**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Frampton v. Boyle*, 2022 NSSC 57

**Date:** 20220223
**Docket:** *Halifax*, No. 508609
**Registry:** Halifax

**Between:**

Greg Frampton

*Appellant*

v.

John Boyle

*Respondent*

**Judge:** The Honourable Justice Ann E. Smith

**Heard:** January 13, 2022, in Halifax, Nova Scotia

**Counsel:** Greg Frampton acting on his own behalf, for the Appellant
John Boyle acting on his own behalf, for the Respondent

**By the Court:**

## Introduction

[1] This is an appeal from a decision on the taxation of a lawyer's account in the Small Claims Court. The taxation was initiated by the appellant, Greg Frampton, who sought a full refund of $800.40 paid to the respondent, John Boyle, for legal services. Although Mr. Boyle was served with notice of the taxation, he chose not to attend. After hearing from Mr. Frampton and considering the evidence, Adjudicator Nancy Elliott concluded that Mr. Boyle's account was fair and reasonable. As a result, Mr. Frampton was not entitled to a refund. Mr. Frampton appeals the decision to this court.

[2] Mr. Frampton is self-represented. He lists the following grounds of appeal:

1. Respondent did not appear at the hearing and did not justify his bill.
2. Natural justice: respondent agreed to perform services, changed his mind, did not perform any service, yet kept retainer.
3. Error in law: Adjudicator laid out legal rationale in the decision to rule in appellant's favour but did not apply it.
4. Adjudicator created a defence on the respondent's behalf in her decision. Bias.

[3] When self-represented litigants appeal Small Claims Court decisions, this court has a duty to assist them in forming and advancing their claims: *Krawczyk v*

*Mieske*, 2013 NSSC 283, at paras 12-14. Having heard from Mr. Frampton, I find that his grounds of appeal can be restated as follows:

1. The taxation was unfair because it involved a lawyer (the adjudicator) reviewing the fees charged by another lawyer. According to Mr. Frampton, the adjudicator, as one of Mr. Boyle's peers, was biased in his favour; and,
2. The adjudicator committed an error of law by reaching a conclusion that was not supported by the evidence.

**The evidence before the adjudicator**

[4] Mr. Frampton filed copies of emails exchanged between himself and Mr. Boyle, the retainer letter, and the legal bill. He also testified at the hearing. Mr. Boyle filed a Response to Taxation, along with a book of documents which included emails and the materials Mr. Frampton provided to him to review. He did not attend the hearing, which meant that the adjudicator made her decision without any additional evidence from Mr. Boyle.

[5] The evidence before the adjudicator was as follows. Mr. Frampton was the plaintiff in a personal injury action that settled in 2010. Mr. Frampton later came to believe the lawyer who represented him had provided him with substandard legal services, and he began consulting lawyers about representing him in a potential negligence claim against Mr. Purdy. He contacted "dozens" of different lawyers who

advised that they were not interested in taking his case for various reasons. One of these lawyers suggested that Mr. Frampton contact the respondent, John Boyle, at Cox & Palmer.

[6] Mr. Frampton contacted Mr. Boyle by email on Thursday, November 12, 2020, asking him to call to "discuss a civil litigation case." During the ensuing phone call, Mr. Frampton explained that he was unhappy with the settlement he received in his personal injury lawsuit and wanted to sue his former lawyer. Mr. Frampton mentioned to Mr. Boyle that there was a limitation period that required the claim to be filed no later than April 2021.

[7] On November 16, 2020, Mr. Boyle sent Mr. Frampton the following email:

> I have completed the conflict search, so I am free to act on your behalf. Assuming you wish to proceed, we will prepare a retainer letter, which sets out the terms of me providing services to you. My assistant will also be in contact with you to collect the information we need to open the file.
>
> **My understanding is that you want me review the file to assess your case.** As active litigation is not yet contemplated, I am able to request a smaller retainer amount of $2,000. This money is kept in trust, and then applied to your final bill. Any remainder is then returned to you.
>
> Happy to discuss further or answer any questions you might have.
>
> [Emphasis added.]

[8] Mr. Frampton paid the $2,000 retainer and signed a retainer letter on November 19, 2020. The retainer letter stated in part:

> Thank you for asking Cox & Palmer to provide services with regards to assessing advice provided by…(the "Matter").

The retainer letter indicated that Mr. Boyle's hourly rate was $240.

[9] On November 25, 2020, Mr. Frampton provided Mr. Boyle with documents for him to review to assess the case, including a detailed complaint drafted by Mr. Frampton concerning his former lawyer, settlement conference briefs that had been filed in the personal injury case, and an accountant's expert report. On November 27, Mr. Boyle emailed Mr. Frampton as follows:

> I have had a chance to review the material you provided. I would like to set up a time for a call to discuss. I am in meetings today and tomorrow, and then discoveries all next week, but are you free on December 7 at 1pm for a call?
>
> In the meantime, do you still have a copy of the agreement with Mr. Purdy regarding fees? Or a copy of any release signed by you in relation to the settlement? If so, please provide them.
>
> Finally, in your complaint document, you state that in "2019 and 2020 I learned new information which indicated that my lawyer did not perform in a proper manner." Can you please advise what exactly the "new information" consisted of?

[10] Mr. Boyle and Mr. Frampton spoke by phone on December 7, 2020. The adjudicator summarized Mr. Frampton's evidence about this call at para 8:

> During this conversation, Mr. Boyle advised him that he defends insurers and had a proclivity to be anti-plaintiff, and for that reason he advised that Mr. Frampton retain a different lawyer.

[11] On December 9, 2020, Mr. Frampton emailed Mr. Boyle as follows:

> I will take your advice and find a 'plaintiff minded' lawyer as you put it. I did not realize this would be the case when we first spoke

> Will you please close your file and return the retainer.
>
> thank you and best regards

[12] Later that morning, Mr. Boyle replied:

> I completely understand. I will prepare an invoice based on the work completed to date, apply the retainer funds, and return the remainder to you.
>
> I wish you every success going forward.

[13] That evening, Mr. Frampton sent one further email:

> After thinking about it. I am bothered by having to lose money.
>
> I don't feel I should pay any fees. Had I known your views on plaintiff claims I would have thought you were unsuitable for my case.
>
> I have discussed my case with several other lawyers who took time to discuss and read documents before telling me that they were not interested in my case. You suggested I find another lawyer who works on the plaintiff side and I have contracted with another lawyer.
>
> I am hoping you will return the retainer in full.
>
> thank you

[14] The last email in evidence from Mr. Boyle to Mr. Frampton, which is undated, stated:

> Please find attached our invoice. We will be deducting it from the retainer amount, and providing the remainder back to you shortly.
>
> As I explained during our call, I was only able to determine the specifics of the claim after reviewing the materials you provided me. It was only after that review that I determined a plaintiff side lawyer would be better suited to this case. I also had to conduct that review to provide you with advice regarding limitation periods, and regarding the likelihood of success on the claim in general. I hope the advice I provided aids you going forward.
>
> Should you wish to discuss further, I will make myself available.

[15] The invoice indicated that Mr. Boyle billed two hours on November 26, 2020, for reviewing the materials provided by Mr. Frampton. On December 7, he billed 0.90 hours for a call with Mr. Frampton "to discuss facts of case and litigation strategy." With Mr. Boyle's hourly rate of $240, the fees for 2.9 hours totalled $696, plus $104.40 in HST, for a total of $800.40.

[16] Mr. Frampton paid the bill, then sought taxation in the Small Claims Court.

**The decision**

[17] The adjudicator began by noting that the hearing proceeded in the absence of Mr. Boyle, in accordance with s. 7(2) of the *Small Claims Court Taxation of Costs Regulations*, NS Reg 37/2001. That section states:

> 7(2) Where a respondent has been served with the Notice of Taxation in compliance with subsection 4(1), the adjudicator may proceed with the taxation hearing in the absence of the respondent.

[18] The adjudicator proceeded to set out the legal principles that apply on a taxation, including that the lawyer always bears the onus of proving that an account is lawful and reasonable in all the circumstances.

[19] The adjudicator reviewed Mr. Frampton's evidence, and his position at the hearing, which she summarized as follows:

> [9] Mr. Frampton's position is that had Mr. Boyle provided his views of plaintiff-side cases at the outset, he would not [*sic*] have moved on to seeking another lawyer. Mr. Frampton alleged that Mr. Boyle had either changed his mind about taking the case or misled him from the beginning that we [*sic*] would take on the case. He does not view that he should be required to pay for the advice that he seek another lawyer.
>
> [10] In support of his argument that Mr. Boyle had changed his mind about the case, Mr. Frampton referred in particular to an email of November 27, 2020, where Mr. Boyle had stated he had reviewed the documents provided, asked for copies of other documents, and asked a question about a comment Mr. Frampton had made in a complaint form. Mr. Frampton said that at this point, Mr. Boyle appeared genuinely interested in the case, only to turn around on December 7 and suggested [*sic*] that Mr. Frampton find a "plaintiff-minded lawyer".

[20] The adjudicator's decision was brief:

> [14] As set out above, the ultimate assessment to be made in a taxation is whether the lawyer's account is fair and reasonable. **One might anticipate that the Respondent, in not attending the hearing, would have some difficulty in meeting the onus of proving the reasonableness of the account. However, in the circumstances of this case, it is not difficult to assess the account to be fair and reasonable.**
>
> [15] Mr. Frampton described his experience with other lawyers who had had discussions with him and reviewed documents and did not charge for that service. However, while this may be the practice of many lawyers, it does not automatically render the account of any lawyer who charges for such services to be unfair and unreasonable. There is no obligation on the part of lawyers to provide free or volunteer services in reviewing documents and in providing an initial opinion of whether they view it as a suitable case for them to move forward with.
>
> [16] **In this case, Mr. Boyle had been clear in his email of November 16 and in the retainer agreement that he was only assessing whether there was a case and that he would be charging for his time to do so.** Mr. Frampton provided multiple and complex documents to Mr. Boyle with a clear intent that Mr. Boyle would take the time to review those documents and then have a discussion with him. It is noted that Mr. Frampton did not dispute the amount of time charged by Mr. Boyle, but only whether Mr. Boyle should have charged for that time. I do not find that the time expended by Mr. Boyle was inflated or the fees charged were excessive. I also do not find the evidence supportive of Mr. Frampton's allegation that Mr. Boyle had misled him or changed his mind about taking the case; rather the evidence supports an opposite finding.
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> [Emphasis added]

[21] The adjudicator concluded that Mr. Frampton was not entitled to any refund of the fees charged by Mr. Boyle.

**The appeal**

[22] Mr. Frampton's position on the appeal is that the adjudicator correctly stated the legal principle that Mr. Boyle had the onus to establish that his fees were fair and reasonable, but failed to apply it. He maintains that Mr. Boyle provided him with nothing of value in terms of an assessment of his case. He said he informed Mr. Boyle in their first conversation that he had been the plaintiff in a personal injury action which had settled, and that he wanted to sue his former lawyer. Mr. Boyle's retainer letter, he noted, indicated that Mr. Boyle understood the nature of his claim before he reviewed the documents. In essence, Mr. Frampton says Mr. Boyle charged him $800 to read his documents, to tell him that he normally did insurance defence work and was inclined to be anti-plaintiff, and to suggest that he would be better off with a more plaintiff-minded lawyer. Mr. Frampton maintains that if Mr. Boyle had told him during their first conversation that he did not normally do plaintiff work, Mr. Frampton would have retained a different lawyer. In Mr. Frampton's view, the adjudicator must have been biased in favour of Mr. Boyle, a fellow lawyer, since she found in his favour notwithstanding his choice not to appear and give evidence at the hearing.

[23] Mr. Boyle participated in the appeal. He argued that there is no evidence to support Mr. Frampton's allegation of bias on the part of the adjudicator. He submitted that there was ample evidence to support the adjudicator's conclusions that he told Mr. Frampton that he was going to charge for his time to review the documents, and that his fees were fair and reasonable.

## Law and analysis

[24] Several provisions of the *Legal Profession Act*, SNS 2004, c 28, address the taxation of a lawyer's account:

> **Interpretation of Part**
>
> 65 In this Part,
>
> (a) "account" means the fees, costs, charges and disbursement to be paid by a client or a party to a matter as a result of an order of a court;
>
> (b) "adjudicator" means an adjudicator of the Small Claims Court of Nova Scotia;
>
> (c) "lawyer" includes a law firm and a law corporation.
>
> **Account recoverable**
>
> 66 A lawyer may sue to recover the lawyer's reasonable and lawful account.
>
> **Taxation**
>
> 67 Notwithstanding any other enactment, a lawyer's account may be taxed by
>
> (a) an adjudicator; or
>
> (b) a judge.

**Initiation of taxation**

68 A taxation may be initiated by

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

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

**Where lawyer is party**

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

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

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

**Appeal**

70 A decision on a taxation may be appealed to

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

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

[25] Section 9(d) of the *Small Claims Court Act*, RSNS 1989, c 430, gives the court jurisdiction "respecting a matter or thing authorized or directed by an Act of the Legislature to be determined pursuant to this Act". Section 9A of the Act provides:

**Taxations**

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

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

> to an appeal of an order of the Director of Residential Tenancies pursuant to Section 17C of the *Residential Tenancies Act*.

[26] Section 32 allows for an appeal from a decision of the Small Claims Court to the Supreme Court:

> **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.

[27] In *Mor-Town Developments Ltd v MacDonald*, 2012 NSCA 35, Saunders JA, for the court, noted that "[t]he reasonableness of a lawyer's compensation is to be assessed in light of all of the circumstances", and that Rule 77.13 "provides a list of certain factors which may be relevant to the assessment": para 40.

[28] Rule 77.13 provides:

> **77.13 Counsel's fees and disbursements: entitlement and assessment**
>
> (1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.
>
> (2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:
>
> (a) counsel's efforts to secure speed and avoid expense for the client;
>
> (b) the nature, importance, and urgency of the case;
>
> (c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;

> (d) the general conduct and expense of the proceeding;
>
> (e) the skill, labour, and responsibility involved;
>
> (f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

[29] As noted by the adjudicator, regardless of whether the taxation is initiated by the lawyer or the client, the lawyer always bears the onus of proving that the account is lawful and reasonable. The Court of Appeal restated this principle in *Mor-Town Developments*:

> [49] To the extent that there remains any confusion regarding who bears the onus during the taxation of a lawyer's account let me be clear. **The onus of proving the reasonableness of an account should always rest with the lawyer.** The lawyer knows what was done, by whom and when. The lawyer knows how long it took to complete the task(s) and what fee was charged to do it. The lawyer will also know why the task or particular action was necessary. Rarely would a client be possessed of such information. To expect the client to "prove" the unreasonableness of the work done by the lawyer would neither be practical nor fair. **In summary, whether the taxation is initiated by either the client or the lawyer, the lawyer bears the onus of proving that his or her account is lawful, and reasonable, in all of the circumstances.**
>
> [Emphasis added]

[30] Turning to Mr. Frampton's restated grounds of appeal, his first ground alleges that the adjudicator, as a practising lawyer, was biased in Mr. Boyle's favour. Little needs to be said with respect to this ground of appeal. Bias on the part of a judicial decision-maker is a serious allegation. Adjudicators and judges are presumed to be impartial, and that presumption is not easily displaced. In *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24, the Court of Appeal reviewed the principles governing a claim of bias or a reasonable apprehension of bias:

> [39] **First, as a matter of law, there is a strong presumption of judicial impartiality, which is not easily displaced. Second, there is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of bias.** Third, whether a reasonable apprehension of bias exists is "highly fact-specific". Such an inquiry is one where the context, and the particular circumstances, are of supreme importance. The allegation can only be addressed carefully in light of the entire context. There are no shortcuts. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45.
>
> [40] The "test" regarding what constitutes a reasonable apprehension of bias appears in the oft-quoted dissenting judgment of de Grandpré, J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at ¶40:
>
> > …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, that test is "what would an informed person, viewing the matter realistically and practically—…conclude? Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.
>
> [41] In relation to what constitutes the "reasonable person", the qualifications are not limited to just being "reasonable". The law requires a fully informed "reasonable person". That is:
>
> > …a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality.
>
> [*R. v. S.(R.D.)( R.D.S.)*, [1997] 3 S.C.R. 484]
>
> [42] In that case, the Supreme Court of Canada explained in detail the requirement for neutrality in decision-making, and how the duty to be impartial did not oblige judges to have no sympathies or opinions at all, but rather to ensure that they were receptive to other points of view. …
>
> [Emphasis added]

[31] Mr. Frampton's allegation of bias is based entirely on the following facts: (1) the adjudicator, like all Small Claims Court adjudicators, is a lawyer, and (2) the adjudicator decided in Mr. Boyle's favour. As I stated during the hearing, much more

is required to establish bias or a reasonable apprehension of bias. I would dismiss this ground of appeal.

[32] Mr. Frampton's second ground of appeal is that the adjudicator erred by reaching a conclusion that was not supported by the evidence. In particular, Mr. Frampton says there was no evidence to support the adjudicator's conclusion that Mr. Boyle's fees were fair and reasonable. I agree.

[33] It is clear, based on the emails and the retainer letter, that Mr. Frampton retained Mr. Boyle to assess the legal advice provided to him by his former lawyer. Put differently, Mr. Frampton hired Mr. Boyle to provide him with advice based on Mr. Boyle's review of the materials and his assessment of the merits of Mr. Frampton's case. Mr. Frampton's position, which was clear from the documents he filed with the Notice of Taxation, has been that Mr. Boyle never actually provided him with any legal advice as to the strengths and weaknesses of the claim. In other words, the assessment contemplated by the retainer was never performed, or, at least, was not shared with Mr. Frampton. As a result, Mr. Frampton says, he received nothing of value in exchange for payment of Mr. Boyle's fees.

[34] The onus was on Mr. Boyle to prove that he did, in fact, give Mr. Frampton the advice he was retained to provide, and that his fees for that work were fair and

reasonable. The evidence that should be given on taxations is discussed in Adam M. Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: LexisNexis Canada Inc, looseleaf ed, updated to 2018) at §10.95:

> Evidence on taxations should be comprehensive but not annoyingly detailed. Lawyer witnesses should state their qualifications and experience; say how they came to be retained by their clients and on what terms; list what problems their clients wanted solved and what instructions were received; **relate what advice was given**; detail what work was done to carry out the instructions; particularize difficulties that were encountered in doing the work (difficulties include uncovering the facts, obtaining documents, difficulties with the law, with opposing counsel and with the clients themselves); indicate how the lawyers' chargers were determined; and show whether the clients questioned the charges or complained about them and, if so, set out what questions were asked and what complaints were made. **Lawyers should, of course, emphasize what effort they put in, including in their narrative some evidence** of the hours they say they worked, and **of the work product that resulted from their efforts**, and they should specifically stress the importance to their clients of the problems they tackled and what they achieved for their clients along the way and in the end.
>
> [Emphasis added]

[35] Mr. Boyle did not attend the hearing. He offered some comment on the December 7, 2020 phone call in his Response to Taxation, but, as the adjudicator pointed out, the Response is not evidence. What evidence, then, did the adjudicator have about the advice that Mr. Boyle allegedly provided to Mr. Frampton? Other than the testimony from Mr. Frampton, the only evidence was the undated email from Mr. Boyle, which stated:

> As I explained during our call, I was only able to determine the specifics of the claim after reviewing the materials you provided me. It was only after that review that I determined a plaintiff side lawyer would be better suited to this case. I also had to conduct that review to provide you with advice regarding limitation periods,

> and regarding the likelihood of success on the claim in general. I hope the advice I provided aids you going forward.

[36] This email, in my view, falls short of discharging the onus on Mr. Boyle to prove that he assessed the legal advice provided by Mr. Frampton's former lawyer and advised Mr. Frampton of his opinion, as contemplated in the retainer. What did Mr. Boyle tell Mr. Frampton about the claim's likelihood of success, and what were the reasons he gave for that opinion? What advice did he give him about limitation periods, beyond what Mr. Frampton already knew and communicated to him during their first conversation? What value did Mr. Frampton receive from the time Mr. Boyle spent reviewing his file? I cannot answer these questions based on the record before me, and neither could the adjudicator. For this reason, I find that she erred in concluding that Mr. Boyle successfully discharged his onus to prove that the account was fair and reasonable in the circumstances.

[37] In allowing Mr. Frampton's appeal, I do not mean to suggest that a lawyer is always obliged to attend a taxation of their account, or that the lawyer's testimony will be necessary in all cases to establish that the account is fair and reasonable. If, for example, Mr. Boyle's advice to Mr. Frampton had been contained in an opinion letter, and that letter was put before the court, the evidence might be sufficient to prove that Mr. Boyle met his obligations under the retainer and that the fees charged

were fair and reasonable. It is up to the lawyer in each case to determine whether their testimony is necessary to prove that the account is lawful and reasonable.

**Conclusion**

[38] This is not a case where justice requires that the matter be remitted to the Small Claims Court for a new hearing before a different adjudicator. When Mr. Boyle chose not to attend the taxation, he did so at his peril. Mr. Frampton's success on this appeal should not result in Mr. Boyle being afforded an opportunity to correct his earlier error in judgment.

[39] The adjudicator's decision is set aside, and I find that Mr. Frampton is entitled to a refund of the $800.40 charged by Mr. Boyle in the account rendered on December 14, 2020, along with filing fee costs in the amount of $99.70. Mr. Frampton is also entitled to prejudgment interest from the date of the invoice until the date of judgment. The interest rate will be 4% per annum, which is consistent with s. 16 of the *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 17/93.

Smith, J.