IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
cite: *Patterson Law v. Sarson*, 2020 NSSM 16

Claim: SCCH 494139
Registry: Halifax

Between:

Patterson Law

Claimant

v.

Melanie Gail Sarson, also known as Melanie Gail Sweet

Defendant

Adjudicator: Augustus M. Richardson, QC

Heard: Heard January 14, 2020 (in person) and May 29, 2020 (written submissions) in Halifax, Nova Scotia.

Decision: June 26th, 2020

Appearances: Jennifer MacDonald and Daniel Boyle, for the Claimant
No one appearing for the Defendant

By the Court:

[1] Can an Adjudicator tax or assess a legal account on his or her own motion? To put it another way, does an Adjudicator have the jurisdiction, power and authority to review a legal account for reasonableness where the client has not objected to the account, or has not filed a Defence to a Notice of Claim that has been filed and served in respect of that account? In

particular, does an Adjudication have the jurisdiction and responsibility to review a legal account for reasonableness on a Quick Judgment ("QJ") Application filed pursuant to s.23(1) of the *Small Claims Court Act*, RSNS 1989, c. 430, as amended (the "Act")?

[2] The Claimant says that the answer to all these questions is "no." It says that an Adjudicator lacks jurisdiction to review an unpaid legal account on a QJ Application where the client has not objected to the account and has not filed a Defence to the Notice of Claim that was filed and served in respect of that account. But for the reasons set out below, I am satisfied that an Adjudicator does have that jurisdiction—and indeed, that he or she has the duty and responsibility to determine whether a legal account is reasonable even where the client has not objected to it, or has not filed a Defence.

Background Context

[3] This matter involves a claim for a total of $8,318.32 said to be owing by the Defendant client to the Claimant law firm on two accounts, one dated August 30, 2016 and the other dated October 28, 2016. (As later noted, it appears that there were other accounts that had been paid, and that only these two remained unpaid.)

[4] The claim first came on before me the evening of January 14, 2020 as a Quick Judgment ("QJ") application pursuant to s.23(1) of the *Small Claims Court Act* ("SCCA"). I note however that the date chosen for the QJ Application was the hearing date that had been specified in the Notice of Claim.

[5] The day before the hearing the Claimant had forwarded to the court an Affidavit in Proof of Application, and a draft order, coupled with the request that its office be contacted "when the copies are ready for pick up."

[6] The Affidavit in Proof of Application was sworn by Jennifer L. MacDonald. It contained a copy of the Notice of Claim. It set out that the Notice of Claim had been served on the defendant client at her residence in Collingwood, Nova Scotia; that more than 20 days had expired since the date of service; and that there had been no communication, and that no payment had been made since the date of service. It attached the two Statements of Account. The

accounts contained details as to what had been done, but not the time associated with each entry, or who performed the service. It was also clear from the Notice of Claim that there had been other accounts, as well as other payments by the Defendant, that predated the two accounts in issue. Details as to the amounts of those other accounts, what services they had included, and how much the Defendant had already paid in respect of those earlier accounts, was not provided.

[7] The Claimant has offices in Truro, Halifax and Bridgewater, Nova Scotia. Ms MacDonald, counsel from the Claimant's Halifax office, appeared on behalf of the claimant. She was not the counsel of record for the Defendant. She had no knowledge, direct or indirect, as to the terms of the original retainer, or of the history of the services detailed in the two accounts (or indeed, who had performed them). The accounts indicated that the services had been provided out of the Truro, Nova Scotia office of the Claimant. Ms MacDonald advised that the reason the Notice of Claim had been filed in Halifax rather than Truro was because the Claimant had centralized all claims on its legal accounts to its Halifax office, regardless of which office had provided the legal services in issue.

[8] Ms MacDonald submitted that I should grant the Claimant's claim in full. She noted that the Defendant client had not filed a defence; had not contacted the Claimant after being served with the Notice of Claim; and that there had been no indication of any objection to the claim.

[9] Ms MacDonald also noted that the Defendant was not there in person that evening. I should note, however, that the Defendant lives off a rural road within the community of Collingwood, Nova Scotia. Attendance at the Halifax Small Claims Court would have required of the Defendant a roughly two hour's drive, much of it in the winter's dark; and then a return trip of equal duration, again on a winter's night. Had the Claimant brought its claim in the Truro Small Claims Court the drive would have been reduced to something a little under an hour each way.

[10] I refused the Claimant's application. I indicated that my view claims on legal accounts ought in normal course to be based on evidence from someone—preferably the solicitor of record—who was able to speak to what was done on a file and why. Such evidence enabled the court to assess the reasonableness of the claim on the account. I also noted that in the absence of such evidence a QJ Application was not generally appropriate. I ruled accordingly that the matter should proceed by way of a hearing so that someone with knowledge of what was done and why

could attend to enable the court to assess the reasonableness of the claim. The matter was accordingly adjourned to January 28th so that the Claimant could have someone with knowledge of the file attend.

[11] The matter did not proceed on January 28th because the Claimant's witness could not attend on that date. It was adjourned at the Claimant's request to a date to be set. The Court was advised on February 24th that the Claimant's witness, a lawyer in Truro, was preparing a brief and asked that the matter be put over to some time in late March or early April. The matter was set for April 7th. COVID-19 then intervened and the courts were closed.

[12] I suggested that the matter could then be held by way of Zoom. The Claimant advised that the file was now being handled by Ms Melanie Taylor, the Financial Recovery Paralegal in the Claimant's Halifax office. She advised that Mr Daniel Boyle, in the Claimant's Truro office, would now be handling the file.

[13] On April 4th, 2020 Mr Boyle proposed that there was an initial objection that had to be addressed. That issue related to the jurisdiction of this court to review or tax a legal account where the client had not objected to the account; or had not filed a Defence to a Notice of Claim based on that account. He noted as well that he had received numerous QJ Orders from at least three different Adjudicators without any form of taxation. I decided to hear this objection to my jurisdiction by way of written brief.

Submissions on Behalf of the Claimant

[14] In written submissions dated May 29th, 2020 Mr Boyle framed this issue before me as follows: does an Adjudicator have the jurisdiction to tax a lawyer's account in the absence of a defence/objection from the client, or a properly filed Notice of Taxation. His answer was "no" for the following reasons. He noted his previous experience "in obtaining quick judgment relating to legal accounts without any form of taxation;" and, for that reason, submitted that "this issue warrants attention to clarify the scope of an adjudicator's taxation authority within the current legislative framework."

[15] First, he submitted that Adjudicators lacked jurisdiction to initiate a taxation on their own—that is, absent an express request for taxation (via a Notice of Taxation) or an express defence of objection to a Notice of Claim. In support of this submission he noted that Adjudicators were granted only "all the powers that were exercised by taxing masters ... and may carry out any taxation of fees, costs, charges or disbursements that a taxing master had jurisdiction to perform pursuant to any enactment or rule:" *SCCA*, s.9A(1). He then referred to to s.4 of the earlier *Taxing Masters Act*, RSNS 1989, c.459, c.459 a taxing master had only the duty "to tax all bills of costs presented to him for taxation." In other words, Adjudicators only had the power that a Taxing Master had under the *Taxing Masters Act*; and under that Act Taxing Masters could only review a lawyer's account when he or expressed was expressly asked to do so. Hence an Adjudicator could not "unilaterally" commence a taxation on his or her own motion.

[16] Second, and flowing from the first, he noted that no Defence had been filed to the Statement of Claim. That being the case, "Quick Judgment should be granted in the usual course."

[17] Third, Mr Boyle then turned to sections 66, 67 or 68 of the *Legal Profession Act*, SNS 2004, c.28, which provide as follows:

> **Account recoverable**
> 66 A lawyer may sue to recover the lawyer's reasonable and lawful account. 2004, c. 28, s. 66.
>
> **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.

[18] Mr Boyle submitted that these provisions could not be read as "imposing a *requirement* that lawyers accounts be taxed, rather that simply a *right* for such accounts to be taxed." But absent the assertion of that right by way of a Notice of Taxation, or a Defence, there was no permission for an Adjudicator "to *initiate* a taxation, and without such initiation, it would seem improper for a taxation to be conducted."

[19] Fourth, counsel submitted that there was no basis "to presume that a lawyer might not have issued reasonable and lawful accounts absent a request for taxation in the proper form."

[20] Fifth, counsel referenced the decision of Haliburton, J in *Llewellyn v. Cook* [1991] NSJ NO. 665 (Co Ct). Mr Boyle acknowledged that the decision appeared to stand for the proposition that claims on legal accounts had to be taxed, that law had not been carried over into the Rule 77 of the current Civil Procedure Rules. He submitted that by removing the "subject to taxation" provision in the former Rule 63.16(16) "the legislature must have intended to remove the requirement which previously existed."

[21] Sixth, counsel noted that the decisions in *Smith's Field Manor Developments Ltd. v. Campbell* [2002] NSJ No. 492 (TD) and *Mor-Town Developments Ltd v. MacDonald* 2012 NSCA 35 were made in the context of disputed legal accounts. The adjudicators in those cases had not engaged in taxations on their own motion. Rather, the clients in both cases had actively contested the accounts, hence triggering jurisdiction.

[22] Finally, counsel turned to policy. He noted that in any matter brought before "the Courts," one party sought a remedy against the other. If the other, having been served, did not defend then "a default judgment or in the case of the Small Claims Court, a quick judgment may be obtained." He submitted that this approach streamlined "there process where there is no effective dispute." A lawyer, by submitting invoices by way of a claim in the Small Claims Court, "asserts the reasonableness and lawfulness of [the] stated account." In the absence of any challenge to those accounts "there is no legislative or policy basis to deny default or quick judgment in relation to a claim." He also submitted that there might be ethical constraints that would limit a lawyer's ability to justify the reasonableness of his or her account in the absence of the client.

[23] Counsel accordingly concluded by submitting that "adjudicators do not have jurisdiction to tax a legal account absent a properly filed Notice of Taxation or a defence to a duly filed claim." He asked that a Quick Judgment be granted as requested.

Applications For QJ Pursuant to Section 23(1) of the SCCA: General Considerations

[24] Section 23(1) of the SCCA permits an order without a hearing where no defence has been filed:

> 23 (1) Where a defendant has not filed a defence to a claim within the time required by the regulations and the adjudicator is satisfied that
>
> (a) each defendant was served with the claim and the form of defence and with notice of the time and place of adjudication; and
>
> (b) based on the adjudicator's assessment of the documentary evidence accompanying the claim, the merits of the claim would result in judgment for the claimant,
>
> the adjudicator may, without a hearing, make an order against the defendant.

[25] The section had its genesis in an amendment to the Act in 1994. Prior to that amendment there was only one section that dealt with default—s.23. It provided as follows:

> 23 Where the defendant does not appear at the hearing and the adjudicator is satisfied that the defendant has been served with the claim and notice of the time and place of the hearing and is satisfied that the merits of the plaintiff's claim would result in judgment in the plaintiff's favour if the defendant had appeared, the adjudicator may make an order against the defendant in the absence of the defendant.

[26] Two points arise. First, before 1994 then there was no provision for a QJ Application. Where there was a default of defence the claimant had to attend court on the day set for hearing and provide enough evidence to satisfy the Adjudicator as to the merits of his or her claim.

[27] Second, notwithstanding the absence of a defence, or of the Defendant at the hearing, the Adjudicator prior to 1994 still had to be "satisfied that the merits of the plaintiff's claim would result in judgment if the defendant had appeared." The nature and extent of what evidence or representations the claimant had to provide might depend on the nature of the claim: see, for e.g., *Moody Brothers Groceries Ltd v. Benjamin* [1982] NSJ No. 154 at para.6. But it remained the case that there had to be *something*—and that "something" had to be sufficient to satisfy the Adjudicator that the claimant would have succeeded even if the defendant had appeared.

[28] In 1991 the Nova Scotia Court Structure Task Force recommended the introduction of some form of default proceedings that would enable a claimant to obtain judgment without the need to attend a hearing in a case where the defendant, though served, failed to defend. Section 23(1) was the result of that recommendation: see the discussion in *CIBC Life Insurance Company v. Hupman* 2015 NSSM 48 at paras.24-27; *Surrette Battery Company Limited .v McNutt & Leeman* 2003 NSSC 006 at paras.10-11, 23-25.

[29] It is important to note, however, that s.23(1) retained the requirement that the Adjudicator hearing a s.23(1) QJ Application still had to be satisfied that "the merits of the claim would result in judgment for the claimant." As noted by LeBlanc, J in *Surrette Battery* at para.25, "the Legislature intended to provide a mechanism for Default Judgment less onerous than a full hearing, but more onerous than is required in the Supreme Court under Civil Procedure Rule 12 [now CPR 8 (Default Judgment)]." In other words, unlike the Supreme Court, where default judgment can be entered on the strength of the pleadings alone, in the Small Claim Court there had to be something more—something sufficient to satisfy the Adjudicator as to the merits of the claim.

[30] What this points to is that an Adjudicator's jurisdiction *and obligation* on a s.23(1) application is not dependent on there being an express objection to the claim from the defendant. Indeed, s.23(1) assumes that there has been no objection and no Statement of Defence. Yet in order to exercise his or her authority to issue default judgment pursuant to s.23(1) the Adjudicator must still be satisfied on the basis of the documentary evidence filed that the merits

of the claim would result if judgment even if the defendant were there. Absent such satisfaction the Adjudicator has no jurisdiction to grant a QJ and must instead remit the matter to a hearing.

[31] What then is necessary to trigger an Adjudicator's jurisdiction to grant QJ pursuant to s.23(1)? It must be "documentary evidence" placed before him or her on the application that satisfies him or her that "the merits of the claim would result in judgment for the claimant." The threshold necessary to meet that burden will vary depending on the type of claim, the evidence submitted and the weight placed upon it. But there must be something more than a bare bones Affidavit in Support of the Application. As was noted by Adjudicator Barnett in *EMCO Corporation v. Classic Hearth & Leisure Limited* 2007 NSSM 24 (CanLII) at para.24,

> "The Affidavit in Proof of Application serves as a proxy for oral evidence that would otherwise be required to prove a Claim. I have seen too many Applications for Quick Judgment where an affiant's lack of knowledge of the circumstances surrounding a Claim would have easily been exposed had the matter proceeded to an oral hearing. The affiant of an Affidavit in Proof of Application should be the same person that a Claimant would call as a witness in order to present persuasive oral evidence in support of the Claim."

[32] We turn now to the question of what is necessary to satisfy the test when the claim arises from a solicitor's account.

Applications for QJ In the Case of Legal Accounts

[33] From the above it is clear that an Adjudicator is not a rubber stamp on an s.23(1) QJ Application. That conclusion applies regardless of whether the claim is based on a plumber's invoice or a solicitor's account.

[34] But what must a solicitor provide to an Adjudicator on a s.23(1) Application? Is it enough that he or she provide their account and say it has not been paid? Or rely on the absence of an objection, or a Statement of Defence, from the Defendant client? Ought such evidence alone be

sufficient to satisfy an Adjudicator as to the merits of the solicitor's claim? On balance, I think the answer in such cases is 'no.'

[35] I start with the observation that a solicitor "may sue to recover the lawyer's reasonable and lawful account:" s.66, *Legal Profession Act*, SNS 2004, c.28. That provision is reflected as well in Civil Procedure Rule 77.13:

> 77.13 (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.

[36] So, as was observed by Halliburton, Co Ct J (as he then was) in *Llewellyn* at para.5,

> "the judiciary have traditionally maintained ultimate control over the billing practices of lawyers. While tradesmen such as plumbers or carpenters may be entitled to be paid in accordance with the terms of their employment, a lawyer's right to be paid is subject to judicial review."

[37] While we are on this point I should say that I reject the Claimant's submission that a Notice of Claim that is based on a legal account is a separate and distinct process from a Notice of Taxation. The two are simply different ways of arriving at the same result—an assessment of the reasonableness of the amount the solicitor seeks to recover by way of his or her account. account. The difference lies rather in the remedy. In a Notice of Claim the Adjudicator can issue an order for payment up to the limit of the Court's financial jurisdiction (currently $25,000.00). In the latter the Adjudicator issues a Certificate of Taxation. Since an Adjudicator's jurisdiction insofar as the reasonableness of the account is concerned is unlimited, a certificate for an amount for more than $25,000.00 can be registered in—and enforced by—the Supreme Court of Nova Scotia.

[38] It is here that the Claimant's submission that the taxation of an account is a procedure separate and distinct from that of a s.23(1) QJ Application on an unpaid account—that it must be expressly *initiated* by the client before an Adjudicator can tax that account—runs aground. I say that because the question of whether a legal account is reasonable and lawful is a question of proof—of evidence—not of procedure.

[39] The onus of proof of a particular fact lies—as it does in every action—on the party asserting that fact to be true. Hence a solicitor suing on his or her account has the onus of establishing that it is reasonable and lawful: *Mor-Town Developments Ltd v. MacDonald* 2012 NSCA 35 at para.49. This onus cannot be met in the case of a legal account simply because the client has not expressly objected, or has failed to file a Notice of Defence. The fact that the solicitor has had to resort to the court to secure payment itself implies at least the possibility of an objection on the client's part. After all, why else would the lawyer be forced into court? True, it may be that the client lacks the funds to pay. But the client's inability to pay may be the result of an account so unreasonably high in the circumstances that it has vastly exceeded the client's ability to pay. It could also be that the client doubts the value of the service they have received.

The fact that they did not make that objection express may be the result of ignorance of their right to challenge the account; or it may be that they feel obligated to accept the lawyer's account in order to secure their continuing representation: *Miller v. Johnson* 2006 NSSM 19 at para.4. Moreover, and as was observed by Goodfellow, J in *Turner-Lienaux v. Campbell* 2002 NSSC 248 at para.33,

> "There is no taxation by default or absence. The exercise of taxation of a solicitor's account is a judicial function. The taxing official must approach such taxation on the basis that the solicitor seeking recovery must establish, on the balance of probabilities, the relevance and reasonableness of the costs and disbursements advanced. The onus remains upon the party seeking taxation and is not altered or shifted in any way by the nonattendance of the other party."

[40] Nor is the onus met because the client has paid previous accounts. The law is clear that a solicitor is not entitled to limit any assessment to only the account he or she puts before the court. An assessment of the reasonableness of a solicitor's account comprises *all* of the interim accounts rendered in respect of the service provided. A client is not deprived of his or her right to taxation simply because they have made payments on account: *Lindsay v. Stewart, MacKeen & Covert* [1988] NSJ No. 9 at p.6 of 11 (CA); *Mor-Town* at paras.39, 43-45.

[41] I should say here that I was somewhat troubled by the Claimant's reliance on the Defendant client's failure to enter a defence, or to appear on the date set for hearing (being the date of the QJ Application). The client lives less than an hour's drive from Truro, where the services were provided. But the Claimant chose, for its own convenience, to file the claim not in Truro, where the services were provided, but in Halifax. That decision meant that the client would have to travel almost two hours, in part on rural roads, in the dead of a winter's night to attend the hearing in Halifax; and then travel another two hours home. I can think of many reasons then why the client might have been reluctant or unable to attend. She might have had to lose time at work. She might not have been able to find suitable child care (assuming she had children). She might have been fearful about driving at night on winter roads.

[42] While on this point I should also say that there may be an issue with the Claimant's decision to centralize all of its claims in its Halifax office. Section 19(1) of the Act makes clear that claims "shall be commenced in the county in which (a) the cause of action arose, or (b) the defendant ... resides or carries on business." The information before me do not appear to satisfy either requirement, and would suggest that the claim ought to have been commenced out of the Truro court. However, since the issue was not raised or addressed by the Claimant I make no ruling on that issue.

[43] All of this is to say that on a QJ Application pursuant to s.23(1) an Adjudicator is required to assess the documentary evidence placed before him or her. They are required to decide whether the material satisfies them that the merits of the claim would result in judgment for the solicitor if the client had appeared—in other words, that the account would be found reasonable and lawful. Absent such evidence the Adjudicator has no jurisdiction to issue a QJ. The claim must instead go to a hearing.

[44] With this conclusion in hand I now turn to the Affidavit in Proof of Application that was placed before me in support of the Claimant's QJ Application.

The Affidavit in Proof of Application

[45] The affidavit was sworn by Ms Jennifer MacDonald. She works out of the Halifax office. She had no direct or indirect knowledge of who provided the legal services in Truro that formed the basis of the two accounts in issue. The legal services were provided by the Truro office. The affidavit makes reference to earlier accounts, and earlier payments by the Defendant, but does not provide details as to either. All that is said of the services provided is that they related "to a family law matter between March 2015 and June 2018." The affidavit does not attach any retainer letter. The two accounts that are attached and which form the basis of the claim detail the service provided on particular dates, but do not explain who provided them, how much time they took, or why they were necessary.

[46] In short, there was nothing in the affidavit that enabled me to satisfy myself as to the merits of the claim—that is to say, the reasonableness of the accounts on which the claim was based. I did not know what the total charge for the family law matter was. I did not have the total

payments made over time by the client. I did not have a complete accounting of all of the services provided, or the time they took, or who provided them. I did not have a retainer letter, or the time dockets. In short, I did not have documentary evidence necessary to satisfy myself that the Claimant would have met the onus of establishing, had the defendant appeared, that the two outstanding accounts were reasonable and lawful. Hence I lacked jurisdiction pursuant to s.23(1) to grant a QJ. A hearing was necessary.

[47] I make one final observation. The fact that other Adjudicators may have granted QJ orders in respect of claims on legal accounts can interpreted in one of two ways. First, if the Adjudicators issued a QJ on a legal account merely because no defence and no objection was made by a defendant client then, with respect, they acted in error and without jurisdiction. Second, and on the other hand, if they issued a QJ because they were satisfied as to the merits of the claim based on the documentary evidence supplied in support of the application, then they acted within their jurisdiction. I prefer to think that the successful QJ applications that the Claimant referred to were the result of the second approach. And in the case before me, the Claimant's affidavit material failed to meet the onus that was on it—and hence failed to trigger my jurisdiction pursuant to s.23(1).

[48] I accordingly order that the question of the reasonableness of the two accounts be remitted to a hearing on the merits once the court re-opens post-COVID-19.

Dated at Halifax, this 26th day of June, 2020

Original: Court File
Copy: Claimant
Copy: Defendants

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Augustus M. Richardson, QC
ADJUDICATOR