# SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *McCormick v. Conohan*, 2018 NSSM 105

**Date:** 2018-07-27
**Docket:** Sydney, No. 473732
**Registry:** Halifax

**Between:**

**Jessie Bennett McCormick**

Applicant

v.

**Chris Conohan**
**(Khattar & Khattar)**

Defendant(s)

| | |
|---|---|
| **Adjudicator:** | **Patricia Fricker-Bates** |
| **Heard:** | **May 28, 2018** |
| **Decision:** | **July 27, 2018** |
| **Appearances:** | **Jessie Bennett McCormick, Claimant, self-represented**<br>**Chris Conohan, Defendant, self-represented** |

## BY THE COURT:

**[1]** On February 28, 2018, the Applicant, Jessie Bennett McCormick, filed a Notice of Taxation in the Small Claims Court seeking a taxation of fees, costs, charges and disbursements in closed court. The Statement of Account, Invoice No. 180050 dated January 25, 2018, totalled $22,043.38 (see Exhibit No. 2) and the Statement of Account, Invoice No. 180051 dated January 25, 2018, totalled $5,092.57 (see Exhibit No. 2). Invoice No. 180050 for $22,043.38 relates to the divorce; and Invoice No. 180051 for $5,092.57 relates to the response to an appeal by the Claimant's ex-husband to the Nova Scotia Court of Appeal from the Corollary Relief Judgment.

**[2]** The Applicant originally saw Mr. Conohan for independent legal advice. Issues discussed included divorce, spousal support, debt and property division.

However, to deal with these matters, proceedings originally commenced under the *Maintenance and Custody Act* (provincial legislation), had to transition into proceedings under the *Divorce Act* (federal legislation).

**[3]** The Applicant testified that when she began to look into divorce, she attended a seminar and came away with the idea that a divorce would cost between $5000 and $10,000 dollars.

**[4]** On August 6, 2014, the Defendant forwarded to the Applicant a six-page Retainer Agreement (see Exhibit No. 3). The letter states (at pg. 1): "Please read this agreement carefully as once it is signed it is a legal contract." The following headings appear in the Retainer letter: Fees & Billing Policies; Disbursements; HST; Retainer Payments; Interest; General; Services Covered by this Retainer; Questions About My Work; Termination of Legal Services; Solicitors' Lien and Collection Costs; Confidentiality; Acknowledgment and Acceptance. It is a detailed piece of correspondence.

**[5]** On August 6, 2014, the Defendant wrote to conciliator John MacInnis to advise that he had been retained to represent the Applicant (see Exhibit No. 4). The letter states:

> I understand that Ms. McCormick and Mr. McCormick recently met with you for a conciliation session. I understand that the matter was not resolved and that according to Ms. McCormick you may be referring the matter to the scheduler. I would note that when I subsequently reviewed these issues with Ms. McCormick she did not appear to have filed a Petition for Divorce …
>
> This technical requirement for a Petition is being remedied by my office filing a Petition for Divorce. …

The Petition for Divorce was filed on behalf of the Applicant on November 5, 2014, by the Respondent (see Exhibit No. 9, Tab A).

**[6]** The parties were divorced by a Divorce Order dated April 5, 2017 followed by a Corollary Relief Judgement dated July 27, 2017 (see Exhibit No. 9, Tab B). At the time, the Applicant was represented by the Defendant, and her ex-husband William McCormick was represented by lawyer David Iannetti.

**[7]** Given that the evidence before me establishes that Mr. McCormick's position during conciliation was that the Applicant was getting nothing, the Defendant secured a comprehensive Corollary Relief Order dated July 27, 2017 (see Exhibit No. 9, Tab B) for his client including: (1) spousal support of $866.00 per month indefinitely; (2) arrears in spousal support of $47,240.00 payable to the

Applicant in installments of $344.00 monthly until arrears are satisfied; (3) adjustment of spousal support arrears by sale of the matrimonial home at an agreed value of approximately $55,000.00. As to the sale of the matrimonial home, the sale proceeds were to be held in trust by the law firm of Khattar & Khattar and the half interest of Mr. McCormick to be applied to the outstanding amount of unpaid spousal support arrears. Lastly, Mr. McCormick was ordered to maintain and provide proof of a life insurance policy with the Applicant as the sole irrevocable beneficiary of the policy.

**[8]** Between the date of retainer (August 6, 2014) and the date of the Corollary Relief Judgement (July 27, 2017), almost three years had passed. As the Applicant, herself, notes in her Affidavit of September 28, 2017 (see Exhibit No. 9, para. 7):

> That this matter was protracted for the most part due to the actions of the Appellant [William McCormick] in delaying the matter either based on his lack of availability or lack of disclosure.

Further to that point, the Defendant had been successful in getting $3000.00 in costs against William McCormick by Order of Justice Robert Gregan issued on July 15, 2016 (see Exhibit No. 5). The divorce trial, scheduled to proceed on July 7th and 8th, 2016, did not proceed as "William 'Billy' McCormick fail[ed] to provide disclosure that had been previously requested and directed by the court to be provided." Those costs were applied to Invoice No. 180050 by the Defendant as a 'write down' (see Exhibit No. 2, Invoice No. 180050, pg. 5). The Defendant also made a $500.00 'write down' on Invoice No. 180051 (See Exhibit No. 2, Invoice No. 180051, pg. 2).

**[9]** The Applicant's Affidavit of September 28, 2017, was filed in answer to a Stay Application filed by William McCormick, her ex-husband, in furtherance of his Notice of Appeal filed with the Nova Scotia Court of Appeal on May 8, 2017 alleging that "the judge erred in law & in fact by ordering that the Appellant [William McCormick] pay spousal support arrears …" (See Exhibit No. 9, para. 14-15, and Tab. C). The Stay Application pertained to the Corollary Relief Order dated July 27, 2017, and the collection of arrears and ongoing spousal support payable by Mr. McCormick to the Applicant (see Exhibit No. 8).

**[10]** William McCormick's Stay Application was dismissed by the Nova Scotia Court of Appeal on October 2, 2017, with costs of $350.00 payable to the Applicant herein (see Exhibit No. 7, pg. 15).

**[11]** In a series of texts between the Defendant and the Applicant is one dated January 25, 2018 at 5:58 p.m. (see Exhibit No. 7, pg. 4). It contains the contents of a letter from the Nova Scotia Court of Appeal addressed to William McCormick and copied to Mr. Conohan, the Defendant herein. In that letter, Cherri Brown, Deputy Registrar for the Nova Scotia Court of Appeal, writes, in part:

> Dear Mr. McCormick;
>
> I have received your fax letter this afternoon. …
>
> …
>
> 2) You have mentioned in your letter that you have reached an agreement with the respondent [Mary Jessica McCormick], and you provided an agreement signed by the respondent Ms. McCormick. The Court of Appeal's file is showing that the respondent has a lawyer representing her.

Without informing her lawyer, the Defendant Chris Conohan, the Applicant herein negotiated a deal with her ex-husband outside of the terms set out in the Corollary Relief Order of July 27, 2017. This despite her Affidavit of September 28, 2017 filed in opposition to her ex-husband's, William McCormick's, application to stay provisions of the Corollary Relief Judgement relating to the collection of arrears and ongoing spousal support (see Exhibit No. 9). Mr. McCormick later abandoned his appeal.

## DECISION OF THE COURT

### Taxation Principles

**[12]** "A lawyer's fees must be fair and reasonable. This is an overriding principle": *S. (H.)* v. *Owen*, 2016 NSSM 44, at para. 22. "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": *Mor-Town Developments Ltd.* v. *MacDonald*, 2012 NSCA 35, 316 N.S.R. (2d) 183, at para. 49.

**[13]** In *S. (H.)* v. *Owen*, supra, Adjudicator Eric Slone considered the principles to be considered in a taxation case (at para. 22).

> 22. The principles governing the taxation of lawyers' accounts are not controversial, although different people may apply them differently, such as by giving more weight to one principle as opposed to another. These principles derive from a number of sources, including the Nova Scotia Civil Procedure Rules, the Code of Professional Conduct of

the Nova Scotia Barristers Society, and the common law both in Nova Scotia and elsewhere in Canada. I would distill those principles to the following non-exhaustive and occasionally redundant list:

> a. A lawyer's fees must be fair and reasonable. This is an overriding principle.
>
> b. The onus of proving reasonableness rests with the lawyer, regardless of who initiates the taxation.
>
> c. The fairness and reasonableness of an account must be assessed in light of all of the relevant circumstances, including (as set out in Civil Procedure Rule 77.13):
>
> > i. counsel's efforts to secure speed and avoid expense for the client;
> >
> > ii. the nature, importance, and urgency of the case;
> >
> > iii. the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;
> >
> > iv. the general conduct and expense of the proceeding;
> >
> > v. the skill, labour, and responsibility involved;
> >
> > vi. counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.
>
> d. The taxation may disallow fees charged for proceedings taken that were unnecessary (such as by overcaution or merely error);
>
> e. Fees may be disallowed if, objectively speaking, too much time was spent on any particular step, or overall, which reflects poorly on the lawyer's skill;
>
> f. The results achieved may be considered, but in some instances may be totally irrelevant;
>
> g. The client's ability to pay may be relevant;
>
> h. The client's expectations may carry some weight, for example where the lawyer's fees significantly exceed an estimate given;
>
> i. The degree of skill demonstrated may, in some cases, be important, though the lawyer may not have had to exercise all of his or her skills to achieve the result.

Adjudicator Slone indicated (at para. 23) that he would not "go through every bill in detail and try to attach a value to a particular meeting or other docket entry." Relying on *Singleton & Associates* v. *Mathieson*, 2005 NSSM 4 (N.S. Small Cl. Ct.), he stated (at para. 23) that "this is not the approach usually adopted in taxations." Rather, he stated (at para. 24) that "the account should be viewed more holistically."

**[14]** When questioned as to why the Applicant was challenging the legal bill in the case-at-bar, she stated: "I think it's too high, the bill." She indicated that she had spoken with a lawyer about the legal bill but, as that lawyer was not present at hearing to give evidence, I give no weight to any commentary attributed to that lawyer.

**[15]** The Applicant went through the challenged entries in the Interim Bill of April 1, 2015; and the final bill of January 25, 2018. The bulk of her focus was on those entries related to file reviews/correspondence reviews/other reviews. She queried why, if matters already had been looked at, did the Defendant need to go back and review the file multiple times? The Defendant addressed each entry challenged and I am satisfied with his explanations. I also agree with the Defendant's observation that files evolve, circumstances change, and evidence needs to be updated. This can only be accomplished by periodic reviews of the file.

**[16]** This was a divorce file complicated by the Applicant's uncooperative husband, William McCormick, a complication attested to by the Applicant, herself, in her Affidavit of September 28, 2017 (see Exhibit No. 9). The Defendant had provided a comprehensive retainer letter and, in his testimony, stated: "Given her equity in the home and arrears of spousal support, I knew she would be able to personally satisfy the debt." He also indicated that as the divorce unfolded, he indicated to the Applicant that costs were escalating "north of $15,000", particularly after the adjournment in on July 7th, 2016, that led to the costs' award of $3000 against her ex-husband which the Defendant put towards the Applicant's outstanding legal bill.

**[17]** The Applicant did not submit a copy of the agreement reached by she and her ex-husband. However, according to the Applicant, under the deal she negotiated with her ex-husband, without the input or knowledge of the Defendant herein, spousal support payments were reduced to $600.00 and outstanding arrears of $47,240.00 reduced to nil. She testified that her ex-husband William McCormick said he would pay so much each year even though the arrears were reduced to nil. In return, the Applicant herein became sole owner of the matrimonial home. She testified that she made this deal without settling her outstanding legal bill with the Defendant Chris Conohan.

**[18]** The Defendant testified that when the matter finally went to trial, he told the Applicant that the legal bill would be over $20,000.00. The Applicant doesn't

recollect this conversation with the Defendant. After the divorce hearing, Mr. Iannetti was dismissed by his client William McCormick. The Defendant was then dealing with a recalcitrant self-represented respondent, Mr. McCormick, and had to return to court for directions as Mr. McCormick was non-responsive to the situation.

**[19]** The Defendant Chris Conohan testified that he holds no ill will towards the Applicant. He stated: "After we got the result, she shaved away the results without consultation with me."

**[20]** Both the Applicant and the Defendant acknowledged to this court that they discussed the Applicant's option of taking out a mortgage to pay the legal fees. This is also found in the text message exchange of February 26, 2018 at 10:30 a.m. (see Exhibit No. 7, pg. 11-12). On February 28, 2018, a text message between the Applicant and the Defendant substantiates the Defendant's efforts to settle this matter, even after the Applicant had filed a Notice of Taxation, by suggesting that the Applicant "contact me and make arrangements to pay what is owed and work out a schedule of payment": (Exhibit No. 7, pg. 14). The Applicant ignored the Defendant. However, the Retainer Letter is quite clear—"Our firm will charge interest on the unpaid balance of your account after 30 days from its date at the rate of 2% per month (24% per annum)": see Exhibit No. 3, pg. 3.

**[21]** The evidence before me establishes that there was a clear understanding between the Applicant and the Respondent as to the terms of retainer prior to the issuance of the final bill. As noted above in *Mor-Town Developments Ltd.* v. *MacDonald*, "[t]he onus of proving the reasonableness of an account should always rest with the lawyer." I am persuaded by the evidence, both oral and documentary, before me that the Defendant has met that onus.

**[22]** After a review of all the evidence, including the exhibits, I find as follows:

Fees: $19,972.75
[(Invoice No. 180050) $15,672.75 + (Invoice No. 180051) $4300.00)]

Disbursements: $530.72 [(Invoice No. 180050) $402.40 + (Invoice No. 180051) $128.32]

HST (Fees and Disbursements): $3075.72 [HST on Fees ($2995.91) + HST on Disbursements ($79.61)]

Balance Forward from April 1, 2015: $3,551.96 (Invoice No. 150375)

Interest: $\frac{\$27,130.95 \times .24}{365}$ x 151 days = $2693.84

(Two percent per month or 12% on outstanding balance of $27,130.95 between February 25 and July 26, 2018)

**SUB-TOTAL: $29,824.79**

**[23]** No costs will be awarded to either party in this taxation proceeding.

**[24]** The bill is taxed at $29,824.79. The Applicant Jessie Bennett McCormick is responsible to the Defendant Chris Conohan for the outstanding balance of $29,824.79.

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Patricia Fricker-Bates
Adjudicator
July 27, 2018