

**Taxation**

**SMALL CLAIMS COURT OF NOVA SCOTIA**  
**Cite as: Mor-Town Developments Ltd. v. MacDonald, 2010 NSSM 64**

BETWEEN:

Name: MOR-TOWN DEVELOPMENTS LIMITED

- APPLICANT

Name: DAVID MACDONALD

- RESPONDENT

DATE OF HEARING: May 25, 2010

**Editorial Notice**

Addresses and phone numbers have been removed from this electronic version of the judgment.

- 1 Dr. Simon Jacobson appeared and spoke for Mor-Town. Mor-Town seeks to tax the legal bill of a solicitor, David MacDonald. The bill relates to the sale of vacant lands located in suburban Halifax. Mor-Town purchased the property in 1969. Mor-Town was then represented by the law firm known as Paton and Paton, whose business passed to the solicitor.
- [2] The shareholders of Mor-Town had long sought to sell the lands. The solicitor became involved in these efforts and carried the prospective sale over a number of years to a closing at the end of September, 2008. He billed the sum of \$51,750.00 plus HST and disbursements. This sum included \$2,000.00 for fees to “wind up” Mor-Town.
- [3] The solicitor, however, submitted a further account for \$5,565.00 plus HST and disbursements for the work post-closing. Mor-Town seeks taxation of this account as well.

- [4] First of all, I think it should be said that, in my opinion, the solicitor handled the file reasonably well. Mor-Town tried for many years to sell this land. Halifax has grown over the last 40 years, but this land has remained beyond the reach of development. It is rough land and removed from public highways. The solicitor immersed himself in the marketing of the property and eventually was instrumental in finding a buyer, patiently dealing with the buyer and his solicitor as the transaction came to fruition. He suggested a substantial increase in the purchase price in a counter-offer which the buyers accepted. He worked through the corporate issues and the conversion of the titles to the individual lots that made up the transaction competently. He is certainly entitled to be paid for his services, but having said that, I find the bill to be 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.
- [5] Mor-Town called Erin O'Brien Edmonds Q.C., an experienced property solicitor, to provide her opinion on the reasonableness of the solicitor's accounts. The solicitor has objected to her report. He raises the Supreme Court Civil Procedure Rules relating to expert reports. These rules are complex and demanding. They are not adaptable, in my view, to the Small Claims Court. Furthermore, the legislature has chosen to give adjudicators a broad discretion to accept relevant evidence without being circumscribed by the strict rules of evidence. An adjournment to give time is certainly appropriate where an opinion is delivered shortly before a hearing, but to insist on the Supreme Court procedure and rules of evidence would introduce a level of complexity in this Court which would defeat the many lay people who appear and greatly increase the costs of those who appear by counsel.
- [6] The solicitor does make the point that Ms. Edmonds is presenting evidence on a subject which is within the province of the Court acting as a taxing master. I will address that point later.
- [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.

[8] The work undertaken by the solicitor unfolded over a number of years. The total fees are high. The solicitor failed to keep the client informed of the costs as they mounted. The solicitor owed it to the client to keep them abreast of his fees. Dr. Jacobson, if he had known that the solicitor was booking the hours which he now claims for, could have clarified the business relationship, and could have put some control on the amount of time and money that was accumulating. Dr. Jacobson, in the end, was simply faced with a large account at the time of the actual closing, with all the money then in the hands of the solicitor. His options to negotiate the fee were quite limited by that time.

[9] Mr. Richardson in his paper entitled The Taxation of Legal Accounts says:

A lawyer has a duty to keep his or her client adequately advised as to the projected and actual fees. Coupled with this duty is a duty to provide reasonably accurate, and timely, estimates of the fees to be charged. A lawyer "is obliged to advise the client without delay of any developments that are likely to increase the fee beyond the estimate. Lawyers are not bound by estimates, but they cannot ignore them; their estimates will be considered by the taxing officer in determining whether an account is "reasonable". A lawyer who fails to warn his or her client that the fees are surpassing the estimate risks a substantial reduction of their account.

[10] A solicitor cannot, in my opinion, sleep on billing a file or telling a client how much the work is costing, and then surprise a client with a large bill at the end. The client, if not informed, cannot question, object or, if dissatisfied with the mounting account, change solicitors. The failure to keep Dr. Jacobson advised is a significant factor in my reduction of the account.

[11] In The Taxation of Legal Accounts, Mr. Richardson, after outlining the jurisdiction of a Small Claims Court Adjudicator on taxation, states the fundamental proposition that:

The common law, legislation and practice all make clear that a solicitor is not entitled to any fee, cost, charge or disbursement. Rather, he or she is only entitled to charge "*reasonable and lawful*" fees, costs and disbursements.

- [12] He then goes on to say that "...the onus is always *on the lawyer* to establish, on a balance of probabilities, that his or her account *is* reasonable and lawful. (emphasis in original), and restates the factors to be considered under the Supreme Court Rules which now provide:

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.

- [13] I do not find the bill reasonable. I consider the counsel's obligation to avoid expense, the nature of the case as a routine, if extended property transaction, the general conduct of the matter, the skill involved and the terms of retention, or in this case, the lack of them.

- [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.

- [15] In my view, this was not an extraordinary transaction. A solicitor should have been able to complete it with more efficiency and less cost than the amount billed. I approach my findings by considering "all the relevant circumstances" in the context of the solicitor's own Statement of Account

which itemizes the time spent at an hourly rate of \$200.00 per hour. The hourly rate, I find, is reasonable. It is the time indicated by the amount charged to each item with which I have considerable difficulty.

1. Reconstruction of Corporate Records \$2,000.00.

The company's minute book was effectively destroyed by the water used to put out a fire at Paton and Paton's offices. The solicitor had to reconstruct the minute book from the records available at the Registrar of Joint Stock Companies. In my experience, this can be done by a phone call or letter to the Registrar's office to request a photocopy of the record, but even if one attends at the office, obtains the file, organizes it for placing in a minute book and reads its contents to bring oneself up to speed on the history of the corporation, the fee should not be in the range of \$1,600.00. Much of the work, with the exception of the reading of the record itself, is a clerical matter that could be handled by a competent assistant and billed accordingly. I allow \$800.00.

2. Discussions and consideration of offers re Steven Murphy \$1,600.00

Mr. Murphy was a potential purchaser. He owned a neighbouring property. He did produce an offer, but it was quite unacceptable. I am not satisfied that eight hours is reasonable to elicit an offer that never went anywhere. I allow \$800.00.

3. To entice GMAC to list the property \$400.00.

I allow that amount.

4. Dealing with HRM \$9,750.00 and 6. Dealing with HRM Planners

The solicitor says he dealt extensively with Halifax Regional Municipality on the issue of access to the lot. He has billed \$9,750.00 for this exercise, or by his hourly rate approximately 50 hours. The land was not marketed or priced as land with immediate development potential. The property is accessed by a private right-of-way over lands of the Federal Crown. I don't understand that the existence of this access is an issue, but rather whether it could be converted to a public highway for the purposes of subdivision. I should have thought that a potential sub-divider would need to own the access and be able to convey it to the Municipality before a subdivision was approved. The letter of Ms. Kirby Grant of the City Solicitor's office, outlining the apprehended difficulties of any approach to the development of the property, make good sense to me as does her referral to development staff who would

have the detailed knowledge of the complexities a developer would face. The solicitor rebuffed this advice.

In the event, the property sold with the right-of-way in place as it was, and there is no evidence that access was an issue pre-closing.

Ms. Edmonds, who performed a very extensive review of the file, concluded the following:

From my review of the file, it does not appear that Mr. MacDonald had extensive expertise in the development of property. For example, his communications with the Halifax Regional Municipality showed that he did not understand the issues of legal access and land development. His communication to the client showed that he did not understand the replies from the solicitor's office telling him he must go to the Development office to determine if the land could be subdivided on a private road. There was a nine month period which, in my opinion, was mostly a waste of time and created delays that were not necessary to complete the project. ...

This accords with my own sense, from the hearing and the other documents presented, of how the issue, if indeed there was one, had been dealt with. This is also, to me, a good example of the failure to keep the client involved. Surely the client would not have approved if he had known that the solicitor was running up an account of thousands of dollars beating up against the city. I allow \$2,000.00 for what might have been a reasonable investigation through the municipality for the development potential of the land.

5. Discussions with Harold and Frank Medjuck and Civtech \$200.00

I allow this item.

7. Keeping Simon up to date \$8,000.00

According to the solicitor's description, Dr. Jacobson was an unreasonable, demanding and somewhat obtuse client who consumed a lot of his time to no productive purpose. I am not persuaded that this is so, and in any event, I refer to Ms. O'Brien-Edmond's descriptions of a failure to manage client communications and expectations efficiently and well. She again refers to the absence of a retainer letter as a factor which made the relationship more difficult. Dr. Jacobson would not have known that the clock was ticking, so to speak, throughout the 40 hours. Furthermore, there is nothing of

substance to back this time up. I assess \$4,000.00 as being a reasonable fee for communications with Dr. Jacobson over the years.

The solicitor has broken the work of completing the agreement of purchase and sale down into a number of separate items. They total \$11,400.00. I list them below:

8. Initial offer and Counter offer \$500.00
9. Various amendments to the agreement before 24-09-08 \$2,000.00
11. Dealings with other lawyer \$4,000.00
13. Dealings with Mr. MacIntosh (escrow agent) \$ 300.00
14. Drafting and circulating various Minutes and Resolutions \$1,600.00
16. Calculate closing adjustments \$200.00
17. Drafting deed and circulating etc. \$800.00
18. Drafting closing documents (letters, forms) \$ 400.00
19. follow up with UPS \$ 200.00
22. Drafting and forwarding new Amendment on Sept. 28-29 \$800.00
23. Receiving impressing and disbursing funds as required \$ 400.00
24. Recording release mortgage and completing release \$ 200.00

Many real estate transactions are difficult. Delays, amendments, difficulties with the other side are part and parcel of a real estate practise. If acting for a corporation, especially if it is disposing of its sole asset, then resolutions are required. A solicitor deserves his pay for his time, expertise and the stress transactions may impose, but \$11,400.00 is not a reasonable fee for the work involved here. I cannot accept, for example, that one would spend 40 hours dealing with the other side on the sale of a piece of raw land or 14 hours preparing amendments. My approach to the particulars is different than Ms.

O'Brien Edmonds, but I agree with her that they are excessive. I allow \$7,500.00.

#### 10. Migrating Properties

The solicitor had to migrate seven separate lots. The migration began as four lots, but there were a number of de facto subdivisions elevating the number to seven without adding any complexity to the title. The solicitor billed what might be called a standard fee of \$1,000.00 for each and Ms. Edmonds accepted his account for \$7,000.00. In my view, however, multiplying the number of lots by a standard fee is not reasonable in this transaction. The back titles themselves were relatively simple and much the same. There is little worry associated with the certification of title. Some descriptions were required, but the boundaries were well defined. There was no complex of easements or rights-of-way. I allow \$500.00 per lot or \$3,500.00.

#### 15. Dealing with threatened action by Peter and Alex \$3,000.00.

Mor-Town was a family company. Some members were not pleased with Dr. Jacobson's management and what they regarded as a lack of timely information. Bad feeling arose and there were some threats of legal proceedings, but I do not see a lot of substance in this friction. I allow ten hours or \$2,000.00.

#### 16. To set up bank account for Company \$1,000.00

I do not see five hours to do so. I allow \$600.00.

#### 20. Intervention to set up HST and Tax Numbers \$200.00.

Allowed.

#### 21. Discussions with C.A. re constructing financial statements \$2,000.00

I allow \$1,000.00. We have here the sale of a lot of land. It had been owned by Mor-Town for many years and some reconstruction of costs would be necessary, but again, I do not see the complexity from the legal end to justify ten hours.

#### 25. Agent's Fees for 2008-09 \$100.00

Allowed.



26. All other conferences \$500.00

Allowed.

- [16] I allow the disbursements which, including HST, total \$1,844.59.
- [17] The solicitor's second account relates to work post-closing. It amounts to a further \$5,565.00 plus HST. The solicitor had set aside \$2,000.00 in his first account to pay for a formal winding up of Mor-Town under the *Companies Winding Up Act*. Dr. Jacobson understood the fee was for all post-closing services. The winding up does not appear to have been done, at least as yet, and so for the purposes of this opinion, I will attribute the \$2,000.00 to the bill I am taxing. I daresay the solicitor will not be engaged to do the work of formally winding up Mor-Town anyway if it is proceeded with at all. I will assess the final bill of \$5,565.00 for its reasonableness in its own right.
- [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. 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.
- [19] In sum, I allow the bill in the amount of \$26,800.00 plus HST, plus disbursements. The solicitor also recovered the fine fee of \$2,000.00 for drafting a vendor take back mortgage from the purchaser.
- [20] After much consideration, I have decided not to allow Ms. O'Brien-Edmonds expert's account in the amount of \$2,712.00. I acknowledge that I found her analysis helpful and certainly, although I got to the result by a different route, I agree with her in it. I refer, however, to the question whether a report from another solicitor is really necessary on a taxation. Without presuming too much about our capacity as taxing masters, I think I can fairly say that we are all lawyers who ought to have a grip on what a reasonable fee is without assistance from another one. Secondly, although this is a taxation, the forum is still the Small Claims Court and we must, I think, be careful to

avoid routinely awarding expert's fees, or encouraging an expectation that we will do so.

- [21] In *French v. Checkmate Home Inspections Inc.*, 2009 NSSC 114 at paragraph 8, Justice Heather Robertson says:

As a general principal the purpose of achieving speedy and inexpensive resolution to small claims, is defeated if experts' fees come into play in every award of costs. Had this been contemplated by the legislation the regulations would have addressed the matter. In my view it would be a rare circumstance where such a discretion should be exercised.

- [22] Mr. MacDonald has been paid his first bill in the amount of \$51,750.00 plus disbursements of \$1,844.59 plus HST all of which adds up to \$60,322.09 . This bill includes \$2,000.00 for winding up. The second bill for winding up has not been paid. I have taxed both bills at \$26,800.00, plus HST which I calculate to be at 13% in the amount of \$30,284.00. I allow the disbursements on both bills in the amount of \$1,982.40. The total amount is thus \$32,266.40. The difference is \$28,055.69. This amount should be paid to Mor-Town forthwith and I will so order. Mor-Town is also entitled to its costs of issuing and serving the notice of taxation in the amount of \$174.43.

**ORDER**

[23] I tax and certify the account in the amount of \$32,266.40.

[24] I order David MacDonald to pay the sum of \$28,230.12 to Mor-Town Developments Limited.

Dated at Halifax, Nova Scotia  
this 31<sup>st</sup> day of August, 2010.

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**J. WALTER THOMPSON, Q.C.**  
**ADJUDICATOR**

Original	Court File
Copy	Claimants(s)
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