SUPREME COURT OF NOVA SCOTIA

Citation: MacDonald v. Mor-Town Developments Ltd., 2011 NSSC 281

Date: 20110708
Docket: Hfx. No. 336735
Registry: Halifax

Between:

David MacDonald

Appellant

v.

Mor-Town Developments Limited

Respondent

Revised Decision:	The text of the original decision has been corrected according to the erratum dated July 29, 2011. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	December 14, 2010 in Halifax, Nova Scotia
Counsel:	David MacDonald, on his own behalf John Kulik, Q.C. and Jeff Aucoin, for the respondent

By the Court:

INTRODUCTION

[1] This is an appeal pursuant to s. 32(1) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, s 70(a) of a Small Claims Court adjudicator's taxation of a solicitor's account. Despite the fact that the corporate client paid the account without complaint, and with the approval of all shareholders, the adjudicator reduced the bill by half. The solicitor appeals this reduction.

FACTS

[2] The appellant, David MacDonald, is a lawyer. The respondent, Mor-Town Developments Ltd., is a Nova Scotia Limited Company. The appellant represented the respondent in the sale of certain property and in the reconstruction of a corporate Minute Book and Company Register that was lost in a fire. There was no written retainer agreement. The property sale closed on September 30, 2008, for a selling price of $520,000. For the respondent, this sale represented a net gain on disposition of the land of $247,154. That day, the appellant sent the respondent a Statement of Account for services rendered in the amount of $60,322, including disbursements and Harmonized Sales Tax. On October 2, 2008, the respondent's president wrote the appellant thanking him for his services, instructing him to pay

his account out of funds held in trust, and instructing him to hold $2,000 in trust for future fees regarding the winding up of the corporation. He wrote, in part:

> I do not wish to create the impression that I was "nickel and diming" things because in the scheme of things divided 6 ways what we were discussing does not amount to a lot per shareholder. However I do not believe in not asking questions where I as president of Mor-Town and personally need clarification. Thus I wanted to confirm again your hourly rate (which I misunderstood to be lower form previous years) and wondered about Barrie's fees.(I did most of the work in the spreadsheet that he is using for the balance sheet so maybe you can understand where I am coming from).
>
> I was wondering if in your summary of your services, you should state that your fees included time spent from earlier years that you put off until after a sale was completed?
>
> I confirm that you can pay the following accounts:
>
> Your account $60,322.09
> GMAC $22,884.00
> Green Jain $8475.00
> You can place $2000.00 in trust for your future fees in winding up Mor-Town.
> HOLD off in placing $18,000 in trust for Green Jain until I have discussed this matter with Barrie Green.
>
> Can we get post dated cheques for the mortgage payments?

[3] Following these instructions, the appellant paid his account out of funds held in trust from the real estate transaction. The appellant's account was further approved by all of the respondent's officers, directors and shareholders on or about December 8, 2008. The appellant then proceeded to deal with the winding-up of the respondent corporation. In January 2009, he wrote the respondent's president on two occasions regarding the winding-up. The appellant informed the respondent that complications in the process could increase the fee from $2,000 to $20,000. Ultimately, the appellant wrote that "$2,000.00 + HST which is still in

Trust for the Company, together with the amount for Barrie [of Green Jain accountants] will cover the wind-up, if there are no further complications," and indicated that the president should get the other shareholders to sign and return the appropriate documents.

[4] It does not appear that the respondent was overly concerned with the appellant's billing before January 2009. Around that time, the respondent's president met with a solicitor, Alan Stern. By letter dated January 6, 2009, Mr. Stern informed the appellant that they had be retained by the respondent, and raised concerns about the appellant's September 30, 2008 Statement of Account, which the respondent had already paid. Mr. Stern queried both “the hourly rate charged and the amounts which appear in the invoice.” Mr. Stern requested the appellant's time records supporting the September 30, 2008 invoice. He also wrote that “[i]f we are unable to reach an amicable resolution of this fee dispute, I will recommend to our client that your account be taxed in the usual manner.” The appellant did not maintain detailed time records to support his invoice. His method of time recording was to make notes on post-it notes, and then to collate these notes, rounding down in the client's favour.

[5] Mr. Stern again wrote the appellant on January 14, 2009, informing him that the respondent had instructed him "to take over all of the Mor-Town files," enclosing such a request from the respondent, and requesting "copies of all of the file contents which include all of the emails from each of the files." Mr. Stern acknowledged that there may have been an account outstanding for services rendered after September 30, 2008, and stated "I will take appropriate steps to secure that account, subject of course to taxation if the client wishes to do so." By fax dated July 14, 2010, the appellant sent the respondent, care of Mr. Stern, a second Statement of Account for services rendered in the period October 1, 2008 to July 8, 2009, in the amount of $6,426.26, including tax and disbursements.

SMALL CLAIMS COURT PROCEEDING

[6] On April 8, 2010, the respondent filed a Notice of Taxation with the Small Claims Court to tax both accounts. By a decision dated August 31, 2010 (reported as *Mor-Town Developments Ltd v. MacDonald*, 2010 NSSM 64), the Small Claims Court ordered that the accounts be taxed in the amount of $32,266.40, held that the respondent was entitled to costs in the amount of $174.43, and, taking into consideration the unpaid account, ordered the appellant to pay the respondent the sum of $28,230.12. It is from this decision that the appellant appeals.

[7] The adjudicator found that the appellant had “handled the file reasonably well” and that he was “entitled to be paid for his services.” He concluded, however, that the amount billed was “unreasonable both from the point of view of the reasonable fees to be charged on the marketing and sale of a piece of raw land, and from the point of view of the time spent on it.”

[8] The adjudicator considered whether he had jurisdiction to order taxation given that one of the accounts had already been paid by the respondent. He rejected the appellant's argument that the definition of “account” in s. 65(a) of the *Legal Profession Act*, S.N.S. 2004, c. 28, limited his jurisdiction to tax only accounts that had yet to be paid. That provision defines “account” as “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.” The adjudicator said, at para. 7:

> The solicitor has argued that his bills may not be taxed since the bill has been paid by Mor-Town. While I acknowledge that the legislation may bear the interpretation the solicitor puts on it, I find the result; that a client be unable to have the reasonableness of an account assessed if he has paid it, to be unreasonable. The result would be to deprive the client of any remedy in many, many cases, especially when as here, the solicitor already has the money in his trust account and the client does not have the full opportunity of considering an account rendered to him or her. I agree with counsel’s submission quoting from W. Augustus Richardson Q.C., an adjudicator of this Court, who has written widely on the taxation of solicitor’s accounts, to the effect that the legislature has conferred the widest possible right on a client to have a bill taxed.

[9] The adjudicator cited a paper by Adjudicator W. Augustus Richardson, *The Taxation of Legal Accounts in the Small Claims Court of Nova Scotia*, as authority

for the principles governing taxation of a solicitor's account. The adjudicator noted that appellant “failed to keep the client informed of the costs as they mounted” and held that this was “a significant factor in [his] reduction of the account” (paras 8-10). The adjudicator further held that the onus was on the appellant to establish the reasonableness of his or her account. In determining that the bill was not reasonable, the adjudicator made a negative credibility finding regarding the bill. He said, at 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.

[10] The adjudicator referred to (and agreed with) the opinion of Erin O'Brien Edmonds, a solicitor called by the respondent to give an opinion on the reasonableness of the account, adding that, while her analysis was “helpful,” he “got to the result by a different route....” (para. 20).

[11] The adjudicator also considered the second Statement of Account, which related to work post-closing and had yet to be paid. He said, at para. 18:

> This bill is more detailed. 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. This impression is reinforced by an allocation of $700.00 to “various phone calls”. Approximately $2,500.00 of the account describes communications with Dr. Jacobson [the respondent’s president]. I doubt Dr. Jacobson had any sense that the solicitor felt entitled to bill Mor-Town for all

> communications post-closing. I do allow that financial statements had to be prepared and a distribution of the proceeds made and that complexities arose through that process, but I find the bill unreasonable. I reduce it to $3,000.00. I allow the disbursements.

[12] In the result, the adjudicator taxed both accounts at $30,284.00, including HST, and allowed disbursements in the amount of $1,982.40. The adjudicator awarded the respondent $174.43 in costs. Given what had already been paid by the respondent to the appellant, this resulted in an order for the appellant to pay the respondent $28,230.12.

ISSUES AND STANDARD OF REVIEW

[13] The grounds for appellate review of a Small Claims Court decision are set out at s. 32(1) of the *Small Claims Court Act*. That section reads:

> 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.

[14] I would characterize the issues as follows: (1) Did the Small Claims Court have jurisdiction to tax the appellant's first account given that it had already been paid by the respondent without complaint? (2) Did the adjudicator commit an error

of law in taxing the second account by placing the onus on the appellant to prove the reasonableness of that account? (3) Did the adjudicator breach the duty of fairness by making a negative credibility finding against the appellant without giving him an opportunity to be heard or by failing to provide adequate reasons for his finding?

[15] The parties disagree on the appropriate standard of review to be applied on an appeal of a Small Claims Court adjudicator's taxation of a lawyer's account. The respondent cites Mark M. Orkin, *The Law of Costs*, 2d ed, looseleaf (Aurora, Ont.: Canada Law Book, 1987), at §603, and *Lindsay v. Stewart, MacKeen & Covert* (1988), 82 N.S.R. (2d) 203 (S.C.A.D.), for the proposition that adjudicators are afforded great deference on appeals of taxations.

[16] The appellant says the respondent has over-simplified the standard of review, but does not suggest a clear alternative, other than submitting that allowance of an unreasonable amount on a taxation is an application of a wrong principle. In *Cape Breton Landowners v. Stora Kipparbergs Bergslags* AB (1983), 58 N.S.R. (2d) 193 (S.C.A.D.), which is cited in *Lindsay*, the Court noted that while there are differing rules in the various jurisdictions in Canada, "the judicial approach appears rather uniform and is one of non-interference unless the Taxing

Master operated on a wrong principle and thereby fell into error" (para 50). The Court held that "the best example of the exercise of a wrong principle is to be found in the allowance of unreasonable amounts" (para 50).

[17] More recently, in *Turner-Lienaux v. Campbell*, 2004 NSCA 41, at para 19, the Court of Appeal affirmed the following statement, from *Conrad v. Snair* (1996), 150 N.S.R. (2d) 214 at 216 (C.A.), as applying to an appeal of a Small Claims Court adjudicator's taxation:

> Since orders as to costs are always in the discretion of the trial judge, this appeal is subject to a clearly defined standard of review. This Court has repeatedly stated that it will not interfere in a trial judge's exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice.

[18] These pronouncements do indeed confer great deference on appeals of taxations, but only with respect to the adjudicator's discretion to determine the reasonableness of the amount charged by a lawyer. If the ground of appeal is something other than a review of the amount determined to be reasonable, the standard of review may be different. In this case, the appellant has not directly challenged the reasonableness of the adjudicator's determinations on amount. Rather, the appellant argues that the adjudicator lacked jurisdiction to tax the first account, that he committed an error of law in the taxation of the second account,

and that he breached the duty of fairness throughout the hearing. It appears that these grounds of review attract less deferential standards of review.

[19] The question of whether the Small Claims Court lacked jurisdiction to tax the appellant's first account, given that it had already been paid by the respondent without complaint, is a pure question of law, upon which the standard of review is correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para. 8, [2002] 2 S.C.R. 235; *McPhee v. Gwynne-Timothy*, 2005 NSCA 80 at para. 33, 232 N.S.R. (2d) 175. Whether the adjudicator erred in law in taxing the second account by placing the onus on the appellant to prove the reasonableness of that account is also a question of law, subject to review for correctness: *Re van Driel*, 2010 NSCA 87 at para. 43.

[20] The appellant's third ground of review – alleging a violation of the duty of fairness – does not require a standard of review analysis. On appeal, the duty of fairness is "an issue of first instance, without any 'standard of review'; but deference may inhere in this court's definition of the applicable procedural fairness principle": *Re van Driel* at para 43. The role of the reviewing court is to determine the content of the duty of fairness in the circumstances, and whether the decision-maker breached that duty: *Bowater Mersey Paper Co v. CEP, Local 141*, 2010 NSCA 19 at paras 30-32, 289 N.S.R. (2d) 351.

JURISDICTION OVER THE APPELLANT'S FIRST ACCOUNT AFTER PAYMENT

[21] The statutory provisions governing taxation of a lawyer's account are found in Part VI of the *Legal Profession Act*, S.N.S. 2004, c. 28, headed "Legal Fees." Sections 65-68 state:

> 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.

[22] The appellant submits that the adjudicator lacked jurisdiction because the definition of "account" in s. 65(a) precludes review of accounts that have already been paid. The respondent says the appellant's interpretation lacks legal and practical sense, and submits that a comparable argument under the predecessor legislation was rejected by the Court of Appeal in *Lindsay*. The respondent further

submits that acceptance of the appellant's position would deprive clients of any meaningful assessment of the accounts they receive from their counsel, particularly where counsel is paid out of proceeds of a sale or from funds already held in trust.

[23] The adjudicator acknowledged “that the legislation may bear the interpretation the solicitor puts on it,” but found the result, “that a client be unable to have the reasonableness of an account assessed if he has paid it, to be unreasonable.” He continued:

> The result would be to deprive the client of any remedy in many, many cases, especially when as here, the solicitor already has the money in his trust account and the client does not have the full opportunity of considering an account rendered to him or her. I agree with counsel's submission quoting from W. Augustus Richardson Q.C., an adjudicator of this Court, who has written widely on the taxation of solicitor's accounts, to the effect that the legislature has conferred the widest possible right on a client to have a bill taxed (para 7).

[24] In *Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27 at 41, the Supreme Court of Canada held that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” In this case, the adjudicator focussed less on the language than on a purposive analysis of the most appropriate policy result. The respondent appears to suggest that full statutory interpretation was not necessary because there is case law from the Court of Appeal on this issue under the predecessor legislation. In *Lindsay*, the trial judge held that the

Barristers and Solicitors Act, R.S.N.S. 1967, c. 18, precluded taxation of a solicitor's bill that had already been paid. The relevant provisions of the Act provided:

> 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 in 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 any portion thereof is claimed.

[25] The trial judge reasoned that s. 36 of the Act restricted taxation to persons claiming a bill or from whom a bill was claimed, and that the use of the word "claimed" precluded a client who had already paid their bill from seeking a taxation, since the bill was no longer "claimed" by the solicitor. The Court of Appeal rejected this argument. The Court stated that s. 35 conferred "the widest possible right on a client to have a bill taxed in Nova Scotia" (para. 20). The Court held that s. 36 must be interpreted in light of this wide right and that this did not support the narrow interpretation of the trial judge:

> 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.

[26] The respondent appears to suggest that this decision is conclusive of the issues on this appeal. In *Lindsay*, however, the Court of Appeal was interpreting

provisions of the now-repealed *Barristers and Solicitors Act* that is not identical to the language of the *Legal Professions Act*. In the process, the operative language of these provisions was changed. It is therefore not clear that *Lindsay* is determinative.

[27] Statutory interpretation requires a textual, contextual, purposive analysis. A statutory definition may be either exhaustive or non-exhaustive. Subsection 65(a) states that "'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...." According to Ruth *Sullivan, Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont.: LexisNexis, 2008) at 62 "[a]n exhaustive definition is normally introduced by the verb 'means'." The listing of "fees, costs, charges and disbursement" that follows "means" is also suggestive of an exhaustive definition.

[28] There is a presumption against tautology. The Supreme Court of Canada has held that it is a principle of statutory interpretation that "no legislative provision should be interpreted so as to render it mere surplusage": *R v Proulx*, [2000] 1 S.C.R. 61 at para 28. This presumption against tautology means that the words of a statute are to be given an effect. 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).

[29] There is also a presumption of consistent expression. According to Sullivan, “[i]t is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning…”: *Construction of Statutes* at 214-215. This suggests that the interpretation of “account” in Part VI of the *Legal Profession Act* must be applicable to each subsequent use of the word “account” in that Part. If “account” means both unpaid and paid accounts, section 66 of the Act, which provides that a “lawyer may sue to recover the lawyer's reasonable and lawful account,” could be rendered meaningless. If the word “account” included both unpaid and paid accounts, a lawyer would be empowered by the Act to sue to recover a paid account.

[30] With this said, the words of a statute are not the only consideration in statutory interpretation. As McLachlin C.J.C. explained in *Canada Trustco Mortgage Co v. Canada*, 2005 SCC 54, at para. 10, [2005] 2 S.C.R. 601:

> When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[31] The respondent argues that the legislature's purpose in enacting Part VI was to allow taxation of both unpaid and paid accounts, conferring the widest power to tax an account, as suggested by *Lindsay*. Section 35 of the *Barristers and Solicitors Act*, which was under consideration in that case, read, "[a]ny bill for fees, costs, charges or disbursements may be taxed…." This provided the context for the Court of Appeal to give a broad interpretation to the sections that followed, particularly the provision determining who could seek taxation. In contrast, the current legislation starts with a narrow definition of "account" that is then applied in subsequent sections. This suggests that the taxation power has evolved from a wide power to tax to a narrower exhaustive power. While s. 68(b) of the *Legal Profession Act* uses the same language as s. 36 of the *Barristers and Solicitors Act*, the word "claimed" is not preceded by a wider grant of power, but by an exhaustive definition of the word "account."

[32] It is worth noting that there have been instances of statutory language that makes it clear – or at least clearer than in the present statute – that taxation is possible only where an account has not been paid. For instance, in *Re McLaughlin* (1986), 6 B.C.L.R. (2d) 278, 1986 CanLII 917, considering taxation provisions of the British Columbia *Barristers and Solicitors Act* that provided for applications for taxation within a stated period after the delivery of the bill (ss. 90-92). The court said, at paras. 2 and 5:

> The client now asserts that the solicitor made an oral agreement that the total amount of his account would not exceed the sum of $13,000. The solicitor denies any such oral agreement. He says he told the client that he would charge for his services at the rate of $175 per hour. The solicitor also says that none of his accounts can be taxed because there is no provision for taxation of paid accounts under the provisions of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26....
>
> In my view, the client's application must fail for the reason that the Barristers and Solicitors Act does not provide for taxation of accounts which have been paid....

[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. The Supreme Court does have jurisdiction to tax a lawyer's account (see s. 67(b) of the *Legal Profession Act*), but as a matter of policy, it would be preferable to allow taxation of both unpaid and paid accounts by the Small Claims Court. I am forced to conclude, however, that the statutory

language cannot support such an interpretation, and that the adjudicator was therefore without jurisdiction over the paid account.

THE SECOND ACCOUNT

[34] The appellant submits that the adjudicator committed an error of law by placing the onus of proving the reasonableness the second account on him. The appellant cites *Schurman v MacKay*, 2009 NSSM 13, at para. 20, for the proposition that "the onus is always on the party seeking taxation." The appellant says the adjudicator could not have made factual findings in favour of the respondent because the respondent's president did not testify on this point, and its expert did not have a mandate to review the second account. The respondent disagrees with the appellant's characterization of what evidence was before the adjudicator, alleging that there were exhibits before the adjudicator relating to the second account. The respondent says the adjudicator's decision should not be disturbed.

[35] In Adjudicator Richardson's paper on taxation in the Small Claims Court, the case of *Gorin v Flinn Merrick* (1994), 131 N.S.R. (2d) 55 (S.C.), aff'd (1995) 138 N.S.R. (2d) 116 (C.A.) is cited as authority for the proposition that the onus always remains on the lawyer to establish on a balance of probabilities that the account is

“reasonable and lawful.” In *Gorin*, taxation was sought by the client after a "very good" to "excellent" settlement. There was no written retainer agreement. Nonetheless, the taxing master found that the client had been apprised of the fees being charged. The client appealed. On appeal, Stewart J held:

> The burden was on the lawyer to prove the agreement and the account before the taxing master on a balance of probabilities. The taxing master, through both parties' submissions, was apprised of the law. He made no specific finding on the evidence as to what the July, 1989 agreement was between the lawyer and the client. He found that at the time of the settlement review conference in May of 1992, the client was aware of what fees were being charged and accepted them notwithstanding any contrary prior agreement.

[36] It appears that in the quoted passage, Stewart J is speaking of the lawyer's obligation to prove that an agreement existed and that the account rendered was consistent with that agreement and the work actually performed on the file; this is quite different than stating that the onus is always on the lawyer to prove the reasonableness of the account.

[37] The appellant cites *Schurman*, supra, for the proposition that the onus is always on the party seeking taxation; however, it is necessary to consider the full context of the passage relied upon. Adjudicator Richardson stated, at paras. 18-19:

> The onus is on the law firm to satisfy the court as to the reasonableness of its account(s) in all the circumstances of the case. In satisfying that onus the law firm is not permitted to rely on the fact that the client did not defend the claim or did not appear at the assessment. As was noted by Justice Goodfellow in Turner-Lienaux v. Campbell, 2002 NSSC 248 (N.S. S.C.), "[t]here is no taxation by default or absence. ... This onus remains upon the party seeking taxation and is not altered or shifted in any way by the nonattendance of the other party:" para. 33.

> Given then that the onus is always on the party seeking taxation….

[38] The appellant relies on the last sentence, but it is also necessary to consider the preceding paragraph and the case cited therein. In *Turner-Lienaux v Campbell*, 2002 NSSC 248, 209 N.S.R. (2d) 371, aff'd 2004 NSCA 41, 223 N.S.R. (2d) 88, Goodfellow J held that the "onus remains upon the party seeking taxation and is not altered or shifted in any way by the nonattendance of the other party" (para 33).

[39] These decisions are not on all fours with the facts of this case. Both *Schurman* and *Turner-Lienaux* dealt with situations where a lawyer was seeking taxation. However, the respondent has not provided any authority for the proposition that the onus on taxation always falls on the lawyer, regardless of whether it is the lawyer or client seeking taxation. In my view, *Turner-Lienaux* supports the appellant's contention that 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.

However, I would not substitute my own opinion regarding the reasonableness of the appellant's account. Recently, in *Gillis v MacKeigan*, 2010 NSCA 101 at para 26, the Court of Appeal allowed an appeal from an assessment of damages stemming from a motor vehicle accident, but refused to substitute its own conclusion because the record was insufficient to allow them to undertake the required analysis. Given the lack of a record of a Small Claims Court proceeding, there is an insufficient record to allow me to assess the reasonableness of the appellant's second account. I would remit the taxation of the second account to a different adjudicator of the Small Claims Court, for redetermination in accordance with these reasons.

DUTY OF FAIRNESS

[41] The appellant claims that the adjudicator breached the duty of fairness by making a negative credibility finding against him without giving him an opportunity to be heard, or by failing to provide adequate reasons for his finding. As the respondent suggests, the appellant's submissions amount to a disagreement with the adjudicator's assessment of the evidence. There are, however, indications of breaches of the duty of fairness. The adjudicator made negative credibility findings with respect to both of the appellant's accounts. Such findings were not necessary to conclude that the accounts were unreasonable, but once such findings

were contemplated, it was necessary to ensure compliance with the duty of fairness.

[42] A duty of fairness applies to every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual: *Cardinal v Kent Institution,* [1985] 2 S.C.R. 643. The concept of the duty of fairness is “eminently variable and its content is to be decided in the specific context of each case”: *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653. In *Knight,* the Supreme Court of Canada outlined three factors for assessing a decision-maker's duty to act fairly: (1) the nature of the decision, (2) the relationship between the decision-making body and the individual, and (3) the effect of the decision on an individual's rights. In *Baker v. Canada (Minister of Citizenship & Immigration),* [1999] 2 S.C.R. 817, the Court further elaborated on the factors to be considered when determining the content of the duty of fairness; these factors are the nature of the decision being made, the nature of the statutory scheme, the importance of the decision to the individual(s) affected, the legitimate expectations, and the choice of procedures made by the decision-maker.

[43] The Small Claims Court is not, strictly speaking, an administrative tribunal, but its emphasis on procedural efficiency renders it, in this respect, more akin to an administrative tribunal than a court of law. A decision on a taxation before the Small Claims Court is a judicial decision with a high degree of discretion; in my view, this factor alone, combined with the fact that taxation affects the rights or interests of an individual, strongly suggests the duty of fairness applies and that it is not minimal. The statutory scheme also supports a robust characterization of the duty of fairness Small Claims Court adjudicator's owe to parties that appear before them. The *Small Claims Court Act* provides a statutory entitlement to appeal, which further supports a robust characterization of the duty of fairness. Taxation decisions are important to the individuals affected. Parties have a legitimate expectation that they will be treated fairly by adjudicators. Against these considerations is the fact that the Small Claims Court was intended to provide a more efficient approach to the adjudication of disputes than was possible in a traditional court and more amenable to participation by lay litigants. This suggests that the duty of fairness may not be as robust as what would be required in this Court.

[44] In any event, in this case, it is not necessary to determine with exactitude the duty of fairness Small Claims Court adjudicators owe to parties that appear before

them. 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 credibility 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: *VIA Rail Canada Inc v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25, 193 D.L.R. (4th) 357 (C.A.). In *Via Rail*, the Federal Court of Appeal held:

> What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case.
>
> …
>
> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

[45] The duty to give reasons is particularly relevant in the context of the Small Claims Court because the adjudicator's reasons may be the only component of the appellate record.

[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.

[48] The applicant is awarded costs as set out in the *Small Claims Court Regulations*.

LeBlanc, J.

SUPREME COURT OF NOVA SCOTIA

Citation: MacDonald v. Mor-Town Developments Ltd. 2011 NSSC 281

Date: 20110708
Docket: Hfx. No. 336735
Registry: Halifax

Between:

David MacDonald

Appellant

v.

Mor-Town Developments Limited

Respondent

ERRATUM

Revised decision:	The text of the original decision has been corrected according to the attached erratum **July 29, 2011**
Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	December 14, 2010 in Halifax, Nova Scotia
Counsel:	David MacDonald, on his own behalf John Kulik, Q.C. and Jeff Aucoin, for the respondent

Erratum:

Paragraph 48 is replaced by the following:

"The applicant is awarded costs as set out in the *Small Claims Court Regulations*."

LeBlanc, J.