NOVA SCOTIA COURT OF APPEAL
Citation: ***Mor-Town Developments Ltd. v. MacDonald***,
2012 NSCA 35

Date: 20120405
Docket: CA 352806
Registry: Halifax

Between:

Mor-Town Developments Limited

Appellant

v.

David MacDonald

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Fichaud, JJ.A.
Appeal Heard:	February 14, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.
Counsel:	John Kulik, Q.C. and Jeff Aucoin, for the appellant Respondent in person

Reasons for judgment:

[1] A lawyer rendered two accounts. The client paid the first, but not the second. The client applied for taxation of both accounts. The adjudicator reduced the size of the accounts and ordered the solicitor to refund to the client the difference between the amount he had initially received and the reduced amount allowed on taxation.

[2] The lawyer appealed to the Nova Scotia Supreme Court alleging error on the part of the adjudicator on matters of jurisdiction, law and procedural fairness. He asked that the adjudicator's decision and confirmatory certificate be set aside and that he be found entitled to retain the full amount of his accounts, as billed.

[3] The judge allowed the lawyer's appeal. He decided the adjudicator lacked jurisdiction over one of the accounts because it had already been paid by the client, and that in any event, the adjudicator had breached a duty of fairness to the lawyer with respect to both accounts which warranted sending the matter back to a different adjudicator for re-determination.

[4] Now the client appeals to this Court. We are asked to reverse the judge's disposition and reinstate the decision of the Small Claims Court adjudicator.

[5] For the reasons that follow, I would allow the appeal, set aside the Supreme Court’s judgment, and affirm the adjudicator's decision and certificate dated August 31, 2010, in all respects.

[6] To set the context for the analysis that follows I need only briefly refer to the material facts. A more fulsome record may be found in the adjudicator's taxation decision, 2010 NSSM 64, or the judge's decision, 2011 NSSC 281.

Background

[7] Dr. Simon Jacobson was the president of Mor-Town Developments Limited. In 1969 Mor-Town purchased a large piece of property as an investment, intending eventually to sell the lands, but not develop them.

[8] Mor-Town retained the respondent, David MacDonald, to do the legal work for the sale of lands which closed on September 30, 2008.

[9] Mr. MacDonald presented two accounts. The first was rendered at the closing and totalled $60,323.09. The second undated account for post-closing work from October 1, 2008 to July 8, 2009, totalled $6,426.26.

[10] On October 2, Dr. Jacobson received papers from Mr. MacDonald to sign as part of the closing documentation. Among the paperwork was the first account and an authorization to pay that account directly from the proceeds of sale. Both the account and the closing documentation were dated September 30, 2008. However, the authorization with respect to payment of the account was not received by Dr. Jacobson until October 2.

[11] Dr. Jacobson immediately expressed his concern with the account by e-mail to Mr. MacDonald and sought clarification. There then passed a series of emotional e-mails between the two. Ultimately the amount of the first account was deducted from the sale proceeds and paid in full.

[12] Included within the first account was an allowance of $2,000 previously paid by Mor-Town out of the sale proceeds and placed in trust by Mr. MacDonald to cover the costs involved with the wind-up of Mor-Town and the finalization of the sale. Dr. Jacobson confirmed by e-mail to Mr. MacDonald that the $2,000 would cover the costs to finalize those matters. However, on July 9, 2009, Mr. MacDonald rendered the second account claiming an additional $6,400. That account did not reference the $2,000 that had already been paid by Mor-Town for such purposes. The second account was not paid.

[13] Dr. Jacobson consulted Alan Stern, Q.C. By letter dated January 6th, 2009, Mr. Stern informed Mr. MacDonald of his being retained and expressed his concerns about the account Mor-Town had already paid. Mr. Stern raised questions about the hourly rate charged and the amounts which appeared in the invoice. He asked the appellant to provide time records supporting the bill. He also indicated that if they were unable to reach an amicable resolution of the fee dispute, he would recommend to Dr. Jacobson that the account be taxed in the usual manner.

[14] On April 8, 2010, Mor-Town filed a Notice of Taxation with the Small Claims Court to tax both accounts. A lengthy hearing was held before the Small Claims Court adjudicator, J. Walter Thompson, Q.C. An array of exhibits were introduced. Dr. Jacobson and Mr. MacDonald testified. Mor-Town also presented expert evidence through Ms. Erin O'Brien Edmonds who was retained by the

company. She conducted a very extensive review of the file and prepared a written opinion expressing her view that reasonable fees for professional services rendered up to the date of closing would be $27,000 plus HST and disbursements. Her opinion was admitted into evidence. The parties also made extensive written and oral submissions before the adjudicator.

[15] In a decision dated August 31, 2010, Adjudicator Thompson ordered that the two accounts be taxed and certified in the total amount of $32,266.40, and ordered Mr. MacDonald to pay Mor-Town the sum of $28,055.69 being the difference between what was taxed, and what had already been paid.

[16] Mr. MacDonald appealed the adjudicator's decision to the Nova Scotia Supreme Court. The appeal was heard by the Honourable Justice Arthur J. LeBlanc on December 14, 2010. The appeal proceeded on the basis of written and oral submissions. In a written decision dated July 8, 2011, and now reported as 2011 NSSC 281, LeBlanc, J. allowed the appeal and sent the matter back to a different adjudicator for "redetermination".

[17] Essentially, Justice LeBlanc's disposition was driven by three principal findings. First, he concluded that the adjudicator was without jurisdiction over the "first" account because it had already been paid. Second, he found that because it was the client, Mor-Town, who sought the taxation, it bore the burden of proving that the solicitor's account(s) was unreasonable. In the words of LeBlanc, J. at paras. 39-40:

> [39] ... In my view … the onus was on the respondent since it was the respondent seeking taxation. As such, the adjudicator erred in law in holding that the onus was on the appellant to prove the reasonableness of his account. …
>
> [40] In my view, the adjudicator's error of law significantly implicates the validity of his subsequent analysis. I would set aside this aspect of the decision. …

Third, he found that the adjudicator had breached the duty of fairness by making "negative credibility findings" with respect to both of Mr. MacDonald's accounts. He added:

> [44] … The aspects of the duty of fairness arising here are among the most basic obligations: the right to be heard and the right to know the case to be met are fundamental aspects of our system of justice. Before a Small Claims Court

> adjudicator can make a negative credibility finding, an opportunity should be given to a party to address the adjudicator's concern. Further, once an adjudicator reaches a decision that involves credibility, the duty of fairness entitles a party to sufficient reasons so as to effectuate his/her right of appeal. …
>
> [46] In this case, the adjudicator's reasons do not sufficiently explain his negative credibility findings. The appellant had an opportunity to present his case, but it does not appear he was ever told that the adjudicator was concerned with the credibility of his account. The adjudicator's reasons on this point do not explain how he concluded that account was generated as "an after the fact rationalization … to justify what was essentially the levy of a commission on a real estate sale." This is a breach of the duty of fairness.
>
> [47] The breach is serious in that it goes to a material aspect of the adjudicator's determination with respect to both accounts. Even if I am wrong on the jurisdiction issue, in my view, the breach of the duty of fairness warrants sending the matter back to a different adjudicator for redetermination.

Issues

[18] Mor-Town now appeals the decision of LeBlanc, J. Its notice of appeal filed July 21, 2011, lists three grounds of appeal claiming the judge erred:

(i) in law by incorrectly interpreting the **Legal Profession Act**, S.N.S. 2004, c. 28 and finding that that statute did not confer authority on a Small Claims Court adjudicator to tax a solicitor's account that has already been paid by a client;

(ii) in law by finding that the onus was not on Mr. MacDonald as a solicitor to prove the reasonableness of his legal account; and

(iii) in fact and in law by finding that the adjudicator, J. Walter Thompson, Q.C. had breached the duty of fairness by making a negative credibility finding against Mr. MacDonald without first offering MacDonald an opportunity to respond, and without giving sufficient reasons.

Standard of Review

[19] The first two grounds raise errors of law and will be reviewed on a standard of correctness. **Housen v. Nikolaisen**, 2002 SCC 33; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80. The third ground raises a question of mixed fact and law which will be reviewed on the palpable and overriding error standard unless a discrete legal principle can be suitably isolated and tested for correctness.

Preliminary Matter

[20] Before analyzing the issues, I will deal with a preliminary objection raised by the respondent. He says this Court has no jurisdiction to consider this appeal relying upon the provisions of the **Small Claims Court Act**, R.S.N.S. 1989, c. 430, specifically s. 32(6) which states:

> 32. (6) A decision of the Supreme Court pursuant to this Section is final and not subject to appeal.

[21] Respectfully, there is no merit to the respondent's preliminary objection. The point is settled law.

[22] At first glance, the wording of s. 32(6) would seem to preclude a further appeal to this Court from a decision rendered in the Supreme Court arising from an earlier order or determination of an adjudicator. However, context is always important. The relevant surrounding portions of the **Act** read:

> **Jurisdiction**
>
> 9 A person may make a claim under this Act
>
> (a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest;
>
> (b) notwithstanding subsection (1) of Section 5, for municipal rates and taxes, except those which constitute a lien on real property, where the claim does not exceed twenty-five thousand dollars exclusive of interest;
>
> (c) requesting the delivery to the person of specific personal property where the personal property does not have a value in excess of twenty-five thousand dollars; or

(d) respecting a matter or thing authorized or directed by an Act of the Legislature to be determined pursuant to this Act.

Taxation

9A (1) An adjudicator has all the powers that were exercised by taxing masters appointed pursuant to the Taxing Masters Act immediately before the repeal of that Act, and may carry out any taxations of fees, costs, charges or disbursements that a taxing master had jurisdiction to perform pursuant to any enactment or rule.

(2) The monetary limits on the jurisdiction of the Court over claims made pursuant to Section 9 and on orders made pursuant to Section 29 do not apply to taxations ...

. . .

32(1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of

(a) jurisdictional error;

(b) error of law; or

(c) failure to follow the requirements of natural justice,

by filing with the prothonotary of the Supreme Court a notice of appeal.

. . .

(6) A decision of the Supreme Court pursuant to this Section is final and not subject to appeal.
(Underlining mine)

[23] The issue here is whether a right of appeal lies to this Court from an appeal of a taxation, in other words, whether the nature of the "proceedings" identified in s. 32(1) makes a difference. That question was specifically addressed by this Court in **Turner-Lienaux v. Campbell**, 2004 NSCA 41. Roscoe, J.A., writing for a unanimous Court, said:

> 17 It would not be practical for some taxations to have a right of appeal to this Court and not others, depending on whether a new issue was raised in the Supreme Court, or whether the party who appealed from the adjudicator noted **Rule** 63.38 in the notice of appeal, or whether the parties raised issues of liability for payment as opposed to reasonableness of the amounts. Prior to the repeal of the **Taxing Masters Act** there was an appeal from taxation to the Supreme Court pursuant to **Rule** 63 and then a further appeal to this Court pursuant to the **Judicature Act**. Although the **Small Claims Court Act** does limit appeals of small claims matters to one level, pursuant to s. 32(6), which is in keeping with the purpose of the **Act**, that is, to simplify matters involving small claims, it is not clear that there was any intention to limit the number of appeals from taxations undertaken by adjudicators. This matter is obviously not a small claim, having started out as a matter involving in excess of $800,000. Furthermore, the taxation of a bill of costs is not a "proceeding before" the Small Claims Court. The proceeding is in the Supreme Court. The adjudicator, acting as taxing master, is in effect acting on a reference from the Supreme Court in furtherance of the original order where a party was ordered to pay taxed costs.
>
> 18 For these reasons, I would determine the jurisdictional matter by finding that s. 32(6) of the **Small Claims Court Act** does not apply to taxations of bills of costs by adjudicators pursuant to the authority vested by s. 9A of that **Act**.

(Underlining mine)

[24] The fact that **Turner-Lienaux** was decided in 2004 and concerned the interpretation and application of the **Rules** and legislation as they existed at the time, is immaterial. In my view, the same reasoning and policy considerations ought to apply. Section 32(6) of the **Small Claims Court Act** was not intended to prohibit appeals to this Court from taxations. To conclude otherwise would be contrary to the interests of the Bar and the public it serves. Section 9A of the **Small Claims Court Act** limits the jurisdiction of that court to claims up to $25,000. However, s. 9A(2) of that **Act** states that:

> (2) The monetary limits on the jurisdiction of the Court over claims made pursuant to Section 9 and on orders made pursuant to Section 29 do not apply to taxations …

[25] We can take judicial notice of the fact that taxations often come before Small Claims Court adjudicators involving hundreds of thousands of dollars. The taxation in the present case involved accounts totalling almost $67,000, nearly three times the Small Claims Court limit.

[26] The general authority with respect to appeals from Supreme Court decisions to this Court is found in s. 38(1) of the **Judicature Act**, R.S.N.S. 1989, c. 240, which states:

> 38 (1) Except where it is otherwise provided by any enactment, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court or a judge thereof, whether in court or in chambers.

[27] As Justice Roscoe observed in **Turner-Lienaux, supra**, the taxation by Adjudicator Thompson which is the subject of this appeal is not a "proceeding" before the Small Claims Court as characterized in s. 32(1) of the **Act**. Rather, the "proceeding" was brought before the Supreme Court to determine the appeal initiated by Mr. MacDonald to challenge the adjudicator's taxation. That appeal led to the "judgment or order" of the Supreme Court, from which an appeal lies to this Court pursuant to s. 38(1) of the **Judicature Act**.

[28] I do not regard **Civil Procedure Rule** 7.04 as creating any sort of impediment to our hearing the case. It says:

> 7:04 The provisions of legislation, such as the regulations under the *Small Claims Court Act*, establishing procedures to be followed on a judicial review or an appeal prevail over an inconsistent portion of the Rule.

In my view, **Rule** 7.04 applies to legislation establishing "procedures to be followed" and not to substantive law issues including the right of appeal that is central to this case.

[29] Lastly, it is immaterial that portions of Justice Roscoe's reasons in **Turner-Lienaux, supra**, make reference to "costs", "bills of costs" , or "solicitor-client costs" . Whatever the terminology, the jurisdictional issue involved

the taxation of a lawyer's account. The principle from that case is still good law. It would neither be practical, nor in the public interest, for some taxations, depending on their monetary value, to have a right of appeal to this Court and others not.

[30] In summary, I would confirm that on the basis of this Court's decision in **Turner-Lienaux**, a party has a right of appeal to this Court from a decision of the Nova Scotia Supreme Court concerning a taxation of a lawyer's account by an adjudicator of the Small Claims Court in accordance with s. 9A of the **Small Claims Court Act**.

[31] I will now turn to the analysis of the three principal grounds of appeal.

Analysis

i. Whether the judge erred in law by incorrectly interpreting the Legal Profession Act, S.N.S. 2004, c. 28 and finding that that statute did not confer authority on a Small Claims Court adjudicator to tax a solicitor's account that had already been paid by a client

[32] Justice LeBlanc concluded that the adjudicator had no jurisdiction to deal with the respondent's first account because Mor-Town had already paid it. He based his conclusion on his interpretation of certain words in the **Legal Profession Act**, which had been urged upon him by the respondent. I respectfully conclude that the judge erred in his interpretation of both the statute and earlier jurisprudence of this Court which dealt with similar language.

[33] I will begin by referring to the provisions of the **Legal Profession Act** which are relevant to the analysis in this case:

> **Interpretation of Part**
>
> 65 In this Part,
>
> (a) "account" means the fees, costs, charges and disbursement to be paid by a client or a party to a matter as a result of an order of a court;
>
> (b) "adjudicator" means an adjudicator of the Small Claims Court of Nova Scotia;

(c) "lawyer" includes a law firm and a law corporation.

Account recoverable

66 A lawyer may sue to recover the lawyer's reasonable and lawful account.

Taxation

67 Notwithstanding any other enactment, a lawyer's account may be taxed by

(a) an adjudicator; or

(b) a judge.

Initiation of taxation

68 A taxation may be initiated by

(a) any person claiming the whole or a portion of an account; or

(b) any person from whom an account or any portion of it is claimed.

Where lawyer is party

69 Where a lawyer is a party in a proceeding in which the reasonableness of the lawyer's account is raised, the presiding judge or adjudicator may

(a) tax the account as part of the proceeding; or

(b) order the account to be taxed by another judge or adjudicator.

Appeal

70 A decision on a taxation may be appealed to

(a) the Supreme Court of Nova Scotia, if the taxation is conducted by an adjudicator; or

(b) the Nova Scotia Court of Appeal, if the taxation is conducted by a judge.

[34] LeBlanc, J. referred to the definition of "account" as meaning "the fees, costs, charges and disbursement (sic) to be paid by a client or a party" and interpreted those words as limiting the adjudicator's jurisdiction to tax only certain accounts. He reasoned:

> [28] … This would suggest that the words "to be paid" and "as a result of an order of a court" in s. 65(a) cannot simply be ignored. The words "to be paid" suggest the legislature intended to limit the definition of "account" for the purposes of Part VI. The phrase "as a result of an order of a court" further suggests a limitation on which accounts can be taxed. This phrase indicates that an account is that which must be paid if a court so orders. I believe that s. 65(a) creates two categories of account: the fees, charges and disbursements to be paid by a client to their own lawyer; and those to be paid by a party to a matter as a result of a court order (i.e. party and party costs). …
>
> [33] This reasoning would suggest that the *Legal Profession Act* does not confer authority to tax an account that has already been paid. Without such authority, as a statutory court without inherent jurisdiction, the Small Claims Court would not have jurisdiction to tax a paid account. …

[35] The judge emphasized the words "to be paid" and interpreted them to mean that only accounts unpaid as of the time of the taxation could be taxed. In other words, as he saw it, accounts that had already been paid did not fit within the definition of "account" and therefore could not be subject to taxation. Here, respectfully, I find the judge fell into error. He adopted a narrow and restrictive interpretation of the legislation which runs counter to this Court's jurisprudence, and the public interest.

[36] In **Lindsay v. Stewart MacKeen & Covert** (1988), 82 N.S.R. (2d) 203 (N.S.S.C., A.D.), the very same issue was addressed. In that case this Court had to consider the application of ss. 35 and 36 of the **Barristers and Solicitors Act**, R.S.N.S. 1967, c. 18. The provisions read:

> 35. Any bill for fees, costs, charges or disbursements may be taxed by a Taxing Master, a judge (Judge) of the Supreme Court or a judge of the County Court for the district in which any of the business charged for the bill was done.
>
> 36. Such taxation may be had at the instance of any person claiming the whole or any portion of such fees, costs, charges or disbursements or at the instance of any person from whom such amount or portion thereof is claimed.

[37] In that case the Chambers judge found that the appellant was not entitled to have the first two accounts taxed because he was not a person from whom those accounts were "being claimed" as they had been paid. On appeal, Jones, J.A. , writing for this Court, rejected that reasoning saying:

> [20] … With respect in my opinion s. 36 should not be given such a narrow interpretation and the unrestricted right under s. 35 should not be whittled away in that fashion. The primary object of s. 36 is simply to define the parties entitled to demand a taxation. More explicit language would be required if the Legislature had intended to deprive a person of his right of taxation simply because he had made payments on account. …
>
> [21] In my view the payments in this case did not preclude the appellant from taxing all four accounts.

[38] In my opinion it makes no difference that the wording of the provisions considered in **Lindsay** is somewhat different than the operative parts of the **Legal Profession Act** under consideration here.

[39] The principle is the same. The purpose of both statutes is to protect the public. That objective would be defeated if the words "to be paid" were interpreted to mean that the account had to be in an unpaid state, at the very moment of taxation, if it were ever going to be challenged by the client. The fact that accounts were rendered to be paid by a client, and then were paid by a client, cannot mean that they no longer qualify as "accounts" under the legislation. Such an interpretation would effectively gut any realistic opportunity for the client to ever challenge a bill. In my opinion, “to be paid” means payable at the date of the account, not at the date of the taxation.

[40] **Civil Procedure Rule** 77.13 states that a lawyer is entitled to reasonable compensation for services rendered and recovery of disbursements necessarily and reasonably made. The reasonableness of a lawyer’s compensation is to be assessed in light of all of the circumstances. The **Rule** provides a list of certain factors which may be relevant to the assessment. The Nova Scotia Barristers' Society *Legal Ethics Handbook*, Chapter 12 states:

> A lawyer has a duty to

> stipulate, charge or accept only fees that are fully disclosed, fair and reasonable;
> …

[41] Lawyers who practice in Nova Scotia have the privilege of membership in a self-regulating profession. The benefits of membership come with a professional responsibility to act with integrity and to exercise all the knowledge, skill and judgment, to the requisite standard of competence, one would reasonably expect of a person trained in the law.

[42] The **Legal Profession Act** should be interpreted in a manner that is consistent with the ethical obligations of the profession. After providing such professional services the **Act** says a lawyer is entitled to recover his or her "reasonable and lawful account". Historically, the legislation governing the practice of law in Nova Scotia as it relates to the taxation of accounts has been broadly interpreted so as to confer the widest possible right to have a bill taxed. In my view, Part VI of the **Legal Profession Act** ought to enjoy the same generous interpretation as its predecessor legislation, so as to achieve the profession's principal objective in regulating its affairs, which is to "uphold and protect the public interest in the practice of law".

[43] Often a client will not know whether a legal account is reasonable at the time he or she is asked to pay it. The client may not come to the conclusion that the account might be unreasonable until he or she has had the opportunity of talking to others who have received similar legal services, or by consulting other counsel. If that client's right to have an account that has already been paid, independently reviewed by taxation is lost, an injustice would result. That could hardly have been the intention of the drafters of this legislation.

[44] There are other practical and equally compelling considerations. It is common practice for legal accounts in real estate transactions to be paid out of the proceeds at closing. The judge's interpretation in this case could potentially exempt those accounts from taxation, such that unreasonable fees could virtually be forced upon vulnerable or unsophisticated clients. The same would apply to lawyers' accounts being paid out of retainer funds held in trust. At the hearing, when questioned by the panel, the respondent argued that once paid, a client's chance to challenge the account was lost; that the only way to avoid aborting a closing would be to oblige the client to pay under formal protest, and then move afterwards to tax the account. I do not accept that as an accurate statement of the

law in Nova Scotia. It seems to me that such resistance by a client would likely scuttle the closing, or hinder a successful wrap-up of the transaction the lawyer had been engaged to complete. This hardly seems a laudable objective.

[45] Finally, the legislation as I read it is clearly written to enable all taxations to be brought before a Small Claims Court adjudicator. The choice of forum is left to the party seeking taxation. There is no indication of any intention on the part of the Legislature to establish some sort of bifurcated process whereby Supreme Court justices would have certain taxation powers (in this case, to tax “paid” accounts) which Small Claims Court adjudicators would not possess. In my respectful view, such a narrow, restrictive interpretation of the **Legal Profession Act** would be contrary to law, the statutory objectives, and the practicalities of every day legal commerce.

[46] I turn now to the second principal argument raised by the appellant.

ii. Whether the judge erred in law by finding that the onus was not on Mr. MacDonald as a solicitor to prove the reasonableness of his legal account

[47] At taxation and on appeal Mr. MacDonald argued that his (former) client bore the onus, citing the decision of Goodfellow, J. in **Turner-Lienaux v. Campbell**, 2002 NSSC 248, aff'd 2004 NSCA 41(**supra**).

[48] Respectfully, the decision of this Court in **Turner-Lienaux, supra**, does not stand for the proposition that the party who seeks taxation bears the burden of proving (or challenging) the reasonableness of the account. The myriad of issues considered by Justice Roscoe in her analysis of the appeal and the cross-appeal in that case, did not include any consideration of the question — who bore the onus of proof? The principal focus involved the evaluation of a judge's decision to reduce an adjudicator's taxation of solicitor-client costs; the most significant reduction following a disallowance of certain "topping-up " amounts previously taxed on a party and party basis following several other interlocutory applications and appeals.

[49] To the extent that there remains any confusion regarding who bears the onus during the taxation of a lawyer's account let me be clear. The onus of proving the

reasonableness of an account should always rest with the lawyer. The lawyer knows what was done, by whom and when. The lawyer knows how long it took to complete the task(s) and what fee was charged to do it. The lawyer will also know why the task or particular action was necessary. Rarely would a client be possessed of such information. To expect the client to "prove" the unreasonableness of the work done by the lawyer would neither be practical nor fair. In summary, whether the taxation is initiated by either the client or the lawyer, the lawyer bears the onus of proving that his or her account is lawful, and reasonable, in all of the circumstances.

[50] I will now address Mor-Town's last ground of appeal.

iii. Whether the judge erred in fact and in law by finding that the adjudicator, J. Walter Thompson, Q.C. had breached the duty of fairness by making a negative credibility finding against Mr. MacDonald without first offering MacDonald an opportunity to respond, and without giving sufficient reasons

[51] The existence of a duty of fairness and its application in any particular case are matters of law, to be evaluated according to our assessment of the circumstances of the case under review.

[52] While acknowledging that the Small Claims Court is not an administrative tribunal, Justice LeBlanc referred to "its emphasis on procedural efficiency" which, he thought, "... render[ed] it ... more akin to an administrative tribunal than a court of law." He reasoned that because the taxation of a lawyer's account required "a judicial decision with a high degree of discretion" that "affects the rights or interests of an individual" a duty of fairness that "is not minimal arose." He concluded:

> [41] ...The adjudicator made negative credibility findings with respect to both of the appellant's accounts. ...
>
> [44] ... The aspects of the duty of fairness arising here are among the most basic obligations: the right to be heard and the right to know the case to be met... Before a Small Claims Court adjudicator can make a negative credibility finding, an opportunity should be given to a party to address the adjudicator's credibility concern. ...

> [46] In this case, the adjudicator's reasons do not sufficiently explain his negative credibility findings. The appellant had an opportunity to present his case, but it does not appear he was ever told that the adjudicator was concerned with the credibility of his account. ... This is a breach of the duty of fairness.
>
> [47] The breach is serious ... [and] warrants sending the matter back to a different adjudicator for redetermination.

[53] I will assume that the parties to this taxation were owed a duty of fairness by the adjudicator when the case was heard in May, 2010. I am satisfied that they were afforded such procedural protections throughout.

[54] The respondent is a lawyer of considerable experience. He retained senior counsel Brian Church, Q.C. to defend his interests. He knew that his accounts and methods of record-keeping were seriously contested by his (former) client. The respondent took the stand to explain his accounts and was cross-examined at length. Mor-Town had retained a lawyer to challenge the accounts and require their taxation. Mor-Town engaged another lawyer as an expert and filed that expert's report as part of its case. In such circumstances the respondent *had* to know that the reasonableness of his accounts, and his explanations for them, would be a central issue at taxation. The adjudicator was obliged to decide whether (to quote the words of s. 66 of the **Legal Profession Act**) Mr. MacDonald's account was "reasonable and lawful". In plain language the validity of the account(s) was in issue. In order to decide that issue the adjudicator was bound to assess the evidence given by both the appellant and the respondent who sought to attack or justify the account(s), respectively. Such inquiries were sure to engage issues of credibility. It can hardly be suggested that the adjudicator owed a duty to Mr. MacDonald to remind him of the obvious.

[55] In summary on this point, Adjudicator Thompson heard two nights of evidence, rendered an extensive written decision, and found the respondent's bills to be neither reasonable nor credible. The adjudicator included many specific references in his decision to show why he did not accept the respondent's explanations. I need only refer to a few of these to make the point:

> (i) Para. 14 - I do not find the bill credible. The bill, as a whole, has the air of an after the fact rationalization as if the solicitor, having billed a sum, was thereafter called upon to justify it within the billing norms of the

> profession, or the air of a bill created to justify what was essentially the levy of a commission on a real estate sale.
>
> (ii) Para.15 - #7 "According to the solicitor's description, Dr. Jacobson was an unreasonable, demanding and somewhat obtuse client who consumed a lot of his time to no productive purpose. I am not persuaded that this is so, and in any event, I refer to Ms. O'Brien-Edmond's descriptions of a failure to manage client communications and expectations efficiently and well."
>
> (iii) Para. 15 - #24 "...A solicitor deserves his pay for his time, expertise and the stress transactions may impose, but $11,400.00 is not a reasonable fee for the work involved here. I cannot accept, for example, that one would spend 40 hours dealing with the other side on the sale of a piece of raw land or 14 hours preparing amendments."...
>
> (iv) Para. 18 "... The solicitor has referred to each piece of correspondence and assigned a time to it. We do not have the actual time records, but only the bill itself. I have the impression from reading it that the solicitor has taken each piece of correspondence and then ascribed a time to it."

[56] In summary, the respondent knew full well that his accounts were to be hotly contested. He is an experienced lawyer. He gave hours of testimony. He was represented by senior counsel. He was cross-examined extensively with respect to his activities on this file. He was also questioned by the adjudicator. Many of these questions related to Mr. MacDonald's lack of any time records whatsoever. He testified that he kept time records and activity descriptions on yellow sticky notes. When challenged, he was unable to produce them and explained that he threw them away once his account was paid out of the proceeds of sale, and did so even after being alerted to his client's displeasure with the account. All of this forms part of the evidence Adjudicator Thompson was obliged to consider. He found the respondent's methods of record keeping to be wanting, and his explanations troubling. It was certainly open to the adjudicator, on this record, to so find.

[57] Any time a decision-maker hears conflicting testimony about contested facts, credibility may be an issue. No special "notice" is required to permit the judge or adjudicator to consider and decide credibility.

[58] In my view, the adjudicator's conclusions find reasonable support in the evidence and ought to have been accorded considerable deference by the judge on appeal. Respectfully, there was no basis for LeBlanc, J. to have concluded that the adjudicator breached a duty of fairness, either in the manner in which he conducted the taxation, or the way in which he expressed the result in written reasons.

[59] Before leaving this ground of appeal let me add this. At the appeal hearing in this Court the respondent complained that the adjudicator lacked sufficient experience in shareholders' rights or real estate law to properly judge what was reasonable. I reject that submission out of hand.

Conclusion

[60] An appeal lies to this Court from a decision of the Supreme Court of Nova Scotia with respect to the taxation of a lawyer's account in the Small Claims Court. A lawyer's account may be subject to taxation, whether paid or not. The lawyer bears the onus of proving the reasonableness of his or her account at taxation.

[61] The appeal is allowed, the decision of the judge is set aside, and the decision, order and certificate of Adjudicator J. Walter Thompson, Q.C. dated August 31, 2010, are affirmed. Owing to the possibly novel and arguably unresolved issues surrounding certain aspects of the case, I would order that each side absorb their own costs on appeal.

Saunders, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.