SUPREME COURT OF NOVA SCOTIA
Citation: *Goulden v. Fownes*, 2021 NSSC 261

Date: 20210831
Docket: *Hfx*, No. 460524
Registry: Halifax

Between:

Allen C. Fownes and Fownes Law Offices Incorporated

Applicants

v.

Michael Goulden

Respondent

Decision
Motion to Extend Time to Appeal

Judge:	The Honourable Justice Christa M. Brothers
Heard:	June 8, 2021 Halifax, in Halifax, Nova Scotia
Final Written Submissions:	July, 2, 2021
Counsel:	Richard A. Bureau and Ryan Christen, for the Applicants J. Paul Niefer, for the Respondent

By the Court:

Overview

[1] The proposed appellants in this proceeding seek an order extending the time for them to file an appeal from a taxation of costs by a Small Claims Court Adjudicator. There will be times when the periods of delay and the relevant circumstances considered collectively, are of such a length, and where there is lack of reasonable excuse, that the discretion to grant an extension of time to file an appeal will not be exercised, even while recognizing the effect this will have on the would-be appellants.

Background

[2] This matter originates in a taxation of a legal account. The Notice of Taxation was filed by the Respondent on February 22, 2017. The matter proceeded before Adjudicator Brent Silver on June 14, 2018, continued on July 26, 2018, and concluded on September 26, 2018, with the decision reserved. The Adjudicator rendered his decision on March 15, 2019. [The Adjudicator's decision lists September 26, 2018, as the second day of the hearing, while both parties filed affidavits which refer to the second date as September 27, 2018 – nothing turns on this]. The taxation proceeding involved an allegation by the Respondent of an overpayment of legal fees.

[3] The Applicants had represented the Respondent on an unsuccessful quieting titles application. The Respondent subsequently sought a fair assessment of the legal fees he owed. The assessment was determined on March 15, 2019, and the Applicants are now attempting to appeal that assessment, more than two years later.

[4] Affidavits from the personal applicant and both counsel were filed on the motion, setting out the procedural background as well as substantive evidence addressing the test to be met. No cross-examination on any affidavits was sought.

[5] The Applicants received the taxation decision on April 15, 2019. The Adjudicator's order was issued on July 25, 2019, requiring the applicants to pay a total of $46,660.32 to the Respondent, comprised of reimbursement of legal fees overpayment and costs. On August 2, 2019, the parties received an amended order, correcting an apparent error in the original order, still dated July 11, 2019. Another

amended order was taken out on September 27, 2019, adding a reference to HST and disbursements which were owed by and satisfied in full by the Respondent

[6] Instead of appealing the decision of Adjudicator Silver, then counsel for the Applicants, Michael Power, Q.C., filed a Notice for Judicial Review on August 7, 2019. The Respondent filed a motion for dismissal on September 13, 2019. The motion to dismiss proceeded before the Honourable Justice Mona Lynch on January 30, 2020. Justice Lynch dismissed the Applicants' request for judicial review on two grounds:

(a) the statutory appeal process had not been followed, and

(b) the application for judicial review was filed outside the time limit.

[7] On February 6, 2020, the Applicants attempted to file a Notice of Appeal, with Allen C. Fownes representing himself and the corporate applicant. On February 26, 2020, the Prothonotary advised Mr. Fownes that the Notice of Appeal was not accepted for filing because an application to extend the time for filing was necessary.

[8] On March 3, 2020, Richard A. Bureau, who was then representing the Applicants, wrote to the Court and said he was considering the issue of the rejected Notice of Appeal and the requirement for an extension of time for filing an appeal. The Applicants then did absolutely nothing until September 18, 2020. At that point, it had been approximately one year and five months since the parties received the taxation decision. On September 18, 2020, Mr. Bureau asked the Bridgewater court administration to set down a date for the appeal, based on the previously rejected Notice of Appeal. On September 29, 2020, the Prothonotary reiterated the previous email of February 26, advising that the Notice of Appeal had been rejected and that nothing further on the matter had been received by the court. At that time, Mr. Bureau again requested a date for the appeal and suggested an interim motion could be brought for an extension of time.

[9] On October 1, 2020, the Prothonotary again reiterated that a successful motion for an extension of time was required. On October 28, 2020, the Honourable Justice Diane Rowe, in a letter to the parties, confirmed the Prothonotary's position that the Applicants must request an extension of time before filing a Notice of Appeal. It was not until February 22, 2021, that the Applicants filed a Notice of Motion to request an extension of time to file the appeal. The Court heard this matter on June 8, 2021.

Position of the Parties

[10] The Applicants acknowledge that they are out of time to file an appeal from Adjudicator Silver's decision. They say their intention to appeal was previously known to the Respondent. The Applicants note that subsection 22(12) of *Small Claims Court Forms and Procedures Regulations NS Reg 17/93*, indicate that noncompliance with the appeal section of the *Regulations* "shall not render any proceeding void, but the proceeding may be amended, set aside as irregular or otherwise dealt with as the Court may direct".

[11] On this basis, it is the Applicants' position that the failure to file a Form 9 Notice of Appeal within the associated period is not fatal and that the court has a wide discretion as to how such a situation can be handled. The Applicants also allege that there were errors in the challenged decision and an injustice would follow if this motion was not granted.

[12] The Respondent says the Applicants had no intention to appeal during the relevant time and points out that they are significantly out of time. They argue that the test has not been met for the Court to exercise its discretion to permit the appeal to be filed and advanced.

Law and Analysis

[13] The governing statute is the *Small Claims Court Act,* RSNS 1989, c 430, as amended (the "*Act*"). Section 32 of the *Act* deals with the right of appeal generally:

> Appeal
>
> 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.
>
> (2) A notice of appeal filed pursuant to subsection (1) shall be in the prescribed form and set out
>
> (a) the ground of appeal; and
>
> (b) the particulars of the error or failure forming the ground of appeal.

[14] The language of the section is unequivocal and unambiguous. An appeal from a decision of an adjudicator is through a Notice of Appeal, not a Notice of Judicial Review.

[15] This matter involved a taxation. As such, the governing regulations are not the *Small Claims Court Forms and Procedures Regulations*, as suggested by the Applicants, but rather the *Small Claims Court Taxation of Costs Regulations* (the "Taxation Regulations"). Section 13 of the Taxation Regulations specifies:

> The decision of an adjudicator in a taxation hearing may be appealed to the Supreme Court in accordance with the Civil Procedure Rules.

[16] The Nova Scotia Supreme Court Instruction Sheet for an Appeal from a Certificate of Taxation, says:

> A person may bring an appeal from a certificate of taxation issued in the Small Claims Court, to the Supreme Court of Nova Scotia by filing a Notice of Appeal (Form 7.19) thirty (30) days after the decision is communicated to the person or six (6) months after the day the decision is made. (See Civil Procedure Rule 77.17, and section 13 of the Small Claims Court Taxation of Costs Regulations).

[17] Section 13 of the Taxation Regulations indicates that an appeal must be filed "in accordance with the *Civil Procedure Rules*". Rule 77.17 incorporates Rule 7.19, which requires a notice of appeal to be filed within thirty (30) days after the decision is communicated, or six months after the day the decision is made, whichever is earlier.

[18] The Applicants acknowledge that no such Form 9 Notice of Appeal was filed until February 6, 2020, after the deadline required by the *Rules* and the *Taxation Regulations*. Instead an application for judicial review was filed.

[19] The Taxation Regulations are not inconsistent with the *Civil Procedure Rules*. In order to determine whether, and by how much time, the Notice of Appeal is out of time, there are several questions to be answered, including when the decision was made and when it was communicated. The Applicants argue that the decision was not made until the amended order was issued. They argue that when one compares Rule 7.19 to Rule 90.13 (which provides that an appeal to the Court of Appeal to be filed "must be started no later than the time provided in the legislation": Rule 90.13(1)), the language in 7.19 is permissive where the language in Rule 90.13 is mandatory. Further, the Applicants look to the definition of a "decision" in CPR 7.01 and argue that many decisions were made in this matter, including the initial

decision on March 15, 2019, the communication of the decision to their legal counsel on April 15, 2019, the costs decision on July 25, 2019, and the amended orders on August 2 and September 27, 2019.

[20] However, the actual decision that is being appealed is clearly that which was communicated to the Applicants on April 15, 2019. It is difficult to understand how it could be anything else given the wording of the relevant *Civil Procedure Rules* and legislation. The Applicants also rely on appeal decisions interpreting and applying Rule 90.13, which are irrelevant to this matter.

[21] Section 10 of the Taxation Regulations indicate that a decision shall be in the form of a Certificate of Taxation in Form 2.

> 10 An adjudicator shall
>
> (a) render a decision in a taxation in the form of a Certificate of Taxation in Form 2; and
>
> (b) file the Certificate of Taxation with the Small Claims Court.

[22] The Applicants submit that the Adjudicator's decision was not filed in the correct form. The Applicants suggest they are still within time to appeal because no Certificate of Taxation was filed pursuant to the Regulations. This is an after the fact argument as counsel had many opportunities to raise this very point, including when the prothonotary rejected the appeal. This was never raised until supplemental submissions were received after the Court asked for case law to be provided concerning the interpretation of the term "communicated" in Rule 7.19. This argument was raised first on July 2, 2021, in written submissions after the motion. I conclude that it is specious. This irregularity cannot displace the significance of the Applicants' years of delay in this matter. Furthermore, this irregularity is more form than substance, as the decision and orders were communicated to the parties. IN addition, a previous judge of this Court has already decided that the Notice of Appeal is out of time, requiring this motion. That was communicated by Justice Rowe on October 28, 2020.

[23] In the case at bar, based on Rule 7.19(1), the time for filing an appeal began once the Applicants received a copy of the taxation decision and confirmed receipt on April 15, 2019. At that point, the decision had been communicated to them. The date of the order, or any amended order, is irrelevant (unlike with an appeal to the Court of Appeal given the application of Rule 90.13(3)). As such, the Applicants

had thirty days to file an appeal starting on April 15, 2019. No appeal was filed until early 2020.

Extension of Time

[24] This Court has the ability to extend the time for the filing of an appeal in such circumstances if an extension is within the interests of justice.

[25] The *Judicature Act*, RSNS 1989, c 240, at section 50 states the following:

> **Extension of time**
>
> 50 Where an enactment authorizes an appeal to the Supreme Court or the Court of Appeal and prescribes a time period during which
>
> (a) the appeal is to be commenced;
>
> (b) an application for leave to appeal is to be made;
>
> (c) a notice is to be given; or
>
> (d) any other procedural step preliminary to the appeal is to be taken,
>
> the judges of the Court may make rules respecting extension of the time period, notwithstanding that the time period has expired.

[26] *Civil Procedure Rule* 94.03 governs the extension of time to appeal a decision to the Nova Scotia Supreme Court. Rule 94.03 states the following regarding an extension of time for an appeal:

> **Extension of time in appeal**
>
> 94.03 (1) A person who wishes to obtain an extension of a period referred to in Section 50 of the Judicature Act may make a motion in an appeal or in reference to an intended appeal.
>
> (2) A judge may determine the motion by exercising a discretion similar to that recognized by Rule 2.03, of Rule 2 - General.

[27] I will consider the particular factual circumstances in this matter and the test for extending time to allow an appeal, but first I will address an argument advanced by the Respondent to, at the outset, deny this motion on the ground of issue estoppel.

Issue Estoppel

[28] The Respondent argues that Justice Lynch's decision that the judicial review was out of time decided this motion as well, on the basis of issue estoppel. I disagree.

[29] The preconditions for issue estoppel are not made out. The same question has not already been decided. Justice Lynch rendered an oral decision on January 30, 2020, holding that judicial review was the wrong vehicle to advance the claim, not that an extension of time should not be granted. (*Danyluk v Ainsworth Technologies* Inc, 2001 SCC 44.). Justice Lynch went on to decide that the Applicants were out of time to file the judicial review. However, in doing so, she was not considering the same question, nor referring to the same legislation, that is before me.

[30] The grounds for this motion were that the application was not filed within the time limits and that the statutory appeal process was not followed. Justice Lynch addressed the later issue first. She addressed the application of s. 33 of the *Act* and the associated *Taxation Regulations*. She found that no judicial review lay from the Adjudicator's decision, and quoted many cases discussing the use of prerogative writs.

[31] Based on the affidavit evidence, Justice Lynch found the decision was communicated on April 15, 2019. Justice Lynch did not decide explicitly that the appeal was out of time, but only commented on the judicial review being out of time. The following is the relevant portion of her oral judgment.

> The other ground for the dismissal that is sought today on the motion, is that the judicial review was filed outside the time for the decision. Civil Procedure Rule 7.05 states:
>
> **7.05 Judicial review application**
>
> (1) A person may seek judicial review of a decision by filing a notice for judicial review before the earlier of the following:
>
> (a) twenty-five days after the day the decision is communicated to the person;
>
> (b) six months after the day the decision is made.
>
> I contrast that with the Civil Procedure Rule for the Court of Appeal in 90.13 where they deal with the time limits for appeal at para. (3):
>
> **90.13 Deadline for starting appeal**
>
> (3) An appeal, or application for leave to appeal, from one of the following kinds of orders, or from the decision upon which it is based, must be started no more than the number of days in the following table after the date of the order, unless legislation provides, or a judge of the Court of Appeal permits, otherwise:

Kind of Order	*Number of Days After*

under *Divorce Act*	30 days, within the meaning of *Divorce Act*
under *Workers' Compensation Act*	30 days, within the meaning of Rule 94
interlocutory or costs only order of judge or court	10 days, within the meaning of Rule 94
other order of judge or court	25 days, within the meaning of Rule 94
order of tribunal	25 days, within the meaning of Rule 94

> (4) An appeal from a decision of a court or tribunal that has not issued an order must be started no more than the number of days stated for the applicable proceeding listed in the above table, after the day the decision is made, unless legislation provides, or a judge of the Court of Appeal permits otherwise.

The Court of Appeal is clear that the starting date is the date of the Order. The difference in the wording from Civil Procedure Rule 7.05 and 90.13 make it the plain reading of those Rules that an appeal or a judicial review to the Supreme Court of Nova Scotia is to made 25 clear days from April 16, 2019, the date of the receipt of the decision was acknowledged by the applicants. Therefore, the filing of the judicial review in relation to the decision was out of time.

Extension of Time and the Test

[32] This Court has the discretion to extend the time limit for an appeal under Rules 94.03(2) and 2.03(1)(c). The test for the exercise of that discretion was recently set out by the Honourable Justice Bryson in *Nelson v Dorey*, 2020 NSCA 34, at paras 18-19:

> 18 … Historically, this Court has applied a three-part test when considering whether to extend time for an appeal. In *Bellefontaine v. Schneiderman*, 2006 NSCA 96 (N.S. C.A. [In Chambers]), the Court described what considerations go into the exercise of discretion to extend time:
>
> > [3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (*Jollymore Estate Re* (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):
> >
> > > (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
> > >
> > > (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and

> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.
>
> [4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met (*Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).
>
> 19 More recently, the Court has restated the factors typically taken into account when considering whether to extend time:
>
> • The length of delay;
>
> • The reason for the delay;
>
> • The presence or absence of prejudice;
>
> • The apparent strength or merit in the proposed appeal;
>
> • The good faith intention of the applicant to exercise his right of appeal within the prescribed time limit.

[33] The circumstances in *Farrell v. Casavant*, 2010 NSCA 71 at para 11-12 bear mention. In that case, the plaintiff was unsuccessful at trial in advancing a claim for damages arising from a motor vehicle accident. The trial judge found that the defendant was not liable. The plaintiff waited almost a year to appeal. A motion to extend the time to appeal was denied. The applicant provided evidence of a lack of resources to retain legal counsel, and claimed he was in physical and emotional pain that made him unable to advance the appeal during the appeal period. The plaintiff admitted that between September and November 2009 he did not have an intention to appeal. The Court found there was a lack of medical evidence to support the claims, noting that if the grounds of appeal are strong, then the weakness of an excuse may become less significant. Further, the Court stated that the object of the *Rules* must be borne in mind:

> 12 To state the obvious, this Rule does not provide any particular guidance on how a judge is to exercise the broad discretion permitted by 90.37(2)(h). Neither does Rule 94.02 nor its reference to 2.03(2). However, the overall purpose of the Civil Procedure Rules are that they are enacted for "the just, speedy, and inexpensive determination of every proceeding".

[34] In *Dennis v Langille*, 2013 NSSC 42, reviewing subsection 22(12) of the *Regulations*, the Court indicated that non-compliance with the *Regulations* is not necessarily fatal to an appeal. That case involved a situation where the respondent had failed to serve a notice of appeal prior to the thirty-day (30) deadline stipulated

in s. 22(2)(b) of the *Regulations*, rather than a missed deadline to file an appeal. The case is not directly on point. However, the decision is helpful with regards to the Court's exercise of discretion. The Court applied the test set forth in *G.S.H. v. Children's Society of Cape Breton*, 2003 NSCA 84, where the Court said, at para. 10:

> To determine this application, I turn to the guidelines for extensions of time for filing a notice of appeal. The court is to be satisfied that (a) the applicant had a bona fide intention to appeal while the right to appeal existed; (b) the applicant had a reasonable excuse for the delay in not launching the appeal within the prescribed time; and (c) the appeal has sufficient merit in the sense of raising a reasonably arguable ground. See *Nova Scotia (Attorney General) v. Mossman et al*. (1994), 1994 NSCA 9, 133 N.S.R. (2d) 229 (C.A.). This three part test is not to be applied inflexibly. As Hallett, J.A. pointed out in *Tibbetts v. Tibbetts* (1992), 112 N.S.R.(2d) 173 at ¶14, the court must ask on such an application whether justice requires the application to be granted.

[35] Discussing the test further, the Court in *Tibbets v Tibbets*, (1992), 112 N.S.R. (2d) 173 (C.A.) stated that while the three-part test is useful, it cannot be considered the only test for the determination of whether time for an appeal should be extended (para14).

[36] As stated in *Dennis*, the subsequent decision of *Farrell, supra*, indicated that the three-part test is more properly construed as a set of guidelines or factors which the Court should consider in determining whether justice requires that an extension of time be granted to file an appeal.

[37] When *Farrell*, is read with *Tibbetts*, it is apparent that the Court has a degree of discretion not only in the scope of remedies but in determining whether an extension should be granted.

[38] I will review the relevant factors and then consider whether justice requires an extension to be granted.

The Appeal period and *Bona Fide* Intention to Appeal

[39] The Applicants rely on the filing of the judicial review application as evidence of an intention to appeal. However, this is a surface analysis. What must be looked at is whether this intention was present during the actual appeal period. To do that one must know what the actual appeal period was and when it expired.

[40] During the hearing of this motion, the parties could not state with any certainty when the appeal period commenced. At the hearing, counsel did not have any authority available for the Court on this essential question. After the hearing, the Court wrote to counsel on June 22, 2021, seeking additional written submissions on this point; those were received.

[41] Some background facts (as contained in the uncontested affidavits) are of import. On April 16, 2019, the Applicants confirmed receipt of Adjudicator Silver's taxation decision on April 15. The Applicants did not file a Notice of Judicial Review (the wrong form of appeal from this taxation decision) until August 7, 2019. A Notice of Appeal from the decision was not filed until February 6, 2020. Once this was rejected, the Applicant did not file this motion until February 22, 2021.

[42] The parties could not locate any decisions interpreting CPR 7.19. However, there is a reasonable argument that case law interpreting CPR 7.05 is applicable given the similarity in the provisions. Rule 7.05(1)(a) uses the word "communicated" in respect of the deadline to file for judicial review of a decision. The question is what it means to "communicate" a decision.

[43] In *Yates v Nova Scotia (Board of Examiners in Psychology)*, 2016 NSSC 152 at para 21, after reviewing various authorities on point, Justice LeBlanc wrote:

> 21 In conclusion, a decision is "communicated" within the meaning of Rule 7.05(1) when the recipient is first provided with all of the information necessary to make a reasoned decision on whether to apply for judicial review. Although I question some of the language used in the Board's continued communication with Dr. Yates, this communication did not change the fact that Dr. Yates had the Board's final decision, and the full reasons for that decision, when she received the April Letter.

[44] In *Yates*, at paras 17-19, Justice LeBlanc reviewed his decision in *Specter v Nova Scotia (Minister of Fisheries & Aquaculture)*, 2011 NSSC 333, which dealt with an appeal under the *Fisheries and Coastal Resources Act*, SNS 1996, c. 25, with respect to amendments to aquaculture licenses. In that case, the appellant was told that amendments had been granted but was not provided with the content of the new amendments until a later date. Justice LeBlanc held that the time for an appeal did not begin until the appellants were provided with the actual amendments because those "details formed an 'integral part' of the decision, and without them the appellants could not make a reasoned decision on whether to appeal" (para 18).

[45] In *Rockwood Community Assn Ltd. v Halifax (Regional Municipality)*, 2011 NSSC 91, Justice LeBlanc dealt with the issue of whether discussions, changes, and amendments to a decision extend the "communication" date. The Applicants argued that changes to a development permit due to deficiencies extended the date of the decision, such that only the "final" decision ought to be considered. Justice LeBlanc concluded that the changes did not alter the date of communication, as the Rule required only "awareness" of the decision:

> 11 HRM contends that there was communication of the decision to issue the development permit to the applicants. In support of this position, they rely on a somewhat analogous rule of the *Federal Courts Rules* that are applicable to applications for judicial review and for appeals under the *Income Tax Act* and *Employment Insurance Act*. HRM asserts that communicating a decision is a midpoint between personal service and no service at all. It argues that communication is akin to actual knowledge, or deemed knowledge, of the decision. In this case, it is submitted, the applicants had actual notice of the decision.
>
> …
>
> 26 I conclude that there was communication to the applicants of the decision to grant a development permit to the respondent Banc Properties. They knew of the decision from at least April 26, 2010. I do not believe that the Rule stands for the proposition that there must be personal service or service by registered or certified mail to the applicants. Provided that they were informed of the development officer's decision, the applicants received communication of this decision.
>
> …
>
> 30 I find these cases to be persuasive authority for the proposition that, for the purpose of communication, all that is required is awareness of the decision. The applicants were aware that the development permit had been issued to the respondent not later than the end of April 2010.

[46] Justice Boudreau cited *Rockwood* and relied on the same principle in *Buchgeher v Nova Scotia (Minister of Immigration)*, 2015 NSSC 251, at paras 34-37, another case where the applicant argued that a "final" decision was not made until a later date, and where that argument was also rejected. Similarly, in *Bridgewater (Town) v South Shore Regional School Board*, 2017 NSSC 25, at para 8, Justice Lynch said, "communication, based on the case law, is when the Council knew of the decision, there is no special communication necessary".

[47] Based on an application of this case authority, the decision of Adjudicator Silver was communicated on April 15, 2019. Based on CPR 7.19 the appeal period would have expired on May 30, 2019 (based on Rule 94.02(1).

[48] The Applicants argue that the filing of the judicial review application after the July 25, 2019 order, and then the filing of the Notice of Appeal after Justice Lynch's decision, is evidence of a *bona fide* intention to appeal. In addition, affidavit evidence of the Applicants was submitted and includes the following relevant uncontested information.

[49] The Applicants were represented by counsel throughout. Instead of counsel being sent the taxation decision by Adjudicator Silver, the Applicant, Mr. Fownes was sent the decision. The affidavit of Mr. Fownes indicates he was out of the country at the time and it was left on his desk in his office as no instructions were left by him (a practicing lawyer) for someone to open this type of correspondence when he was away from his practice. It was not until May 2, 2019, that he returned to his office and opened the correspondence. In the interim, counsel for the Respondent provided a cost submission to the Adjudicator, copied to then-counsel for the Applicants, Mr. Power. This is the first time anyone for the Applicants became aware a decision had been rendered on April 15, 2019.

[50] Mr. Fownes's affidavit indicates he discussed an appeal with Mr. Power in July 2019. There are no other details in the affidavit about his intention to appeal during the appeal period. There is no evidence as to his intentions between April 15 and July 2019. There is a subsequent email from Mr. Power dated August 1, 2019, indicating that the Applicants had an intention to appeal. (Mr. Power, represented the Applicants throughout the taxation matter, until Justice Lynch rendered her decision regarding the inability of the Applicants to advance a judicial review from this taxation.)

[51] Counsel for the Respondent received the Small Claims Court decision on March 22, 2019. Adjudicator Silver had invited counsel to make submissions on costs. Mr. Neifer provided his submissions on behalf of the Respondent on April 14, 2019. In Mr. Fownes's Affidavit, sworn May 31, 2021, he states:

> 19. Mr. Neifer provided his submissions on or around April 14, 2019 and provided copies by way of email to Mr. Power and myself.
>
> 20. Upon receiving the email form Mr. Neifer, I became aware for the first [sic] that a decision had been rendered in the taxation matter.
>
> 21. On April 15, 2019, Mr. Power's paralegal forwarded me an email from Mr. Niefer's legal assistant which included costs submissions.
>
> 22. I emailed Mr. Power's paralegal and inquired into why the costs submissions were being made and further asked if a decision had been rendered in

Mr. Goulden's favour. Attached as Exhibit "B" to this affidavit is a copy of the April 15, 2019, correspondence.

23. I was out of the country throughout the entirety of March and April 2019. I did not receive any copy of the Decision by email during that time.

24. When I returned to Canada, I was aware that a decision had been rendered (by way of the subsequent cost submissions being submitted) but I subsequently learned that the copy of the decision was mailed only to myself (and by extension the other Applicant) but not to our counsel, Mr. Power.

25. Upon receiving Mr. Niefer's submissions on costs, Mr. Power wrote to the Court on April 15, 2019, indicating that he had not received the decision of March 15, 2019.

26. The emails referenced in paragraphs 19 and 23 of this affidavit are provided at Exhibit 1 of Mr. Niefer's affidavit attached as Exhibit "A" to this affidavit.

27. The Court emailed Mr. Power indicating that a copy of the decision had been forwarded to the parties on March 20, 2019.

28. Mr. Power then wrote to the Court on April 16, 2019, confirming that he did not receive a copy of the decision from the Court but that Mr. Niefer had provided him a with a copy at that time.

29. The emails referenced in paragraphs 25-26 are provided at Exhibit 2 of Mr. Niefer's affidavit attached as Exhibit "A" to this affidavit.

30. The decision was delivered by mail to my law firm at the time, Crowe Dillon Robinson and the envelope addressed to Fownes Law Offices Inc. was placed on my desk.

31. As noted above, I was out of the country at that time which meant that the decision remained unopened until around May 2, 2019, when I returned to my office and discovered the correspondence.

32. Before leaving the country, I informed the office staff at Crowe Dillon Robinson to not open any mail addressed to Fownes Law Office as it is a separate firm.

33. As I had retained Counsel in the taxation matter to represent me, I did not request that the staff look for a Decision from Adjudicator Silver.

34. I anticipated that the decision would be sent to Mr. Power as he was the counsel of record, had filed my defence and appeared on my behalf at both hearing dates.

35. I am unsure why Mr. Power was not sent the decision.

36. Mr. Power and I discussed appealing Adjudicator Silver's decision in July of 2019 ("the costs decision").

[52] Mr. Fownes maintains in his affidavit that he did not instruct Mr. Power to seek judicial review of the decision but had the intention to appeal since he learned of the decision. There is no evidence as to why the judicial review continued, or what the source of the delay was to bring this motion.

[53] Mr. Neifer's uncontested Affidavit sworn January 14, 202 states:

> 8. On April 15, 2019, I forwarded a copy of the taxation decision to Michael power, Q.C., after he informed both the court and I by email that he had not received a copy.
>
> 9. On April 16, 2019, Michael Power, Q.C. confirmed receipt of the taxation decision by email….

[54] By April 15, 2019, the decision was communicated as per the relevant *Rules* and *Regulations*. Mr. Fownes deposes in his affidavit that in March and April he did not receive an email copy of the decision. But why? His counsel received it on his behalf on April 15. There is no evidence that he could not have received a facsimile or PDF copy by email. There is no reason to accept any other date of the communicated decision than April 15, 2019. In today's age of digital communication being on vacation in the United States for two months does not mean you are cut off from all means of communication and information sharing. Yes, the Small Claims Court should have sent a copy of the decision to counsel in March, 2019. It did not. This error did not cause the delay in filing of the appropriate appeal documents. What this does is set the date that the decision was communicated to April 15, 2019.

[55] Furthermore, Mr. Fownes was sent an email from Mr. Power's assistant enclosing submissions from the Respondent in relation to costs on April 15, 2019, at 2:11pm. Despite being out of the office and out of the country, Mr. Fownes responded at 2:16 p.m. - on the same day - as follows:

> Received, thank you.
>
> Was there a decision in Mr. Goldens [sic] favour?
>
> Why is this being submitted?
>
> Allen

[56] Mr. Fownes clearly had access to email and the ability to receive documents electronically.

[57] In addition, attached to Mr. Fownes's affidavit is an email from Mr. Power with no addressee listed dated July 17, 2019, at 8:18am stating:

> Good morning! [sic] was thinking the same thing the other day … we certainly did not receive any thing … yes we plan to appeal most vigorously …

[58] On July 25, 2019, a decision on costs was rendered and an order was taken out from the Adjudicator's decision. This order was subsequently amended. The Respondent filed a Notice of Dismissal of the Judicial Review on September 13, 2019. While Mr. Fownes states in his affidavit that he did not give instructions for this procedure, but intended to bring a statutory appeal, no change in direction was taken until after Justice Lynch's decision. This is despite the fact the Applicants, through counsel, advanced the judicial review for months until Justice Lynch's decision was made.

[59] It was not until August 1, 2019, that the Applicants indicated to opposing counsel that they intended to appeal. This came by way of email from Mr. Power to Mr. Neifer, wherein he stated:

> Paul,
>
> Do you have a draft of the Order for my review as we intend to appeal?
>
> Michael K. Power, QC

[60] I have scant evidence of an intention to appeal during the appeal period. There is a blanket statement that an intention existed in July 2019 but that is the extent of the evidence. The delay here is not short, and to compound matters, we have a failed attempt at a judicial review and a further delay to advance this necessary motion. The delays become compounded. This is not like *G.S.H.*, for instance where the applicant was a mere day late.

Reasonable Excuse for Delay

[61] The Applicants argue that the appeal period was initially missed because their legal counsel choose to advance a judicial review and not a statutory appeal as prescribed by the *Act*. They rely on *Clark v Canzio*, 2003 NSSC 252, in which an appeal period was missed by legal counsel. The Court said:

> [16] In the instant case, Ms. Chiasson, counsel for the appellant, committed the error of failing to file the Notice of Appeal within 30 days of the decision and failing to file it in the correct office. The error was entirely that of the solicitor.

> [17] When exercising my discretion, I believe it is necessary to consider the impact of an extension or a refusal on the parties. Refusing the extension would mean that Ms. Canzio would be unable to have the decision reviewed to determine whether or not such an error was an oversight on his part. I find no prejudice to Mr. Clark if the extension is granted.

[62] The Applicants say any other delays were attributable to the Covid-19 pandemic. However, no clear explanation of how the pandemic created delays was advanced. How Covid-19 delayed a motion for the extension of time to be advanced is inexplicable. There is no affidavit evidence submitted on this application which speaks to this issue. It is a mere assertion by counsel with no context.

[63] The Applicants filed their Notice of Appeal on February 6, 2020. While it was accepted and date stamped, the Court in Bridgewater advised that this was an error as the Notice of Appeal was out of time and a motion for extension of time had to be advanced. In particular Julie Langille, Prothonotary, wrote:

> Good afternoon Counsel,
>
> I have reviewed your correspondence dated October 21, 2020 and Mr. Niefer's submissions dated October 26, 2020 regarding the Notice of Appeal received by the Court on February 6, 2020.
>
> Additionally, I sought Judicial direction on the issue.
>
> The Court must first hear a Motion to extend the time to file an Appeal before the Appeal itself can be scheduled.
>
> A Judge must make the determination if the time to file an Appeal will be extended and this cannot be determined by the Prothonotary….

[64] What happened between then and the filing of the motion on February 22, 2021? The Applicants say the Court was in an essential services model with no paper filings except for urgent and essential matters. This situation continued between March 19, 2020, and June 15, 2020. It was not until September 18, 2020, that current counsel for the Applicants wrote to the Court arguing that no motion to extend needed to be advanced because the Court had already date stamped the document. What ensued was a sequence of written submissions on the issue with a decision on October 28, 2020, that the motion was indeed necessary if the Applicants wished to proceed. The motion was not filed until February 22, 2021, some 3.5 months later.

Sufficient Merit/ Raising a Reasonably Arguable Ground

[65] The Applicants take the position that there is a strong case for appeal based on the Adjudicator's alleged error.

[66] This factor is "sometimes referred to as the need for the applicant to show an arguable issue" (*Nelson v Dorey, supra* at para 28). A searching examination of the merits is not appropriate, but the Applicants must be able to articulate a realistic issue of sufficient substance for appeal. The absence of any evidentiary basis for a proposed ground of appeal is an important consideration

[67] The Applicants say they have raised reasonably arguable grounds of appeal in their Notice of Appeal. They allege an error of law and a failure to follow the requirements of natural justice.

[68] The appeal raises claims that the appropriate legislation was not followed, that documentation was not considered, and that there was no proper review of the appropriate common law authorities as well as jurisprudence among others. The Applicants say there are appealable questions of law with reference to the applicability of the *Limitation of Actions Act*, SNS 2014, c 35.

[69] Many of the grounds of appeal advanced in the proposed Notice of Appeal are actually attacks on the fact finding of the Adjudicator. There is no record. No appeal lies from findings of fact. The following grounds relate to fact finding:

> 3. Erred in failing to acknowledge the parties' agreement as to the cost of the trial litigation and specifically Mr. Goulden's affidavit evidence and the evidence of consulting other counsel with regards to fees prior to engaging Mr. Fownes;
>
> 4. Erred in deciding from the evidence that Mr. Fownes acknowledged an overpayment when in fact no acknowledgment was made, nor as one shown to have been paid, from the evidence;
>
> 5. Erred in the assessment of what is a fair and reasonable fee by disregarding the evidence of what other counsel proposed to charge Mr. Goulden and Mr. Goulden's own sworn affidavit evidence as to what he agreed in advance to pay Mr. Fownes for the trial and appeal;
>
> > i) Not making reference to the lengthy decision by Justice Margaret Stewart in the Goulden v. Rapp, Van Buskirk right of way case including the fact the matter involved multiple defendants, title issues, boundary issues with two adjoining owners, ambiguous descriptions and the contest as to the use of right of way.
> >
> > ii) Overlooked the fact that party and party costs to the successful party in litigation were over $46,000.00 alone one measure of fair and reasonable compensation.

> iii) Erroneously considered trial counsel's bill to be exorbitant and was influenced by cost of work of previous counsel Mr. Dumke which he though to have reduced Mr. Fownes' trial counsel's time and cosets.
>
> iv) Substituted time dockets when fees had been agreed in block total and which fees and disbursements had been paid in full without complaint.

[70] The Adjudicator made the following findings in his decision of March 15, 2019:

> (37)…As a result, I find that Mr. Goulden paid a total of $88,405.04 for the services he received from Mr. Fownes on his Quieting of Titles Action and subsequent appeal. This establishes an overpayment by Mr. Goulden to Mr. Fownes in the amount of $11,082.01 and my Order in this matter will require that this amount be returned to Mr. Goulden in addition to any other remedy which may be ordered.
>
> …
>
> (43) While keeping time records (manually or electronically) is not mandatory and there may be other means of satisfying a Court that an invoice is "fair and reasonable", Mr. Fownes' failure to keep accurate records of his time and efforts does significantly disadvantage him in his effort to satisfy the Court that his fees were fair and reasonable.
>
> (44) Turning to the invoices, few of the entries from time give any indication of what was done to justify the fee. This is disappointing as the Court is left with little if anything upon which assess the reasonableness of the fees. A key example in this case is invoice number 4794 dated January 11, 2013. Up to this point Mr. Fownes had billed a total of $22,500.00 for his efforts to prepare for trial.
>
> …
>
> (49) I make the above observations about Mr. Fownes' invoices to highlight the fact that they provide very little detail about the actual services being provided. In my experience, some lawyers invoices are created in sufficient detail so as to allow a basis upon which to assess the value of the work in question. This is not the case with respect to Mr. Fownes' invoices. Theses invoices make very generic and repetitive statements about the work being performed. In addition, the invoices and PC Law ledger reference a discount which does not appear to have been accurately applied and finally the invoices reference a fee of $3,500.00 per day of trial time which neither party testified about as an agreed upon basis for billing between the parties.
>
> …

> (62) Taking all the above noted into consideration, while Mr. Fownes has done little if anything to document his time, he obviously put significant effort into the litigation file. He spent five days in trial, and a day in court on the appeal, together with associated preparation time. Unfortunately, his failure to keep accurate records or even detailed invoices, and the limited extent to which he has been able to recount details of his efforts in his oral evidence, make it very difficult for me to objectively assess the value of Mr. Fownes' efforts on an hourly basis.

[71] No appeal lies from findings of fact. Given this, these grounds are not strong.

[72] However, there are grounds which relate to alleged errors of law. These include:

> 1. Erred in deciding the Taxation by Mr. Goulden was not statute barred for haring been brought more than 6 years following the services rendered in the trial of action,
>
> 2. Erred in failing to give effect to the parties' agreement as to costs of the litigation and specifically Mr. Silver's ignoring of Mr. Goulden's affidavit evidence confirming this;
>
> v) Error in law not considering *quantum meruit* by all the evidence available.

[73] These grounds are arguable.

Compelling or Exceptional Circumstances and Interests of Justice

[74] The ultimate question for me is whether there are compelling or exceptional circumstances to warrant an extension of time.

[75] In *Jollymore v. Jollymore Estate*, 2001 NSCA 116, the Court stated at paragraph 22 as follows:

> [22]…
>
> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[76] The Applicants say the Respondent is not prejudiced, as he knew since August 2019 that a challenge to the Adjudicator's decision was being sought.

[77] There are no special circumstances in this case that require an extension of time in the interests of justice. Despite having some potentially arguable grounds of appeal, the interests of justice demand that the Applicants' motion be dismissed because the delay bears upon the taxation of a lawyer's accounts. In *Price v Sonsini* (2002), 215 DLR (4th) 376, the Ontario Court of Appeal addressed a situation where a lawyer failed to raise a timely objection to an order of assessment, at paras 19-21:

> 19 Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill. As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the process. See Orkin, The *Law of Costs*, 2nd ed. (2001), at p. 3-13. In my view, the courts should interpret legislation and procedural rules relating to the assessment of solicitors' accounts in a similar spirit. As Orkin argues, "if the courts permit lawyers to avoid the scrutiny of their accounts for fairness and reasonableness, the administration of justice will be brought into disrepute". The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities. See *Krigstin v. Samuel* (1982), 31 C.P.C. 41 (Ont. H.C.) and *Minkarious v. Abraham, Duggan* (1995), 27 O.R. (3d) 26 (Ont. Gen. Div.), at 55-57. See also *Solicitor, Re*, [1972] 2 O.R. 571 (Ont. H.C.), at 574, where the court held that a solicitor's reversal of position with respect to the procedure to be followed on an assessment should be approached cautiously.
>
> 20 Accepting the respondent's position would also be contrary to the principle that the law will prevent prejudice resulting from delay in asserting claims or legal arguments. This principle is applied through the doctrines of estoppel, laches, waiver and acquiescence. Rule 2.02(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 limits the right of a party to attack a proceeding or a step, document or order in a proceeding for irregularity if the party has taken a further step in the proceeding after obtaining knowledge of the irregularity. In *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), leave to appeal to S.C.C. dismissed, (S.C.C.) reconsideration dismissed, [2002 CarswellOnt 1903 (S.C.C.)], this court held at p. 722 that "[a] party cannot claim entitlement to the mechanical grant of an automatic remedy without regard to the consequences to the rights of others that might flow by reason of the complaining party's own conduct, including any delay in asserting the claim".
>
> 21 An assessment officer has jurisdiction to assess solicitors' accounts. The *Solicitor's Act* sets out the procedures to initiate assessments. Fairness and the orderly administration of justice require that solicitors raise procedural objections in a timely manner. To allow such objections to be raised years later, after a lengthy and costly hearing on the merits, would be to invite chaos. Accounts long settled could be reopened because of overlooked or long forgotten procedural

> shortcomings. It follows that the respondent is now precluded in law from raising his procedural objections.

[78] The Applicants' position is that a refusal to grant an extension of time to file an appeal will deny them of an opportunity to appeal a substantial order including a sizable costs award. The ability to extend the time to file an appeal does not guarantee success but does guarantee that the merits of the Adjudicator's decision can be reviewed by a Court.

[79] The prejudice to the Applicants is that an unjust outcome could potentially occur where an error of law is allowed to stand. The associated prejudice to the Respondent is a delay in associated payment (should the appeal be unsuccessful).

[80] As the timeline demonstrates, the Applicants have intermittently persisted in attempts to appeal, resulting in prolonged uncertainty for the Respondent and continued legal costs.

[81] Adjudicator Silver assessed Mr. Fownes's accounts and determined that Mr. Goulden was owed $32,387.61 in legal fees and $11,173.01 for an overpayment. The taxing master determined that Mr. Fownes charged Mr. Goulden fees that were neither reasonable nor lawful, and unlawfully retained excess funds, in the total amount of $43,560.62.

[82] The Respondent first asked for his accounts with the Applicants to be taxed on February 22, 2017. It is now 2021, more than four years later, and the Respondent still does not know with certainty that he can have his money back. Instead, he continues to have to pay legal fees to participate in a process that is intended to ensure fairness. I have found that the Notice of Appeal was filed defectively- far beyond the applicable deadline, and that there is scant to no evidence which points to an intention to appeal during the appeal period. Even after the judicial review was dismissed, the Applicants dragged their heels in advancing the appeal. It is not sufficient to simply blame the pandemic for the failure to address the late filing of the Notice of Appeal.

[83] Based on the evidence presented on this motion, I am satisfied that there are no compelling or exceptional circumstances which support the view that the interests of justice require an extension.

Conclusion

[84] For the reasons set out above, I conclude that the Applicants have not established that an extension of the time to file an appeal should be ordered. The motion is dismissed.

[85] If the parties can not agree on costs, I will received written submissions within 30 days of this decision.

Brothers, J.