charged for services not incurred on the client's behalf; and,
- (5) the solicitor charged for services after the client had instructed the solicitor to cease all work.

1 The parties agree that on this appeal the pertinent question is whether the taxing
officer made an error of principle or whether the award is inordinately high or low. A
judge sitting on appeal of a taxation is not to reassess the material and substitute his or

her opinion for that of the taxing officer when there is no error of principle: *McLennan Ross v. Mercantile Bank* (1988), 59 Alta. L.R. (2d) 369 (C.A.).

1. Request for an Adjournment

2 The taxation was originally set to be conducted on November 13, 1995. The Notice of Appointment for Taxation was served on the client on October 27, 1995. The taxation was then rescheduled to November 29, 1995. Notice of this change was sent to the client on November 3, 1995. Between November 9 and November 28, the solicitor had an exchange of correspondence and telephone calls with another lawyer who had been contacted by Mr. Mueller. The day before the taxation, the solicitor was informed that Mr. Mueller will appear in person at the taxation without the assistance of counsel.

3 At the taxation, Mr. Mueller requested an adjournment so that he could review the time records for all services rendered by the solicitor from the date of the initial retainer to the account of April 13th. The time records for the three unpaid accounts had been provided previously. The relevance of the earlier time records is something I will discuss below.

4 The decision whether or not to grant an adjournment is a discretionary matter. Nothing has been submitted to me to suggest that the taxing officer exercised her discretion to refuse the request in an unprincipled manner. The client had ample notice of the taxation; he chose to represent himself. I will not set aside the taxation on this basis.

2. **Value of the Services Billed**

5 The client's counsel on this appeal submits that the total amount of fees billed by the solicitor over the entire course of his retainer is relevant to a determination as to whether the unpaid accounts are fair. He refers me to my comments in *Cooper v. England*, [1994] N.W.T.R. 305, where I said that accounts pre-dating those under taxation may be considered so as to assess whether the total amount charged for services rendered is fair and reasonable remuneration. In that case, however, I presided as a taxing officer at first instance; I was not, as here, sitting on an appeal.

6 The solicitor submits that the previous accounts are irrelevant. Each account was rendered as a periodic "final" account. They were paid in full without taxation or complaint from the client. Reference is made to Rule 553 which permits a solicitor to make an agreement with the client respecting the amount and manner of payment of the whole or any part of the services rendered and fees charged.

7 The essence of this ground is that the client says he simply paid too much for what was accomplished. He provided no evidence, however, to substantiate this claim. Even if I consider the total amount paid by the client from the beginning to the end of the solicitor's retainer, and having regard to the apparent size and complexity of the claims being litigated and the hourly fee charged by the solicitor, I cannot say that the amount paid is surprising. This type of litigation is inevitably lengthy and costly.

8 It would have been preferable if each account had clearly specified, in addition to the nature of the work performed, the time involved for that specific work. Clients are entitled to that information. In this case, however, that information was provided for purpose of the taxation.

9 With respect to this ground, I agree with the comments of D. Lane J. in *McCarthy Tétrault v. Signum Communications Ltd.* (1995), 36 C.P.C. (3d) 169 (Ont. C.J.), at page 173:

The client submitted that the Assessment Officer erred in principle by failing to take into account the total fees paid by the client throughout the litigation when assessing the reasonableness of the accounts under assessment. The complaint is not that the earlier bills were not assessed, but that the Officer's Reasons do not indicate that he had regard to the overall total when assessing the last four bills. I was referred to *Lang, Michener, Cranston, Farquharson & Wright v. Newell* (1986), 5 W.D.C.P. 486 (Ont. Assess. O.) where periodic bills had been rendered over several years relating to a matrimonial matter. The solicitors maintained that each bill was a final one for the billing period and thus the right to assess the earlier ones had been lost by the passage of the limitation period in the *Solicitors Act*. Craig J. rejected that argument. Interim bills could not be fully assessed until the trial had been completed so that the Officer could take a global view of the accounts as a whole. The result was that all of the bills were remitted for assessment.

The clients here could thus have had all of the bills assessed. They did not seek to do so, but now invite the court to reduce the final bill because the total is unfair. I have difficulty with the proposition that adding one fair bill to other fair bills (for those not disputed when the opportunity exists must be taken to have been fair) will reach an unfair result, but assuming that to be possible, I am not persuaded that it has occurred here. The Assessment Officer had in evidence a list of all the accounts and the oral evidence ranged back at times to the very start of the relationship. He was thus aware of the history, although he did not specifically refer to the amounts of the earlier bills as a factor in his decision. Since the client did not choose to put them before him, he could not reduce them. Equally, in my opinion, he could not reduce the bills before him from an amount that is fair for the work they cover because the earlier ones were too high. The statements in *Lang, Michener* and the authorities relied on in it, support the view that the client may have the whole of the accounts assessed so as to have a global view of their fairness. This client did not choose to do that. I think it probable that an experienced Assessment Officer such as Mr. Gramlow is, would have had a look at the overall amount. If he did not do so, he did not err in principle because the client had not placed the whole account before him.

10 In this case, the total amount billed to the client was before the taxing officer. The client, however, did not place the earlier accounts in issue but chose simply to rely on the global amount as justification for reducing the current unpaid accounts. I find no error in principle by the taxing officer in not reducing these accounts on this basis.

3. Charges for Services Not Done or Already Billed

11 There was no evidence to support this ground and no reliance was placed on it.

4. **Charges for Services not Incurred on Client's Behalf**

12 This ground refers to several disbursements for legal research and consulting services. I am satisfied, as was the taxing officer, that these were properly incurred and the client was aware from the inception of the retainer the basis on which these services would be billed. I find no merit in this ground.

5. **Charges After Termination of Retainer**

13 The client, by the letter received by the solicitor on April 17, 1995, quoted earlier, instructed him to do no further work. There was a suggestion left open to revise the retainer arrangement on terms to be negotiated, but the client's instruction to stop work was explicit. The solicitor submits that he had ongoing obligations as an officer of the court to continue to do some work on the file notwithstanding this instruction.

14 It seems to me that whatever work was done by the solicitor after April 17th was done at the solicitor's risk of not being paid. Having reviewed what was done after that date, I do not think any of it was fundamentally necessary to protect the client's interests. The solicitor could just as well have filed a Notice of Ceasing to Act and informed opposing counsel accordingly.

15 I will therefore reduce the accounts by the amount of fees billed for work after April 17th. This means that the fees on the account of May 3, 1995, are reduced by the sum of \$510.00; the fees on the account of May 31, 1995, are eliminated entirely. The

disbursements on those accounts are confirmed in full. The accounts collectively will therefore be reduced by \$722.50 in fees and \$50.58 in tax.

16 With the adjustments noted above, the taxation certificate is confirmed in the total sum of \$21,391.18. In all other respects, this appeal is dismissed.

17 The solicitor seeks costs of the appeal. I do not think it is necessary to enter into a review of the developing state of the law relating to the entitlement of solicitors, acting on their own behalf, to recover counsel fees as costs. The solicitor chose to represent himself. The matter was substantial. While there was a small modification to the overall fees, it is minor in comparison to the solicitor's success on the appeal. I decline to award costs for fees, but I will order costs of this appeal to be paid by the client to the solicitor equal to the actual disbursements incurred by the solicitor for the appeal. Those costs are hereby fixed in the sum of \$1,785.37. These are costs that would not have been incurred were it not for the appeal, so I think it only fair that the solicitor be compensated for them.

John Z. Vertes
J.S.C.

Dated at Yellowknife this
26th day of March, 1996

Counsel for the Appellant (Client): Noel Sinclair

The Solicitor, W. Donald Goodfellow, Q.C.,
appeared in person

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