

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *McMullin & Associates Ltd. v. Restaurant Association of Nova Scotia*, 2017
NSSM 32

Claim No: SCCH 448306

BETWEEN:

McMullin & Associates Ltd. and Blair McMullin

**Claimant/
Defendants by
Counterclaim**

v.

Restaurant Association of Nova Scotia

**Defendant/
Claimant by
Counterclaim**

Editorial Notice: Addresses and phone numbers have been removed from the electronic version of this judgment

Tanya G, Nicholson appeared on behalf of the Claimant/Defendant by Counterclaim;

Mary Jane McGinty appeared for the Defendant/Plaintiff by Counterclaim;

DECISION

The Claimant, McMullin & Associates Ltd., is an accounting firm owned and operated by the Defendant by Counterclaim, Blair McMullin. The corporate Claimant was hired by the Defendant, Restaurant Association of Nova Scotia, (“RANS”), a not-for-profit organization whose members consist of restaurant owners across Nova Scotia. The Claimant performed various accounting services, the extent of which is in dispute, and rendered several bills. But for the invoices from May – July 2015, all bills were paid to date. RANS refuses to pay these latter bills submitting that the amount exceeds that which is contracted. They have also launched a

counterclaim against the corporate Claimant and McMullin in his personal capacity, seeking reimbursement for what it claims is overpayment as well as the cost of recreating accounting records when the Claimant refused to provide them for lack of payment of these invoices.

This decision has been filed beyond the sixty days prescribed by the *Small Claims Court Act*. As stated by the Supreme Court of Nova Scotia in *Towle v. Samad*, 2013 NSSC 260, that time line has been held to be directory rather than mandatory. Nevertheless, the parties and their counsel have been anticipating this decision. Their patience is greatly appreciated.

The evidence in this matter has been quite detailed and well presented. While there may be certain exhibits not specifically referenced in this decision, both parties can be assured that I have given each exhibit and point raised in *viva voce* evidence due consideration in preparing this decision.

Issues

- Was there *consensus ad idem*, or a meeting of the minds, for the terms of the contract?
- What was delivered?
- Was the contract breached?

The Evidence

The evidence from each party varies, and at times, significantly. Perhaps not surprisingly, Mr. McMullin speaks in fulsome and glowing terms of the extent of his work, relying particularly on an error in reporting HST which resulted in a refund; meanwhile Costa Elles and Gordon Stewart on behalf of the Restaurant Association, downplay its value and impact considerably. As noted below, the truth lies in the middle. Considerable documentary evidence was submitted by both sides which helped to corroborate certain facts. I have summarized the evidence of each witness below in hopes of providing further clarity:

Blair McMullin

Blair McMullin is the owner of McMullin & Associates Limited (“the firm”). He earned a CMA in 1984 and received his CPA designation in 1999. The firm provides accounting services, particularly general ledger building and maintenance, as well as year-end reporting for corporations, unincorporated associations and charitable organizations. His firm has done business with the Restaurant Association of Nova Scotia in the past, from 2004 until June 2015, except for the 2011-13 fiscal years, when their accounting work was performed in-house or elsewhere.

Mr. McMullin's initial contact with RANS was through Gordon Stewart, the Executive Director of RANS. Following the termination of his services in 2011/2012, he approached Mr. Stewart again in October 2014. Mr. Stewart advised him that RANS was not satisfied with their current accountant and arrangements were made for the firm to provide accounting services. There was no retainer agreement or other document to evidence the contract. As with the firm's previous engagement, the initial arrangements were made verbally. His instructions were to take corrective actions on the 2014 file. He was not to be concerned with the 2011, 2012 and 2013 fiscal years in doing so, which he followed except where those years were necessary to find historical information needed for continuity. He would prepare invoices as the work was completed which ended up being on a monthly basis.

He testified that the ledgers and accounts were such that he could not simply take corrective action. It was necessary to start from scratch and do it right. According to Mr. McMullin, more time is required to retrace steps and correct the situation, than to start from the beginning. He reviewed the HST reporting and the general ledger and found it to be "inconsistent at best". In other words, there was no correlation between the bank records and the general ledger. There were difficulties in reconciling some businesses when two or three businesses were owned. He consulted Mr. Stewart who, according to Mr. McMullin, told him "I don't want to know what's wrong, just fix it." Mr. Stewart also advised that he did not have the administrative talent on staff to fix it.

He testified that the appropriate professional standard was "audit quality", which for Mr. McMullin, meant that the data supporting it is correct so the CPA can attest to the financial statements. He found the standards deteriorated between 2011 and 2014 until he resumed doing the accounting work for RANS. Mr. Stewart advised him in 2014 that if the situation did not improve, the association would be "on the rocks". He testified that his work was 90% complete by April or May 2015. Sometime early in his work, he discovered RANS had been remitting HST on unpaid membership dues and, further, \$55,000 worth of invoices for memberships were generated and never mailed.

He described the time as being in constant contact with Canada Revenue Agency, which included alerting them to the error so they were expecting the amendment. He described the process necessary for the remittance of HST. Following the review of the documents, two errors were identified and corrected, namely approximately \$25,000 was overpaid and \$5000 underpaid resulting in a net remittance of approximately \$20,000. Following that, he continued to maintain the general ledger and books on a monthly basis.

Mr. McMullin submitted into evidence a spreadsheet showing a summary of all of the work the firm did for RANS which he prepared in May 2015. He tendered this summary as well as the invoices into evidence. (Exhibit 1, Tabs A and B).

The invoices were issued monthly from November 30, 2015 to April 30, 2016. They included reviewing and "maintaining the integrity of the general ledger", preparing the year end, invoices

and cheque requisitions and preparing and dealing with CRA on the HST issue. The term “integrity” describes ensuring the figures in the general ledger were consistent with the invoices. They did not tie back with anything.

There was work performed following that which was billed in May, June and July, whose bills remain outstanding. That is described as accounts receivable, general accounting/posting and invoice generation. Larger charges include year end and special work, maintenance of the general ledger system and maintenance of the accounts receivable subsystem. He testified that he was assisted by several others who all billed at different hourly rates. For his own work as a CMA/CPA, Mr. McMullin billed at \$125 or \$100 per hour but for performing the more routine functions, he billed \$50 per hour which is similar to the billing rate for his assistants. The total amount outstanding was \$5175 in May and the monthly maintenance for June and part of July whose billing was \$1495 and \$517.50 respectively. The bills show a past due charge of 1.5% per month or 18% per annum. The amount outstanding at the time the Claim was filed was \$8015.32 representing the outstanding amount inclusive of billed interest.

Mr. McMullin provided evidence of the financial reporting which the firm completed on behalf of RANS. It consisted of Financial Statements as at December 31, 2014 and Financial Reports for May and June 2015 which reflect the corrected reporting and general ledger. He also described the background behind the HST reporting, which resulted in a submission in early May 2016.

Mr. McMullin met with Costa Ellas and Joe McGuinness, who are directors with RANS, to discuss his billing practices. They asked for a summary and breakdown of the work which was performed to date. He responded on May 20, 2015. He continued to work and had communicated with Gordon Stewart and Cathy Kalil. By letter from Costa Elles, he was told to stop working on July 14, 2015. He rendered a final bill for that purpose. He described his reaction as shocked. He tendered into evidence the correspondence as well as his e-mails seeking payment. He testified that RANS had been paying their bills on time and in full. In their letter of July 14, the Defendant directed him to send their records which he prepared to Collins Barrow. He refused to do so and continues to hold the records. In response to the counterclaim, he disputes that he has been overpaid. He confirmed that he stands by his work and thought the billing was fair and amends his claim for further interest, \$8338.75 plus costs.

Under cross-examination by Ms. McGinty, he testified that RANS’ accounting system had been kept by using Sage and it needed to be populated to Quickbooks, the program he used. He confirmed that he refused to turn over the books. He confirmed that when he met with Gordon Stewart in October 2014, he did not give an estimate for a cost to do the work. He testified that he typically does not give an estimate of time to complete a process as one does not know “what tangles will take place”. He acknowledged in his e-mail to Gordon Stewart on January 7, 2015 that he thought the HST reconciliation would take a lot of time, “1-2 days” although to harmonize it with CRA and bring it into compliance will take a while.” He also asked RANS for an update on accounts receivable to include it in the reporting.

Mc. McMullin maintained from the outset that he did not realize the full magnitude of the problem. He testified that he input his time daily and it is maintained in an Excel spreadsheet. He did not bring any original documents with him to court or any timesheets. When asked if he expected his client to rely on the estimates given in the e-mail, his response was that "it was an e-mail".

In January, he indicated that he spent 27 hours on the accounts receivable system. The purpose was to address the fees that were not invoiced and write it off. The difficulty arose when they wrote off their accounts receivable. He described the receivables as not typical as they are membership based rather than an invoice for goods and services. He described RANS' system as ancient.

He described the HST work in April and May 2015 as detailed and noted that neither Mr. Stewart nor the executive ever asked him for details. He described the books as being under control by June and the billing at \$1300. He testified that he has a proprietary interest in the records and does not intend to release them.

Under redirect, he testified that the bills and accounting information comes from RANS rather than an external party. His role for the chequing and expenditures was to make them easy to follow along with the general ledger. He indicated that the January 7 e-mail was approached differently once he dug deeper into the records and could no longer follow it. His intent was to restore the books to audit quality. He described the resolution of the HST issue as a windfall to RANS.

Mark Alan Marshall

Mark Marshall is a CPA formerly employed with Collins Barrow. He had practiced there since 1999. He met with Gordon Stewart and Costa Elles in the summer of 2015 for the purpose of discussing Mr. McMullin's work and to provide an estimate of the cost to do any additional work required and to review the accounts for the work that was done. In his view, the amount charged was excessive and detailed time records should be requested by RANS from Mr. McMullin.

He estimates a reasonable cost for his work in preparing statements would be \$2500 for reconstruction and clean up of a general ledger, regular preparation of \$400 per month (thus, January – June reports would have been 6 @ \$400 per month or \$2400). A yearend report would cost approximately \$4000.

He acknowledged requesting books from Blair McMullin, but was refused until the Claimant's bill was paid.

He testified that when a client was invoiced there would be detail outlined of the work that was done, and if requested, the amount of time spent would also be indicated. The work would generate the rate, date and time spent on each file.

Under cross-examination, Mr. Marshall acknowledged that his hourly rate was \$300 per hour and a bookkeeper was billed out at \$125. There were more senior accountants on staff there and elsewhere that charge more. He described the difference between the work of a CMA and a CA, namely a CA does more in-depth tax work. He described the work performed as typical of a CMA. He compared the invoices and financial statements to form his opinion that the amount was excessive. He did not see the summary reports (Exhibit 1, Tab G).

In discussing Mr. McMullin's services in court, Mr. Marshall acknowledged there were many tasks that would have been conducted by a company's in-house accountant or bookkeeper. He noticed a number of tasks performed by Mr. McMullin that his firm would not do. Mr. Marshall's quotes do not include this level of service or administrative services. He found the most recent records to be done fine and described the June records as looking fine. With respect to unpaid bills, it was his practice to recommend his clients always pay outstanding bills of other accountants. In his opinion, it is improper to impede the progress on a file if the bill is unpaid.

In redirect, he commented that \$800-\$900 for invoicing was excessive as was a monthly fee for financial statements of \$1300 per month. He acknowledged that his quote did not include the work relating to the accounts receivable system.

Costa Elles

Costa Elles is the President of the Restaurant Association of Nova Scotia. He has been in that position since 2007-2008. He has been on the board of RANS since 2000, which is comprised of other restaurant owners. He is the owner of both locations of Eta Greek Taverna. The association provides a means for restaurant owners to share information and to organize to lobby government. It is a not for profit organization which is registered under the *Societies Act*. Gordon Stewart is the Executive Director of the Association and performs the work for the Board volunteers.

In 2014, the association was experiencing accounting issues, so the decision was made to retain Blair McMullin again to perform the accounting duties. He directed Mr. Stewart to meet with Mr. McMullin and get an estimate to do the work. He testified that he was told the quote was between \$6000 - \$8000 which he thought was high but agreed they should pursue it. He tendered into evidence a copy of an e-mail dated December 4, 2014 from Gordon Stewart which outlined what they believed to be the retainer. I shall address them more fully in the summary of my findings further in these reasons. He indicated he would not have accepted \$1000 per month. He compared what he pays for his business' returns and said he currently pays \$1000 per month for his two restaurants. He did not indicate if the restaurants are owned by one company or several.

The issue with the payment arose when he was approached by Mr. Stewart to sign a cheque for almost \$7000. He was surprised to learn the payment was set at \$7000 and they had paid almost \$17,000 for the services to date. He felt the information on the invoices was lacking detail, specifically, the hours spent and the tasks completed. He recalls seeing year end statements but nothing for month end. As a result, he arranged a meeting with Mr. McMullin, Joe McGuiness and himself. Following that, he contacted Mark Marshall who indicated he thought the cost was high.

He testified that the bookkeeper hired by the association was sufficient to bring the books in line. He feels the only benefit with the Claimant's services was the HST refund which he felt any accountant could have found.

Under cross examination, Mr. Elles conceded that Mr. McMullin and his work were well known to him and RANS. He was unaware of any issues with the quality of his work. He recalls having the financial statements for his meeting. He did not deal directly with Mr. McMullin, but left all of that to Gordon Stewart. He trusted Mr. Stewart and Mr. McMullin to obtain the quote for the work and do the hiring. He did not recall that Mr. McMullin was hired monthly as he only recalled seeing two statements. He thought the only remaining job was to prepare the year end for 2014. He believed everything would be completed in three months.

He recalled the problem with the internal accountant was that she was not keeping up with her work. He did not know when the staff accountant was replaced.

He reiterated the outcome of his meetings with WBLI. He used his experience with his restaurant as a basis for comparison. He identified the letter he sent to Mr. McMullin terminating his services.

Catherine ("Cathy") Kalil

Cathy Kalil is an employee of RANS. She described her role as administrative in nature. She has worked with RANS since April 28, 2015. During that time, she had regular contact with Blair McMullin. She worked through what accounts were collectible and those which were not.

She identified, in evidence, a report of all of the membership accounts. They are divided among those which could not be collected, those that were and those where an invoice had not been verified. This had been prepared by the previous staff accountant. She used it as the basis for accounts receivable. Any members who could not be located were "googled" and sent out where possible. She recalls having to order cheques but does not recall being advised to change banks.

Ms. Kalil testified that she sends out 25-30 invoices per month on average, although it may be as few as 15 and as many as 50. She estimates spending approximately two hours per month on invoicing. They address accounts payable every two weeks. She estimates this process takes about one hour. She testified their current system is sufficient for payroll and T4 preparation as

well. She identified a Chase Paymentech statement as evidence of credit card processing. In all cases, she would forward each of these reports to Blair McMullin.

Under cross-examination, she testified that she could only speak to the process when she assumed her position. She agreed the statements (e.g. Beanstream and others) did not provide enough information. She testified that the administrative work with the association was prepared by Ms. Kalil and other times Mr. McMullin. She does not recall ever seeing financial statements for 2015. She recalled receiving statements for June 2015. She recalled issues with staff payroll but could not attribute any of this to Mr. McMullin. She testified that invoices are now done once or twice a month and they do not take long.

In redirect, she did not recall doing anything with Mr. McMullin other than invoicing and payables.

Gordon Stewart

Gordon Stewart is the Executive Director of the Defendant. He describes the role of RANS as an association of independent restaurant owner and operators. Their objective is to grow and improve investment in the Nova Scotia restaurant industry. He described his long standing relationship with McMullin from the days when they occupied the offices in the same building. He reports directly to the Executive or its committee. Any contractors, including the Claimant, report directly to him.

In October 2014, he initiated the general conversation of the firm performing various accounting functions, particularly the fiscal year end for 2014. He testified to receiving an e-mail from Mr. McMullin on January 7, 2015 in response to his request for an update for work to be completed. The details have been summarized earlier, namely 7 days to complete the HST and have the general ledger brought up to speed, his hourly rate would be \$125 or \$100 with work to be done by others. He testified that he relied on this estimate. He followed up with a request for the financial information on February 20. He testified that McMullin did not respond. (As noted further, he responded almost immediately indicating he was looking for December information, and, also referenced the possibility of further work). He testified that he relied on the e-mails.

In his opinion, Mr. McMullin went beyond what he was retained to do dealing with Showclix, Beanstream and Chase Paymentech. He did not require those details. In his view, McMullin exercised bad judgment and time was wasted. There was a report in evidence generated by a staff member showing unpaid bills and uncollected HST. The rest of the accounting was sent to Donna Pitre.

He described the relationship as broken down. He kept receiving invoices but there was no breakdown of time spent or other notation. He prepared the 2014 financial statement and had nothing prepared for 2015. In June, he refused to do the payroll unless he was paid. He

acknowledged that McMullin refused to release the records to the accountant. He does not feel any confidence in the numbers for 2014 or 2015.

He acknowledged that everything got off on the right foot. He identified the issues with the HST and its impact on cash flow in the future.

Under cross-examination, Mr. Stewart acknowledged that he hired Mr. McMullin due to his familiarity with the files. He conceded that he did not provide the memo to the Board regarding Mr. McMullin's rates, or send something comparable to Mr. McMullin. He was aware the executive committee approves everything. He acknowledges the books were in bad shape but the bookkeeping was not poorly done. There were problems with the HST. He acknowledged there were payroll issues and potential garnishment issues.

He described the former accountant, Erica's, relationship with Blair McMullin. In Mr. Stewart's view, she was hard on him. He was not sure if it was the bookkeeper's job to file quarterly remittances for HST. He acknowledged that on January 7, it was the first time he was aware of the HST problem. The description of the books as "three years of rubble" on February 20 was his first indication of problems. He knew there would be challenges. He did not think it unfair to hold him to \$8000, given that the organization had paid him over twice that.

He acknowledged receiving the e-mail of May 11 showing the net refunds of \$20,326.47. Any invoices for his services went to the bookkeepers for payment. He does not recall what he paid Donna Pitre for their yearend bill. He does not know when the accounts receivable were restructured.

Under redirect examination by Ms. McGinty, he confirmed that McMullin's instructions with the "three years of rubble" were to take the 2014 data and prepare the year end.

Law

In order to establish a case for breach of contract, the onus is on the Claimant to establish on the balance of probabilities that a contract existed. One of the key elements of the contract is *consensus ad idem*.

It is a fundamental principle of contract law, to quote Professor G.H.L. Fridman, QC, in *The Law of Contract in Canada* (6th ed.) that:

"Agreement is the basis of any legally enforceable contract. There must be *consensus ad idem*. Without a meeting of the minds of the parties there can be no contract."

While there is no doubt that a contract is in existence, the cases also require a meeting of the minds on the terms themselves. As Fridman states at pp. 15-16:

“Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed, and if so, upon what...”

“In each instance the courts seek proof of an agreement between the parties involving the necessary exchange of acts and promises, promises and promises or acts and acts.”

In its counterclaim, RANS alleges overpayment and claims unjust enrichment. In support of this position, Ms. McGinty cites the cases of *Gretz Designs Construction v. Coles*, 2015 ABPC 177 and *Miller Paving Ltd. v. B. Gottardo Construction Ltd.*, 2007 ONCA 422. Once again, the onus is on the Claimant by Counterclaim to prove the existence of unjust enrichment.

Findings

As noted previously, I have considered all of the evidence tendered before the Court. I make the following findings:

Breakdown of Time

The Claimant was hired in October 2014 to perform the year end for 2014 and any general ledger items. There was no agreement orally or in writing as to rates, times or even extent of duties. There were few instructions given. The Claimant's primary duties were to reconcile the 2014 general ledger with the bank statements and prepare financial statements for the year end for 2014. Mr. McMullin was directed to “just fix it”.

The Defendant, RANS, is an association of restaurant owners. Despite that its executive committee is comprised of volunteers, they are business people who engaged a business contract.

The Defendant was familiar with the Claimant's billing practices and lack of detail in its invoicing from its previous dealings with Mr. McMullin. While I cannot condone this lack of detail, the Defendant knew what to expect. Indeed for the first five months of the contract, November 2014 – April 2015, despite attempts to pin Mr. Mullin down to precise expectations and terms, the Defendant paid its bill with little incident.

Mr. McMullin, Mr. Stewart, RANS staff and the RANS executive committee all displayed a marked failure to communicate. There were several figures discussed between the parties, yet none of them sought to confirm any understanding. Costa Elles' view that Mr. McMullin quoted between \$6000 - \$8000 was not supported by anything elsewhere in evidence. Mr. McMullin testified that he charged three different rates for his services, \$125 and \$100 for his regular time and \$50 per hour to perform more mundane administrative tasks. There was no evidence as to the decision to charge \$100 and \$125 for comparable services. There were no time sheets called into evidence. Given the previous billings which had been paid, I find Mr. McMullin did not maintain time records of any kind until May, when his billing was called into question. He charged what he thought the services were worth. I have reviewed the billings below and found his work was expected, completed and of value.

While I was impressed with Mark Marshall and his recollection of evidence, the evidence he provided was of standard fees for various accounting services, particularly his former firm's fixed fees for standard accounting services. By his own admission, some of the services conducted by McMullin are of the type performed by a staff accountant or administrative personnel. A typical accounting firm would not have performed those duties. He did not seem to know that was even a consideration until asked by counsel when giving evidence. In many ways, I am being asked to consider two different types and levels of service. I place little weight on his evidence.

General Ledger and Year End

In his evidence, Mr. McMullin maintains that in reconciling the general ledger, he found it simpler and more efficient to begin the process from scratch rather than retrace the steps. In my view this was logical.

If I accept Mr. Stewart's evidence in its entirety, it would appear that the estimate of time and trouble kept expanding. In December 2014, Mr. Stewart advised the executive committee that the Claimant would charge \$1500 to bring the 2014 financials up to date, \$2000 to finish the books and year end and remaining accounting at \$1000 per month. These prices would not include accounts payable and deposits and reviewing bad debts. This memo should have been copied to Mr. McMullin. By e-mail of January 7, Mr. McMullin confirmed what was left to do, namely review and correct the accounts receivable, have HST in compliance and finish an appropriate year end. In a follow up email, he provided the following estimates:

Accounts receivable: 1 day
 Harmonize HST: About 1-2 days
 Year end: 1 day.

In short, he estimated approximately 3-4 days. It is not clear the number of hours spent per day on this file. I estimate 4 days at 8 hours per day, or \$4000 + HST assuming an hourly rate of \$125. Thus, he would have charged \$4830 to that point and anticipated a further \$4600. The invoice for January 31 was \$4168.75, which is reasonable.

Payroll

The next bill which was received included payroll services and deposits, plus dealing with CRA. The bill was for \$3018.75. I find nothing on this invoice contemplated by the e-mails referenced above. I find the service was performed with RANS consent.

HST

In the process of correcting the books, Mr. McMullin discovered HST was being remitted based on amount billed rather than collected. This resulted in an overpayment. RANS was entitled to and received a net HST refund of \$20,326.47. I find this was not originally part of the estimate. However, once it was discovered, I find by the letter of February 7, Mr. McMullin advised RANS expected it to take additional time to remedy that problem. Whether through Mr. Stewart's silence or direction, I find Mr. McMullin was authorized to proceed and prepare the necessary filings. I find the Claimant billed a total of \$8012.50 + HST, for HST issues, year end and reconciliation related to the HST refund and accounts receivable. The Claimant was paid for this work. In my view, I find there was consent and direction with respect to completing this portion of the work.

During his testimony, Mr. Elles' commented that any accountant could have discovered the problem. While the comment was merely designed to downplay Mr. McMullin's work, it ignores the potential gravity of the situation.

In Canada, the *Excise Tax Act* and the *Income Tax Act* create obligations for organizations, including not for profits like RANS, to remit tax withholdings. The statutes also impose personal liability on directors of those organizations for unremitted funds. In spite of this potential for personal liability, Mr. Elles and the Board took an astoundingly "hands off" approach to the finances and tax reporting for RANS, leaving it all to Mr. Stewart and Mr. McMullin to address. His opinions are very strong on what everything should have cost. Had the error resulted in a net loss of \$20,000, rather than a credit, he and his board members would have been jointly and severally liable for it.

The problem had not been obvious to the previous person making the remittances. I find that like most errors of this magnitude, once discovered, the HST errors seem glaringly obvious each time the financial statements and general ledger are reviewed.

For his part, Mr. McMullin uses the success in this issue to defend a lack of detail and justify payment for other billings. As noted below, he has not proven entitlement to full payment.

Charges for May – July 2015

In order to assess the invoices for May – July, 2015, it is appropriate to review the bills for March and April.

The bill for March 31 included services for year end and HST issues. I find this was the time when Mr. McMullin was "constantly in contact" with CRA. As noted, it was appropriate to be more careful. It was not appropriate to exceed the estimate to this extent without warning. Nevertheless, I am satisfied the work was necessary. The invoice is for \$4427.50. April's invoice was for general ledger, HST and other issues, in other words, monthly accounting services. Curiously, this is set at \$905.63. These were paid after his responses to the letters and memos.

As noted previously, I do not accept any spreadsheets or other records provided by McMullin are accurate as they relate to time spent or that he even actually charged an hourly rate. That is not what was expected by the parties. While I find he conducted himself with due diligence and that his work billed up to April 30 was not duplicitous or unnecessary, his work going forward has not been fully proven. In spite of the additional detail on those invoices, it is not clear how much extra was conducted. In other words, had the Claimant maintained time sheets, there would have been less difficulty in finding value in these services.

With respect to the May invoice, it contains several items, such as cheque posting, invoicing, etc. Several of those were billed at \$50 per hour. I find most of these were done and necessary. I do not understand the need for the further year end charges of 16.25 hours at \$125 or the “additional meetings” noted on the invoice. I am not satisfied that the work was necessary and it greatly exceeded the amount earned. A discount for 4.5 hours at \$125 and 9 @ \$50 were applied. I apply a reduction of 20 hours at \$125 which is a reduction of \$2500 + HST or \$2875.00. I allow \$2300 (\$2000 + HST) for the work in May.

There is no reference between the parties of a monthly rate for the books. The Claimant tendered an invoice for April of \$905.63 taxes included and then charged \$1300 + HST for presumably the same task in June. I allow \$905.63 all inclusive. I disallow any claim for July 2015.

Damages

I find the Claimant is entitled to the following:

May 2015	\$2300.00
June 2015	\$ 905.63
July 2015	<u>\$ 0.00</u>
	\$3205.63

The claim is allowed in the amount of \$3205.63.

Counterclaim

Having found the work was performed according to the contract between McMullin & Associates Limited and Restaurant Association of Nova Scotia between the months of October 2014 – April 2015, I need not to consider a counterclaim for unjust enrichment. That portion of the counterclaim is denied.

I find the decision to withhold the electronic records was not appropriate, particularly in light of what I found to be an excessive charge. There is no evidence of the cost associated with recreating the records, although the sum of \$3411.20 is referenced in the counterclaim. I find it was necessary for RANS to expend time and effort that would not have been necessary but for McMullin’s refusal to turn it over. I fix the sum of \$1000 to be set off against the claim.

The Counterclaim against McMullin in his personal capacity is dismissed.

Interest and Costs

In the circumstances, I decline to award interest on either sum. This is also an appropriate case for each party to bear its own costs.

Summary

In summary, I find the Defendant liable to the Claimant for \$2205.63. The claim against Blair McMullin in his personal capacity is dismissed. Each of the parties shall bear their own costs.

An order shall issue accordingly.

Dated at Halifax, NS,
on February 15, 2017;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)