

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Boyne Clarke LLP v. Gill-Iosipescu*, 2017 NSSM 21

BETWEEN:

BOYNECLARKE LLP

Claimant

- and -

NICHOLAS GILL-IOSIPESCU

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on May 10, 2017

Decision rendered on May 17, 2017

APPEARANCES

For the Claimant

Aaron Schwartz, articling student

For the Defendant

self-represented

BY THE COURT:

1. This is a claim by the law firm Boyne Clarke for an outstanding legal account, against its former client. Though this was started as an ordinary

claim, it is essentially a Taxation and will be dealt with as such. Hereafter, the Claimant will be referred to as the “Lawyers” and the Defendant will be referred to as the “Client.”

2. The case raises familiar issues, most notably the questions of whether there is full value in work done that fails to produce the hoped-for result, and whether the account is reasonable.
3. The Client first sought the advice of lawyer Bryen E. Mooney, who is a family law specialist, in January 2015. At the time he was experiencing matrimonial problems. There was a fairly lengthy meeting, which became the subject of a bill dated February 26, 2015, in the amount of \$345.58. That bill included a discount for one-half hour, in recognition of the firm’s policy to provide a half-hour free consultation.
4. Nothing relevant happened until a half year later, on August 17, 2015, when the Client (accompanied by his father, who is himself a lawyer) had an urgent meeting with Ms. Mooney. By then, the Client’s marital situation had deteriorated and the Client had concerns about the safety of his children. He was looking to obtain primary care and control of the children, along with a requirement that his spouse’s access to the children be supervised.
5. A formal Retainer Agreement was signed August 27, 2015, and Ms. Mooney was instructed to commence proceedings. It was decided to proceed under the *Maintenance and Custody Act* rather than the *Divorce Act*, in order to restrict the proceeding to what was deemed most urgent.

6. That Retainer Agreement set out that Ms. Mooney's hourly rate was \$225.00, and that others (including a paralegal) would be working on the file, as required, at rates also set out. The Retainer Agreement set out the rates for disbursement items, such as copying and printing, and contained much of the information one would expect to see in a retainer agreement.
7. The evidence is clear that Ms. Mooney was not asked for, nor did she volunteer, any estimate of what it might cost in total for the Client to achieve his stated goals. The reason why lawyers in Ms. Mooney's situation rarely give estimates is that in many litigation matters it is unknown at the outset what the other party's position will be, and what steps may be needed.
8. The evidence is clear that over the next six weeks or so, Ms. Mooney worked intensively on this file. Several things were frustrating for her:
 - a. The Client's spouse was vigorously contesting the matter, which was doubtless her right;
 - b. The Client's spouse had an apparently inexperienced lawyer, who proved hard to deal with and who (in Ms. Mooney's and the Client's opinion) caused court time to be wasted;
 - c. The judge who was assigned to the case in the Family Division of the Supreme Court was a relatively new appointee, who insisted (over Ms. Mooney's objection) that the parties attempt to settle the application, with the result that precious court time was lost while fruitless discussions occurred, and the judge never received enough evidence to make a ruling on the requested interim relief.
 - d. The Client's father decided to make his own court application for grandparent access, which threw off the schedule as the court insisted that everything be heard at the same time, and his lawyer had a conflict with some of the dates set aside to hear the applications.

9. To complicate the matter slightly, Ms. Mooney was pregnant and anticipated to start a maternity leave on November 6, 2015. This was known to the Client, and another experienced Boyne Clarke lawyer was lined up to take over, when required.
10. By the time Ms. Mooney's maternity leave started, the Client had been in court three times, with no tangible result other than an interim consent order that only partly accomplished what he wanted.
11. I take notice that it is extremely challenging to get time in the Family Division, as the judges are extremely booked up. This can be particularly frustrating when the matter is urgent.
12. The other Boyne Clarke lawyer never got to take over the case, except for a final meeting where the client refused to provide any further money and took his file away from the firm. By then, the legal bill had mounted and the Client was balking. He had already paid \$10,000.00, and was being asked for a further amount in excess of \$12,000.00.
13. The Client's objection, as I understand it, is simply based on reasonableness. He was not really critical of Ms. Mooney, other than to suggest that she might have been a little more assertive in trying to get the court to pay attention to the urgency of the situation, and in shutting down the opposing counsel who appeared to be dominating the discussion in court.

Taxation principles

14. I reviewed these principles fairly thoroughly in *H.S. v. Owen*, 2016 NSSM 44, a case which also involved expensive family law litigation. The following excerpt is relevant:

22. The principles governing the taxation of lawyers' accounts are not controversial, although different people may apply them differently, such as by giving more weight to one principle as opposed to another. 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 would distill 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):
 - i. counsel's efforts to secure speed and avoid expense for the client;
 - ii. the nature, importance, and urgency of the case;
 - iii. the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;
 - iv. the general conduct and expense of the proceeding;
 - v. the skill, labour, and responsibility involved;
 - vi. 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.
15. In the *H.S.* case I made a finding that the lawyer spent too much time on certain tasks, and because of the rather slow pace of the litigation, spent repeated occasions - all charged at full rates - re-familiarizing himself with the file. I also found in that case that the client was someone of limited means, who needed fairly quick specific relief, and yet the lawyer did not appear to have proceeded with dispatch and did not focus his efforts on what the client really needed. To make matters worse, the lawyer stopped work at the time the client ran out of resources to pay him, with the result that he never even obtained the formal court order that had been agreed to in principle by counsel at a court attendance. For those reasons, and others, I reduced the lawyer's bill.
16. I find little parallel to the case here. I find that Ms. Mooney was diligent and worked very hard on the case. She rightly had a concern that properly prepared and thorough materials needed to be filed with the court, as they would reflect on the client throughout the proceeding - not just on the initial interim application. She did not lose sight of the urgent objective, but had

to make sure that the material filed was sufficient to meet objectives down the road, had the case progressed to other issues.

17. The roadblocks she ran into were unforeseeable.
18. I cannot penalize the Lawyers for being thorough and dogged in their pursuit of the Client's interests. There was no reason to believe that the Client was looking for bargain-basement advocacy. To the contrary, it appeared at the outset, at least, that the Client had the full financial backing of his lawyer-father. Moreover, the issues seemed so important at that time, involving allegations that young children were being placed at risk, that it is hard to imagine any limits being placed on Ms. Mooney.
19. In hindsight, the one thing she might have done better would have been to explain to the Client as the matter progressed, how much time she was spending and what this was costing him.
20. Even so, I believe the Client had a good sense of how hard Ms. Mooney was working and he ought to have known that the bill was mounting.
21. I have been critical in the past about the mechanical application of hourly billing, including statements I made in the above-mentioned *H.S.* case. Too often, the bill becomes disproportionate to what is actually at stake. However, in cases involving the parenting and safety of children, it is almost impossible to say that work done in the client's interest to safeguard his children is disproportionate to what was at stake.

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22. This client had grave concerns that his children were at risk, and Ms. Mooney would have been derelict in her duty had she failed to take those concerns seriously, in the service of some principle of proportionality.
23. As a taxing officer, I may discount a bill because of a poor result, if it appears that the lawyer exercised poor judgment or otherwise failed to deliver good service. I find nothing in the case here that would incline me to discount the bill for the result achieved. I find that Ms. Mooney's work was professionally done and the result reflected things out of her control, including inadequacies of the court system, in terms of the difficulty of actually getting the matter heard.
24. For all of the above reasons, I am not convinced that the Lawyers' bill ought to be reduced on any grounds.
25. Although there was some confusion at the hearing as to how the claim was calculated, Ms. Mooney later provided copies of two accounts that had been inadvertently omitted from the materials filed. Taking those into consideration, the following bills are properly under consideration:

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|---------------------------------|-------------------------------------|-------------|
| Account dated February 26, 2015 | fees | \$270.00 |
| | other charges (incl. disbursements) | \$30.50 |
| | HST | \$45.08 |
| Account dated October 9, 2015 | fees | \$16,594.00 |
| | other charges (incl. disbursements) | \$410.50 |
| | HST | \$2,562.65 |

| | | |
|---|-------------------------------------|--------------------|
| Account dated November 3, 2015 | fees | \$2,025.00 |
| | other charges (incl. disbursements) | \$46.16 |
| | HST | \$310.67 |
| Account dated June 15, 2016 (involving final work done in November 2016) | fees | \$65.00 |
| | other charges (incl. disbursements) | \$11.95 |
| | HST | \$11.64 |
| Less amounts paid | | (\$10,000.00) |
| TOTAL AMOUNT OWING | | \$12,383.15 |

26. In the result I tax and allow the account in the amount of \$12,383.15. In my discretion, in light of the confusion about the bills and the proper calculation, I decline to award any interest on that sum.
27. The Lawyers are also entitled to recover their costs consisting of \$199.35 to file the claim and \$97.75 to have it served.
28. The total amount owing is therefore:

| | |
|----------------|-------------|
| Legal accounts | \$12,383.15 |
| Costs | \$297.10 |
| Total | \$12,680.25 |

Eric K. Slone, Adjudicator