PROVINCE OF NOVA SCOTIA
COUNTY OF ANTIGONISH **C.At. No.: 2387**

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER SIX

BETWEEN:

RICHARD & MACDONALD

Plaintiff

- and -

RUHOLLAH SHAFIE and NAHID SHAFIE

Defendants

Duncan J. Chisholm, Esq., Counsel for the Plaintiff.
Peter McLellan, Esq., Counsel for the Defendants.

1991, January 31st, Anderson, A.J.C.C.:

FACTS:

1. In May of 1988, the Shafies retained the services of Duncan Chisholm to act on their behalf in connection with certain proceedings which had already been commenced by Shell Canada. William Meehan had originally been the solicitor for the Shafies but had to withdraw as it transpired that he was a witness to certain material discussions. The Shafies were introduced to Mr. Chisholm by William Meehan.

2. At the time the solicitor-client relationship was established there was no discussion regarding methods

of billing, amounts to be charged or the like. Mr. Chisholm did not have any practice of confirming any methods of billing or how accounts would be prepared.

3. There was an initial account rendered in July of 1988 which was paid, $2,000.00 coming from a retainer and the balance being paid on January 23, 1989. A second account was rendered on August 2, 1988, and this was paid on August 5th, 1988.

4. There was some correspondence from Mr. Chisholm to the Shafies regarding accounts. There was an apparent misunderstanding about the initial retainer of $2,000.00 having been returned by the Bank but that was, in fact, an error on the part of Mr. Chisholm.

5. The Shafies were becoming concerned themselves regarding the future costs of the legal proceedings with Shell Canada because of their own precarious financial situation. The Trial was less than a month away and Mr. Shafie was even giving consideration to going without a solicitor or attempting to have the matter dealt with by Legal Aid. On the advice of Mr. Meehan, Mr. Shafie was advised to meet with Mr. Chisholm and have him place a "cap" a "lid" or an "upper limit" on the future costs of the proceedings.

6. Mr. Shafie met with Mr. Chisholm who initially declined to give any such figure. Mr. Shafie met again with Mr. Chisholm and emphasized the importance of this information to him. Mr. Chisholm then indicated that the additional costs in the proceedings would be a maximum of $6,000.00 to $7,000.00.

7. Shortly after giving this information, Mr. Chisholm sent to the Shafies an account for $3,227.45. It apparently related to services performed prior to January of 1989.

8. Mr. Shafie then met again with Mr. Chisholm. Mr. Chisholm again confirmed that the future costs would not exceed $7,000.00 and that in total it would not exceed $10,000.00, including the account dated January 6, 1989. Mr. Chisholm required mortgage security for legal costs and the figure he suggested was $10,000.000 on the three properties owned by the Defendants.

9. The Defendants fulfilled their part of the obligation by providing the mortgage for $10,000.00 and paid cash of $900.32 with Mr. Chishom not pressing for the balance of the extra $2,000.00 requested.

10. Following the Trial the Shafies received an additional account for legal services dated February 15, 1989. This new account was for $16,402.95. This meant that there were then "outstanding" two accounts:

(a) January 6, 1989	$3,227.45
(b) February 15, 1989	$16,402.95
TOTAL	$19,630.40

11. The Shafies paid the $10,000.00 which they had agreed to pay. This was paid out of the sale of one of the three properties and at that time the Plaintiff was unwilling to pro-rate the monies over the three properties in question.

INTRODUCTION:

This is a classic case which illustrates the perils inherent in a solicitor-client relationship when communication lines are not clear and uncertainty prevails. In short, both Mr. Chisholm and Mr. Shafie came away from their discussions of January 1989 with different impressions. Mr. Shafie believed that the legal services he was getting would go no higher than $10,000.00. Mr. Chisholm, on the other hand, believed that his legal fees would probably not go over $10,000.00, but that the possibility that they would remained open and understood by both sides.

The role for the court, in this dispute, is to decide on the facts, and to apply thereto the relevant case law governing the determination of fee estimates as it has developed over the years. Further, the court is given direction by the **Code of Professional Conduct** which governed Mr. Chisholm's relationship with Mr. Shafie throughout the course of their relationship.

The Case Law and the Code - Duty Upon the Lawyer.

In **Alexander v. McKenzie** (1984) 29 Man. R. (2d) 263 (Co. Ct.), Judge Jewers speaking to an issue very similar to the one at bar, held; at p. 264:

> "In my view solicitors must be very careful about giving estimates to clients. The clients have no idea of what time might or would be involved in court proceedings, and are utterly dependent upon their solicitors for advice in this regard. A solicitor should make it clear to their clients that the time estimates for a proceeding is only an estimate and might very well be exceeded, and further, a

> solicitor should ensure that their clients are kept abreast of proceedings and any anticipated or likely change in the original time estimate. [emphasis added]

The importance of keeping clients advised of possible adjustments to estimates given by solicitors for services is further found to be a duty upon solicitor and barrister in **Re: Murphy, Murphy, and Mollins and MacEachern's Estates** (1980), 32 N.B.R. (2d) 281 (N.B.Q.B.) at p. 283; **Leslie v. Atkinson and Hughes** (1983), 49 N.B.R. (2d) 97 (N.B.Q.B.) at p. 101. Further in **Carwood v. Mirza** (1981), 13 Sask R. 428 (Sask. Dist. Co.), Wimmer, J. quotes the **Code of Professional Conduct**, Rule 3, Chapter Xl respecting fees in supporting this duty upon lawyers, at p. 432-433.

> ". . . misunderstandings respecting fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice. The lawyer should try to avoid controversy with his client with respect to fees, and he should be ready to explain the basis for his charges (especially if the client is unsophisticated or uninformed as to the proper basis and measurements for fees). He should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make informed decisions. When something unusual or unforeseen occurs which may substantially affect the amount of the fee, the lawyer should forestall misunderstandings or disputes by explanations to his client."

The Ontario Appeal Court decision in **Cohen v. Kealey** (1985), 10 O.A.C. 344 (C.A.), is directly on point

with the case at bar in that it deals with the issue of "maximums" in estimates and their importance. As the case law above found that lawyers have a duty to advise clients as cost estimates change, the duty to advise of changes in costs is even heavier when lawyers quote "maximum" amounts to clients. In **Cohen** the solicitor wrote the client and gave the following estimate for his legal services. "...I have told you that the total expenses that you may incur for legal fees and disbursements including chartered accountant and real estate appraiser fees will certainly exceed $10,000.00 and may be as high as $50,000.00." The solicitor later sued to collect $76,202.00. In upholding the agreement or undertaking for a ceiling of $50,000.00, Robins, J.A.:

> "...He did not, however, appear to fully appreciate the significance of the understanding reached by the parties on the basis of which the solicitor was hired or attached sufficient weight to that understanding. He treated the understanding as an estimate rather than a firm understanding as to the maximum fee he was entitled to charge depending on the success of the proceedings. Even in the case of an estimate, a solicitor is obliged to advise the client without delay of any developments that are likely to increase the fee beyond the estimate and that was not done in this case. [Emphasis added]

THE UNDERTAKING OF MR. CHISHOLM - FORMING AN AGREEMENT

Based on the evidence before the court, it is clear that Mr. Chisholm provided both an estimate and a ceiling to the plaintiff. At page 27 of the hearing transcript, Mr. Chisholm responded in cross-examination to questions as follows:

> "Q. But he had a concern, did he not, Mr. Chisholm, that he [Mr. Shafie] wanted to know at some stage how much it was going to cost him to go to trial.
>
> A. He did ask me that. He asked for well what I would term to be an estimation.
>
> Q. Alright, he wanted to know how much it would be and do you recall giving him then the figure of $6,000.00 to $7,000.00?
>
> A. Yes.
>
> Q. And...
>
> A. Excuse me, I gave him a figure..an estimate of six to seven thousand. I didn't think it was going to exceed $10,000.00." [Emphasis added]

In doing so Mr. Chisholm clearly provided both an estimate of $6,000.00 - $7,000.00 and a ceiling of $10,000.00. This is a reading a reasonable person would give that undertaking. This is also what the plaintiff understood as to be the fee structure. Based on this understanding, Mr. Shafie agreed to proceed, or at a minimum, it formed part of the basis for his argeeing to proceed with the services of Mr. Chisholm.

THE FAILURE TO UPDATE THE ESTIMATE

At p. 32 of the hearing transcript, Mr. Chisholm, responding in cross-examination admitted that he failed to take steps to update his estimate or his ceiling.

"Q. Would you also agree that at no time from either the 6th of January or the 11th of January or the 23rd of January did you go to Mr. Shafie and tell him that the estimate could no longer be relied upon?

A. No, I never told him that... I never did from that time on."

CONCLUSION:

This case is not about the credibility of the defendant, it comes down to evaluating the concrete actions in an objective manner from the perspective of the client. Unlike **Toulany v. McInnes Cooper & Robertson** (1989), 90 N.S.R. (2d) 256, the truth of the defendants' evidence is not at issue, instead, objective analysis of exactly what was said gave legitimacy to the assertions of the defendant that there was a cap placed on the fees chargeable by Mr. Chisholm.

Consequently, the plaintiffs' action should be dismissed and costs awarded to the defendant.

An Additional Judge of the County
Court of District Number Six