CLAIM NO. 201547
DATE: 20030711

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Coleman Fraser Whittorne & Parcells v. Canada (Attorney General) , 2003 NSSM 3

BETWEEN:

Name	Coleman Fraser Whittome & Parcells	Applicants
-and-		
Name	Arnold Pizzo McKiggan	
Name	The Attorney General for Canada	Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 7, 2007. This decision replaces the previously distributed decision.

D E C I S I O N

Appearances:

John A. McKiggan on behalf of Arnold Pizzo McKiggan and Norman W. P. Fraser on behalf of Coleman Fraser Whittome & Parcells and;
Leanne M. Wrathall, Q.C., Suhanya Edwards and Catherine McIntyre, articled clerks on behalf of the Respondent Attorney General of Canada

[1] This taxation came on before me on June 16, 2003. It involves two accounts: that of Mr. Fraser for fees totalling $51,150 and disbursements of $11,200.52; and that of Mr. McKiggan with fees of $36,126, plus disbursements of $2,384.48, plus HST.

[2] The total of both accounts amounts to $114,691.16 plus the cost of the taxation.

BACKGROUND

[3] The taxation took the better part of a day. I heard the evidence and submissions primarily of Mr. Fraser and secondarily of Mr. McKiggan, in support of their accounts. I also heard the submissions of Ms. Wrathall, on behalf of the Attorney General.

[4] The action which gives rise to this taxation on a solicitor and client basis arises out of certain sexual assaults that were alleged to have been committed on M.J.D., a master corporal in the Canadian Armed Forces in July and again in August 1994. The assaulter was one D.B., who later pleaded guilty to charges of sexual assault.

[5] M.J.D. subsequently moved or was reassigned to British Columbia. Once there, she developed post traumatic stress disorder and, eventually, voluntarily resigned from the Armed Forces in 1995. Her pension was paid out. The Canadian Armed Forces subsequently decided that she should have been given a discharge because of medical reasons (for the PTST) and sought recovery of the pension payout in order to fund medical payments. All of this eventually generated income tax ramifications which, as Ms. Wrathall conceded on the part of the Crown, "while not an issue in the litigation, did prove a barrier to settlement."

[6] M.J.D. then applied for a pension from the Minister under the *Pension Act*. The *Pension Act* provides benefits, not unlike Workers' Compensation, for members of the RCMP and the military. Those injured in the course of service are entitled to these benefits.

[7] The Minister denied M.J.D.'s application on the grounds that the assaults happened outside the course of service. This decision, in the view of all counsel before me, was clearly wrong on the facts of the case. However, the decision was not appealed by M.J.D. Instead, she went to Mr. Fraser in 1998.

[8] Mr. Fraser was called to the Bar in British Columbia in 1984. He has focussed on civil litigation, particularly personal injury law and has a special interest in cases involving sexual abuse in institutional contexts. His normal hourly rate at the material time was $200 an hour. Mr. Fraser practices in Duncan, British Columbia, but his understanding was that the hourly rate in Vancouver would have been much higher, in the range of $300 an hour. I pause here to note that Mr. McKiggan, who was also retained in this matter (as detailed below), was called to the Bar in Nova Scotia in 1990, with a practice of general litigation. For the past seven years he has been involved almost exclusively in personal injury litigation on behalf of plaintiffs and has also developed some expertise in the same area of sexual abuse in institutional contexts. His normal hourly rate was $200 an hour at the material time, although it is $250 an hour now.

[9] Over the years Mr. Fraser had developed some expertise in civil litigation involving sexual assault.

[10] On June 17, 1998 M.J.D. entered into a contingency agreement in British Columbia with Mr. Fraser's firm, which provided that:

(a) if the matter settled, Mr. Fraser would receive 25% of any settlement; and

(b) if M.J.D. elected not to proceed with the claim, she agreed to pay for legal services to date at an hourly rate of $180.

[11] M.J.D. could have filed an appeal of the Minister's decision. Such an appeal would not, according to Ms. Wrathall, have cost M.J.D. much because there counsel are made available by the Government free of charge to assist appellants.

[12] In order to understand why M.J.D. elected to retain a lawyer (Mr. Fraser) and consider a civil suit against the Minister as opposed to filing an administrative appeal, one has to understand something of the history surrounding s. 111 of the *Pension Act*, as it was then worded. In 1998 and for some time thereafter the meaning and intent of that provision of the *Pension Act* was unclear.

[13] The Minister's position had always been that s. 111 meant that a claimant under the *Pension Act*:

(a) was barred from pursuing a civil action until the administrative process, including all appeals, was exhausted;

(b) if a negative decision was rendered at the end of the administrative process, then the claimant was free to proceed to a civil suit; but

(c) if there was a positive decision (i.e. if a decision was made to pay benefits), then the claimant was forever barred from civil action.

[14] The Crown's position, if accepted, meant that M.J.D., in this case, could not sue until she appealed the decision of the Minister to the Appeal Board and obtained a negative decision from that body.

[15] Ms. Wrathall conceded, however, that the wording of s. 111 at that time was not as clear as it might be, and that there was jurisprudence from several appellate and other courts across the country that had adopted interpretations different than that of the Crown. In particular, there were decisions to the effect that a claimant who had received at least one negative decision was entitled to proceed with a civil lawsuit and that an appeal of that original decision was not necessary. Ms. Wrathall agreed that, based on that case law, there was a "good chance" that a claimant could avoid the "intended" bar of s. 111 without exhausting all appeal routes; that either one negative decision (or, indeed, no decision at all) was sufficient to permit a claimant to go the civil route.

[16] M.J.D. chose the civil route, in part because she lacked faith in the administrative appeal process, believing that the appeal body was biased in favour of the Crown. She was particularly concerned that the Appeal Board might provide her with a pension of only, for example, one dollar, which all counsel agreed before me would have had the effect of barring her civil claim. As against this uncertainty, counsel had more ability to predict what would happen in the civil courts if such a claim went to trial, both in terms of liability and in terms of *quantum.*

[17] Initially Mr. Fraser commenced an action against the crown and Mr. D.B. in the Federal Court. He was subsequently persuaded by the Crown that he could not sue D.B., an individual, in Federal Court. He accordingly decided to commence an action against the Crown and Mr. D.B. in the Provincial Courts.

[18] At this point Mr. Fraser made the decision to commence the action in Nova Scotia. Since this decision led to a decision where two senior counsel, one in British Columbia (Mr. Fraser) and one in Nova Scotia (Mr. McKiggan) worked on the file, it should be explained briefly.

[19] M.J.D. lived in Duncan, British Columbia. Mr. D.B. lived in Nova Scotia. The cause of action arose in Nova Scotia. In Mr. Fraser's opinion, the fact that M.J.D. lived in British Columbia was not enough to give British Columbia jurisdiction to hear the case.

[20] It was unclear to me on the taxation whether this was a *forum conveniens* argument, or a substantive law argument. I found it surprising to be told that the court in British Columbia would not accept jurisdiction in respect of a person who lived and worked (at least part of the time) in British Columbia, and suffered at least some of the damage in British Columbia. While I could appreciate that there might be a concern with respect to a British Columbia court refusing jurisdiction on the grounds of *forum non conveniens* (because a number of the witnesses were not in British Columbia) I would have thought that that would have been an argument raised by the Defendant. However, I understood Mr. Fraser's submission and opinion to be broader than that: his opinion was that British Columbia law prevented M.J.D. from pursuing her claim in British Columbia.

[21] Be that as it may, I note that the Statement of Defence filed by the Crown to the Nova Scotia proceedings did not raise a *forum non conveniens* argument. Nor was there any application to that effect. In addition and, as submitted by Mr. Fraser, even if he could sue in British Columbia, it is clear that the applicability of Nova Scotia law (particularly with respect to the limitations of actions) would be an issue and, consequently, would require evidence as to Nova Scotia law.

[22] Accordingly, I accept that the decision made by Mr. Fraser to commence an action in Nova Scotia was not unreasonable.

[23] The decision to commence an action in Nova Scotia mandated the involvement of Nova Scotia counsel, which led to Mr. McKiggan's retainer by M.J.D. at the suggestion of Mr. Fraser.

[24] M.J.D. entered into a second contingency agreement, this one dated November 9, 1999. This agreement was essentially the same as the first but added the firm of Mr. McKiggan. It is unclear whether it was intended to supercede the first contingency agreement. On the evidence of Mr. McKiggan it was basically a direct "copy" of the British Columbia agreement (so much so that it continued to reference in clause 12 the client's right to have the agreement reviewed in British Columbia; and in clause 13 the Rules of the Law Society of British Columbia).

[25] The action against D.B. and the Attorney General of Canada (on behalf of the Department of National Defence) was commenced in Nova Scotia in April 1999. It was filed by Mr. McKiggan, based on a draft prepared by Mr. Fraser.

[26] The Crown entered a Statement of Defence in October 1999. The Defence relied on a number of limitation defences, based on both federal law (and in particular s. 111 of the *Pension Act*); and provincial law (and, in particular s. 2(1)(a) and (5) of the Nova Scotia *Limitations Act*).

[27] It is clear that from the start of the action that these various limitation defences and, in particular, s. 111 of the *Pension Act* had to be addressed.

[28] There were two ways these issues could be handled: at trial; or on a preliminary basis by way of an interlocutory application.

[29] It is clear, and all parties agreed, that it made sense to attempt to resolve the issue on an interlocutory basis. On this point, Mr. Fraser, Mr. McKiggan and Ms. Wrathall were all in agreement. There was clearly no point in undergoing the massive expense of a civil action (with witnesses from all over the country) if the limitation defences relied upon by the Crown were good.

[30] All counsel agreed at the time that thought should be given to putting the matter of the limitation defences before the Court on a preliminary chambers application. At the time of the discussions it was thought that the proper approach would be by way of an application to strike the pleadings.

[31] In April 2000 Ms. Wrathall received a call from Mr. McKiggan. Apparently Justice MacAdam had two days free in early May. He asked her whether she was prepared to proceed with an application. She agreed.

[32] Unfortunately, no formal application documents were actually exchanged until literally days before the scheduled hearing in May 2000. A few days before the application Ms. Wrathall received the formal application papers to strike, coupled with an Affidavit of M.J.D. At this point she realized that:

(a) she could not agree to the Affidavit material without cross examination or countervailing evidence; and

(b) striking the claim was not the way to go, because all that needed to be established was a "arguable case."

[33] What the parties wanted was a binding decision at the preliminary stage, not a decision that the Plaintiff had an "arguable case." These matters were raised in a telephone conference with Justice MacAdam the day before the application. By this time Mr. Fraser had travelled to Nova Scotia to attend the chambers application. It had been agreed beforehand, between himself and Mr. McKiggan, that he would argue the s. 111 and federal limitation issues; and Mr. McKiggan would argue the Nova Scotia limitation issues.

[34] Mr. Justice MacAdam refused to hear the application without an Agreed Statement of Fact. One was rushed together, and the matter proceeded on that basis before Justice McAdam. Justice MacAdam, at the hearing, ruled against the Crown by way of oral reasons, with written reasons to follow.

[35] With this preliminary decision in hand, Mr. Fraser returned to British Columbia and retained an actuary in June 2000. The actuary produced a report showing that the past and future income loss of M.J.D. was in the range of $800,000, a figure which, together with general damages, justified a *quantum* assessment, in Mr. Fraser's opinion, in the range of $900,000.

[36] Both sides agreed before me that it was clear to both at this point in time that regardless of who won or lost the limitation defence arguments, the matter would be going all the way to the Supreme Court of Canada.

[37] The matter was of importance to both parties, particularly the Crown which was facing a number of similar lawsuits.

[38] Mr. Justice MacAdam released his written reasons some time in August 2000. About this time the Crown realized that there was an error in the Statement of Fact. The Crown applied to Justice MacAdam for a reconsideration of his decision, based on the error in the Statement of Fact. He refused to do so, saying that he could not determine at that point whether or not the error would have influenced his decision.

[39] The matter then went to the Court of Appeal in January 2001. Shortly before that, in the fall of 2000, s. 111 of the *Pension Act* was amended to make clear what had been the Crown's position all along. However, because of concern that it not be suggested that the Crown was trying to change the legislation in order to specifically do away with M.J.D.'s action, it was agreed at that time that the previous legislation would continue to apply to M.J.D.'s case.

[40] When the appeal of Justice MacAdam's decision was heard in January 2001 the Court of Appeal decided that the issue was moot, because of the error in the Statement of Fact. Accordingly, the decision was, in effect, set aside.

[41] The parties then went back to attempting to draft a mutually acceptable Statement of Fact so that the matter could be relaunched at the chambers level.

[42] About the same time, production and discovery preparations began to take place. The Crown produced volumes and boxes of documents.

[43] The Crown then appeared to change its position with respect to s. 111. It advised Mr. McKiggan and Mr. Fraser that it would now argue that s. 111 did have retroactive effect and would apply to M.J.D.'s case. This, of course, required more research on the part of Mr. Fraser and Mr. McKiggan to deal with the issue of retroactivity.

[44] Negotiations over the proposed Agreed Statement of Fact dragged on for a number of months. The principal sticking point was whether or not there was new evidence to put in front of the Appeal Board in respect of M.J.D.'s application for pension benefits.

[45] In the end, however, it was not necessary to arrive at an Agreed Statement of Fact. The matters were resolved by way of an agreement that the Crown would become obligated "to pay M.J.D. her solicitor and client costs as approved by a taxing officer pursuant to Nova Scotia Civil Procedure Rule 63. The parties agree that accounts from Norman W.P. Fraser and John A. McKiggan, solicitors for M.J.D., shall be combined into one proposed bill of costs that will be presented and taxed in Nova

Scotia subject to the Rules for taxation in Nova Scotia. Further that the Attorney General of Canada shall have the right to present argument, with respect to the amount of the proposed bill of costs, on taxation of same."

[46] Counsel also agreed before me that if this taxation is appealed, documents dated October 1, 2002 and November 13, 2002 shall be put before the appeal judge as part of the record.

[47] Part of the discussions noted above eventually resulted in M.J.D. applying for a pension from the Appeal Board. She was eventually awarded a pension equal to approximately $700 a month, plus retroactive payments of about $44,000. I was advised by Mr. Fraser that that award had a present value of approximately $400,000.

PRINCIPLES

[48] With this factual background to the taxation, I now turn to the principles to be applied by me on this taxation.

[49] My role on this taxation is to assess the "reasonable and lawful" fees of the two solicitors on a solicitor and client basis.

[50] The fact that one party has agreed to pay another party's solicitor and client costs does not mean that he or she must pay all of those fees. A lawyer is only entitled to charge his or her "reasonable and lawful" fees, costs, charges and disbursements: *Barristers' and Solicitors' Act*, s. 41. As noted by Goodfellow, J. in *Halifax Regional Municipality v. Joudrey* [2001] N.S.S.C. 185 at para. 14, "[a]n award of solicitor and client costs is not a determination that the responsible party pays whatever the solicitor and client costs bill happens to be." A party who has been ordered to pay another party's solicitor and client costs is entitled to raise any objection that that party could have raised to the "reasonableness" of the charges on taxation and, accordingly, a taxing officer is obligated to tax a solicitor and client costs award as though the client were the one resisting the bill: *Harwood v. Harwood* [1998] A.J. No. 217, affirmed [1998] A.J. No. 296 (Q.B.); *Mintz v. Mintz* (1983), 43 O.R. (2nd) 789 (H.C.J.); and see also *Mai v. Mia* (2002) N.S.S.C. 204 at para. 22.

[51] The existence of a contingency fee agreement does not prevent or bar a court or a taxing officer from taxing the solicitor and client fee: *Ormrod (Litigation Guardian of)*

v. Goodall [2002] N.S.J. No. 487; *Oatway v. Bannister* [1988] N.S.J. No. 458 (T.D.); and see C.P.R. 63.16(2) and 63.17.

[52] A number of the submissions made by Mr. Fraser and Mr. McKiggan, both at the taxation and in written submissions filed thereafter, suggested that the Crown, in challenging the account, or some of the items in the account, was somehow resiling from its agreement to pay their solicitor and client costs following taxation; or was in fundamental breach of the agreement; or that the Crown was not entitled to question in any way the accounts.

[53] In my view, such submissions misconceive both the law and the role of the a taxing officer on such a taxation. The agreement required the taxation of the collected accounts of Mr. Fraser and Mr. McKiggan on a solicitor and client basis, and both the agreement and the above noted case law make clear that the Crown, as the person liable to pay those solicitor and client costs, is entitled to advance any argument that the client could have advanced in the event that she challenged the account as being "unreasonable."

[54] Indeed, the Crown was prepared to concede a liability that it would not ordinarily have had. In ordinary course a party charged with another's solicitor and client costs cannot be expected to pay those costs and disbursements incurred before the action, in which the order is made, was commenced: *Magee v. Trustees of RCSS Ottawa* (1962), 32 D.L.R. (2nd) 162 (Ont. H.C.J.) at p. 163. However, the Crown, as set out in Ms. Wrathall's submissions, accepted in principle that its obligation extended to fees incurred prior to the Nova Scotia action being commenced. However, the Crown did not concede that all such fees incurred prior to the action starting were reasonably incurred.

SUBMISSIONS MADE ON BEHALF OF THE CROWN

[55] There were several thrusts to the Attorney General's attack on the solicitor and client accounts of Mr. Fraser and Mr. McKiggan most of which rely, in spirit if not in fact, on 63.33(1). They included the following:

(a) the charge-out rate for the solicitors' fees (at $180 per hour) was too high;

(b) too much time was spent by the two lawyers on the various steps;

(c) work was duplicated by the two lawyers; and

(d) work was performed by senior counsel (or by two senior counsel) when it could have been done by a junior counsel or an articled clerk at a lesser rate.

[56] The Crown also questioned some of the disbursements, the most important of which was the actuarial account. It says that the account was obtained prematurely and that the Plaintiff (or Mr. Fraser) ought to have waited until after the limitation defence issues were finally resolved.

[57] There are several other points that should be made.

[58] The Crown agrees that I may include, as part of the solicitor and client fees to be taxed, those fees incurred by Mr. Fraser prior to the issuance of the Statement of Claim in Nova Scotia. Its position is not that no fee may be claimed under this taxation prior to the issuance of the Statement of Claim; rather, it is that there was duplication, or excessive preparation, or unnecessary preparation prior to that date that ought to be removed.

[59] Second, the Crown does not say that the Plaintiff ought to have pursued her appeal in the pension appeal process to the exclusion, or at least before pursuing, the civil action. It accepts that the state of the case law was such that the Plaintiff did have a viable claim in the civil courts; and that it made sense to pursue a civil action rather than a pension appeal (the result of which was, in any event, uncertain). Again, its complaint is not that the civil action was pursued instead of the pension appeal; rather, its complaint is that too much time, or excessive, or duplicated time was spent on the case.

[60] The Crown, in its submissions, focussed on four areas of time:

(a) the initial application in May 2000;

(b) the appeal in January 2001;

(c) the abortive application preparations after the hearing of the appeal in January 2001; and

(d) the extended negotiations over the draft Agreed Statement of Fact.

[61] There was also some faint concern raised over the accuracy of the various time entries of Mr. Fraser and Mr. McKiggan, but Ms. Wrathall was not prepared to argue

that the “discrepancies” meant that someone was intentionally creating dockets in respect of nonexistent time. Accordingly, I do not accept that any discrepancy that might exist in the time records indicates anything other than the usual bookkeeping errors that crop up over the course of several years of accounts (as is the case here).

AGREED DEDUCTIONS

[62] Mr. Fraser conceded that certain disbursements, especially those associated with the Federal Court matter, should be deducted. These disbursements were at Tabs 3,4, 6, and 25 of Exhibit C4and total $207.58.

HOURLY RATE

[63] I should say at the outset that I do not accept the Crown’s argument that Mr. Fraser’s or Mr. McKiggan’s time should be billed at anything less than $180 an hour. Both are experienced civil counsel. Mr. McKiggan was called to the Bar in 1990; Mr. Fraser in 1984. Both are experienced personal injury and trial lawyers and both have “normal” hourly rates of at least $200 an hour, if not more.

[64] Accordingly, I accept that the time of Mr. McKiggan and Mr. Fraser, if otherwise reasonable, is properly billed on a solicitor and client basis at $180 an hour.

COST OF THE ACTUARY

[65] Having heard the submissions made on behalf both the solicitors and the Crown, I am not satisfied that it was reasonable to retain the services of an actuary in June 2000.

[66] First, it is clear that the limitation issue was, by all accounts, going to go to the Supreme Court of Canada, regardless of who won or lost the decisions before. If the Plaintiff had lost, they would have had no claim and hence no need for an actuarial report. It was, accordingly, premature to order one before the issue had been determined, especially since both sides agreed that the preliminary issue had to be addressed before the merits of the claim were dealt with.

[67] Second, it was not, in my view, necessary to assess the claim, at least with the degree of exactitude employed by actuaries. At this stage of the proceedings, only

the most general assessment of the *quantum* of the claim was necessary, and such could have been performed by any reasonably competent counsel without the need of an actuary.

[68] I, accordingly, conclude that it was not reasonable for Mr. Fraser to retain an actuary when he did, and that a client would be entitled to resist that particular disbursement on that ground. I will disallow that part of the claim.

PHOTOCOPYING

[69] The photocopying costs claimed are $394.40 (Mr. McKiggan) and $735.90 (Mr. Fraser).

[70] To some extent the amount of photocopying was, I find, a function of having two lawyers in two separate offices review the same documents. While I do agree that Mr. McKiggan did have to review the Government's documents initially, there is nothing to say that once he had reviewed them, he could not have sent them on to Mr. Fraser, rather than obtaining a separate copy for himself.

[71] In addition, it would appear that some of the photocopying involved providing copies of documents to the client herself. In my opinion, a party in the Crown's position does not have to pay for the costs of documents that the client herself received.

[72] On the other hand, I am satisfied that some duplication of important documents would be reasonably necessary, not unlike the situation where both junior and senior counsel have their own copies of books of documents that are used in court.

[73] I do note that photocopying was charged at a reasonable rate in Mr. McKiggan's office ($.10 a page).

[74] In my view it is impossible for me to arrive at an exact figure that would take into account the facts that:

(a) there was, in my view, some unnecessary duplication; but

(b) avoidance of unnecessary duplication would have involved costs in its own right (for example, the cost of couriering documents back and forth between Mr. Fraser's and Mr. McKiggan's office depending on who needed the documents); and

(c) there was some unavoidable (and, hence, reasonable) duplication of documents.

[75] Having looked at the number of documents involved and, given the peculiar nature of this case, I am satisfied that there was not an excessive amount of duplication and, in the circumstances, I think the fairest approach is simply to reduce both Mr. McKiggan's and Mr. Fraser's bill by 5%.

FAXES AND COURIER CHARGES

[76] I am satisfied, notwithstanding the mild criticism advanced by the Crown, that these charges are reasonable in the circumstances of this case.

COMPUTERIZED LEGAL RESEARCH

[77] The Crown submits that the total charge for computerized legal legal research ($1,039.24 for Mr. Fraser and $502.44 for Mr. McKiggan) is "excessive."

[78] These charges strike me as being unreasonably high. There is some case law that stands for the proposition that, at least on a party-and-party taxation, computerized legal research is really part of office overhead and ought not to be allowed on a taxation: see for e.g., *Elliot v. Nicholson* (1999), 179 N.S.R. (2nd) 264 (T.D.) at para. 7; *Bank of Montreal v. Scotia Capital Inc.* (2002), N.S.S.C. 274 at para. 15. On the other hand, this is a solicitor and client taxation: *Bank of Montreal v. Scotia Capital Inc.*; and there is some support for the proposition that at least **some** computerized research is "cost effective:" *Keddy v. Western Regional Health Board* [1999] N.S.J. No. 464 (T.D.) at para. 18.

[79] The jurisprudence of necessity consulted by the lawyers covered all of the provinces, which accordingly involved researching case law and case reports that would not normally be expected to in the office library of a law firm (outside of the very largest). I am accordingly inclined to allow some but not all of the computerized research claimed. In my view, it is reasonable in the circumstances to deduct $1,100 from the total amount claimed.

LAWYERS' TIME

[80] I now turn to the most contentious part of the taxation, that involving the amount of Mr. McKiggan's and Mr. Fraser's time in this matter.

[81] My analysis follows the various stages of the proceeding.

A note with respect to deductions in time

[82] The account that was submitted for taxation is a total account, which includes the times of Mr. Fraser and Mr. McKiggan. In what follows I have deducted certain time because, in my view, the totality of the time charged was not reasonable in the circumstances of this case. In making those deductions I have focussed on either the work of Mr. McKiggan or of Mr. Fraser. However, in so doing I am not making any determination as between themselves as to the value of their respective contributions. That is to say, the fact that I may have deducted, for example, 10 hours in respect to Mr. McKiggan's time or 10 hours in respect of Mr. Fraser's time, is not to be taken as a finding that, as between each other, their allocation of the overall account should be based on those deductions. It is simply to say that it was impossible for me to differentiate between any particular hour of time spent by Mr. Fraser or Mr. McKiggan as to its reasonableness. This is because both were charged at the same rate ($180 an hour) and both were contributing **something** to the overall progress of the file; but these services, as I have noted in certain cases below, were overlapping. I eventually decided that the best way to reflect the fact that:

(a) at a minimum, the file would have required at least one senior counsel working on it; and

(b) in some circumstances it was reasonable to have two senior counsel working on it; but

(c) in other circumstances it might have been reasonable to have one senior counsel and one junior or articled clerk working on it;

was to focus on the time of one or the other of the counsel and reduce that time by a percentage. Accordingly, I leave it to Mr. Fraser and Mr. McKiggan to work out amongst themselves as to how the total account should be split between them (if at all).

Mr. McKiggan's time prior to the second contingency agreement dated December 9, 1999

[83] The Crown in its submissions dated June 12, 2003 filed a chart (Tab 5) analysing the combined accounts of Mr. Fraser and Mr. McKiggan by date, nature of activity and time involved. This chart was based on the docketed time entries that had been provided to it by Mr. Fraser and Mr. McKiggan. I found the chart most useful, and I did refer to it in my analysis of the time of Mr. McKiggan and Mr. Fraser.

[84] By my count, 35.7 hours of Mr. McKiggan's time were incurred between June 1998 and the date of the second contingency agreement, which was dated December 9, 1999.

[85] Accordingly, those 35.7 hours of Mr. McKiggan's were performed under the terms of the first contingency agreement which was between M.J.D. and Mr. Fraser only. Clause 8 of that agreement provides as follows:

> "The solicitors may employ the services of such other solicitors or counsel as they deem appropriate to the proper conduct of the case, but the fees of such solicitors or counsel shall be for the account of the solicitors and not charged to the client:" Exhibit C1.

[86] There was some dispute among the parties as to how much weight, if any, I should place upon the contingency agreements. Mr. Fraser and Mr. McKiggan took the position that the first contingency agreement was subsumed and fell by the wayside when the second contingency agreement was entered into. The Crown, on the other hand, took the view that the first contingency agreement was binding, at least insofar as clause 8 was concerned.

[87] Contingency fee agreements are not binding on a taxing officer: C.P.R. 63.16(2), 63.17. They are merely one of the factors that must be considered by the taxing officer in determining whether or not an account is "reasonable." In my view, a client who had signed the first contingency agreement would be entitled to say to Mr. Fraser that he or she ought not to be expected to bear the cost of another solicitor, at least in the face of clause 8 (which was, presumably, drafted by Mr. Fraser or his law firm). It would not be right, in other words, for me to ignore the existence of that provision, notwithstanding that a subsequent contingency fee agreement might have been entered into later which did include that other solicitor.

[88] While I am prepared to accept that a client would agree to a new agreement that included an additional solicitor such as Mr. McKiggan from that point on, I do not think it would be reasonable to say that the client would agree to his time prior to that new agreement, since to do so would be to vitiate the provisions of clause 8 in the original agreement.

[89] In my opinion the Crown, standing in the shoes of M.J.D., is entitled to argue that the time of Mr. McKiggan is time that, pursuant to that provision ought, not to be charged to the client. I accordingly disallow those 35.7 hours of Mr. McKiggan's time incurred prior to the second contingency agreement.

Combined time of Mr. McKiggan and Mr. Fraser to the end of the May 2000 application

[90] The Crown submits that it was unreasonable to have two senior counsel working on the application and that Mr. Fraser or Mr. McKiggan or both ought to have had a junior solicitor or an articled clerk working on the file instead of having two senior counsel.

[91] I do not accept that submission in the circumstances of this case.

[92] First, it was clearly a complicated and important case. From the Crown's perspective, the importance went well beyond the boundaries of this case. Other cases were waiting in the wings. The Crown pulled out all stops, and put in all defences. Both sides knew that whoever won, the matter would go all the way to the Supreme Court of Canada.

[93] Second, there were conflicting appellate decisions. How best to convince a court of how to resolve such conflicts requires, not just the legal research that a junior or an articled clerk might provide; it also requires the judgment that only experienced trial counsel can bring to the mix of fact and law that is necessary to a successful argument in court.

[94] Third, there were, throughout the piece, changes in the thrust and approach to the preliminary matter right up to the day of the application. Some of these changes were the responsibility of the Crown; some of these that of Mr. Fraser or Mr. McKiggan. However, it is clear in my mind, based on the history of the proceedings as presented by both Mr. Fraser and Ms. Wrathall, that all these changes and alterations were made in a good faith effort to streamline the issues and get the matter decided at a preliminary stage. Last minute changes, however, always bring with them a premium in time expended.

[95] Fourth, the client here did have the benefit of senior counsel at a discounted rate ($180 an hour). Such time was, in my view, undoubtedly more valuable because of that experience, than a clerk or junior counsel at $150 an hour.

[96] I am, accordingly, satisfied given the nature of the issues and their importance to both sides; given that the application involved an attempt to draft an Agreed Statement of Fact, which agreements almost invariably always involve substantial amounts of time, that the time of both Mr. Fraser and Mr. McKiggan between December 9, 1999 and the conclusion of the application in May 2000 was reasonable.

The appeal

[97] As noted above, the decision of Justice MacAdam was appealed. The appeal proved abortive because of an error in the Agreed Statement of Fact put to Justice MacAdam, which resulted in the Appeal Panel deciding that the matter was moot (therefore requiring the matter to be heard all over again at the chambers level).

[98] I am satisfied that there is some reason to be concerned about the duplication of senior counsels' time in respect of the appeal. Having heard the submissions of counsel and having reviewed the time entries, I am satisfied that all of the substantive research and issues had been briefed before Justice MacAdam. The issues were now reasonably limited and fixed, and did not require a lot of extra work in order to have the matter heard at the appeal level.

[99] While there would have been a role for an assistant or junior counsel, to assist in the preparation of the appeal papers; or to advise Mr. Fraser as to local practice on an appeal; I do not believe it was reasonable to charge a client for the full time of two senior counsel in the period between May 2000 and the appeal in January 2001. This is not to say that the work performed by Mr. Fraser and Mr. McKiggan during the period in question did not have any value; it is simply to say that, in the circumstances, I am of the view that some part of the time could have more reasonably been performed by an associate or articled clerk.

[100] In my view, the best way to reflect the fact that there was some continuing need for assistance and input on the file pending the appeal, but that not all of that work had to be done by senior counsel, is to total Mr. McKiggan's time from June 6, 2000 (the first time entry after the May 2000 application) to the date of the appeal (January 22, 2001), and reduce that time by 75%.

[101] By my count, Mr. McKiggan's total hours are 41.3 which, when reduced by 75%, result in a reduction of 31 hours in the total claimed.

From the January 2001 appeal to the resolution of the matter

[102] The Crown objects to what it considers to be duplication in time and work in the period January 2001 to the resolution of the matter in October 2002.

[103] It is clear to me from a review of the accounts submitted that there was some duplication of effort. Accepting that there may have been some changes in strategy on the part of the Crown, it remained the case that the essential issues were the same. It was not reasonable, in my view, to have senior counsel duplicating or reviewing each other's efforts. While Mr. McKiggan did provide valuable and reasonable assistance in reviewing the Government's documents in preparation of the List of Documents, my review of the documents does not suggest that that review took up a large part of his time.

[104] In my view, the appropriate way to handle this duplication is to total Mr. McKiggan's hours between January 2001 and September 2002, and reduce those hours by 90%. By my count there were 35.3 hours and reduction of 90% results in a further deduction of 31.8 hours from the total claimed.

[105] The obligation on the part of the Crown to pay solicitor and client costs contemplated a termination date based on a pension decision from the Appeal Board. I understand that decision was released in January 2003. At that point, as I understand the evidence, Mr. Fraser took over the active control of the file, and Mr. McKiggan's work was no longer required in respect of the Nova Scotia action. Accordingly, his hours from January 9, 2003 (the date of the pension decision) to the end of the account total 5.9 hours and these are deducted.

Mr. Fraser's time

[106] From reviewing the time docket submitted it appears that Mr. Fraser's time associated with reviewing the actuarial report totalled 7.8 hours. Since I have found that the request for and use of an actuarial report was premature and ought not to be allowed, it is in my view reasonable to deduct those 7.8 hours from the total claimed.

[107] In addition, Mr. Fraser's travel time to and from Halifax over the course of this litigation totalled 39 hours. This total includes the travel time for the application in Halifax (23 hours), and that for the appeal (16 hours). In my view it is unreasonable

to bill a client at the full rate for travel. Given that air travel does permit a lawyer to work, I can accept that some of the time spent travelling would have been occupied reviewing materials and preparation for either the application or the appeal. However, travel back to British Columbia would essentially be dead time. I am also concerned that, while it might have been appropriate to have the two senior counsel in chambers, having two on the appeal was not necessary. Accordingly, I will calculate Mr. Fraser's travel time at 8 hours each way and allow him only one trip, for a total of 16 hours. As a result there must be a deduction of 23 hour in his time for travel.

A summary of hours deducted

[108] Based on the above reasons, I have deducted a total of 135.2 hours from the total account which, at an hourly rate of $180, is equal to $24,336.

[109] The effect of this deduction is to reduce the total fees claimed from 484.7 hours (or $87,246) to 349.5 (or $62,910). I am satisfied that this figure represents a "reasonable" fee in respect of what in essence amounted to one interlocutory application, one appeal therefrom, and a preliminary review of documents (albeit admittedly extensive documents). In reaching this conclusion, I note that had it not settled, the total fees had this matter gone to trial (which would have involved appeals all the way to the Supreme Court of Canada, extensive discovery of individuals in various jurisdictions, and a trial of at least a weeks duration, with appeals therefrom) would have been no more than approximately $250,000 (based on a 25% contingency of a total claim in the million dollar range). Such a figure is not likely to have reflected the actual time of the lawyer in such a complicated piece of litigation as this one could have proved to be.

[110] Accordingly, an award of a little less than 25% of the maximum costs the solicitors could have expected to obtain if this matter went to trial is not unreasonable.

[111] On the reverse side, I do not accept the Crown's argument that anything more than $50,000 would be too much for what in essence comprised no more than an interlocutory application and an appeal.

[112] This is a solicitor and client taxation. It is intended to represent full indemnification of a lawyer's "reasonable and lawful" fees. This was an important case for the Government, which caused it to leave no stone unturned in its defence. While the Crown was entitled to adopt this stance, it is certainly one that drove up the Plaintiff's costs. The matter was complicated, involving the laws of several jurisdictions, as well as conflicting appellate decisions. All agree it would have ended up in the Supreme Court of Canada, regardless of who won below. The

claim, which represented at its most something in the range of one million dollars or more was important to M.J.D., not just in terms of money, but also in terms of personal vindication.

[113] The parties chose to pursue the resolution of the legal issues concerning the limitation defences via chambers applications on questions of law based on Agreed Statements of Fact. Anyone involved in the drafting of an Agreed Statement of Fact knows that it can consume as much, if not more, time than a day in court. The establishment of certainty comes at a cost (as it does with a trial).

[114] The one concern I did have involved the decision to pursue litigation rather than an appeal of the pension decision. I had that concern because a client might reasonably have said that it would have been less expensive to mount an appeal before the Appeal Board than to pursue a civil action.

[115] However, in the hearing the Crown agreed that it was not unreasonable for Mr. Fraser to have followed the course of action that he did. The Crown, having accepted that choice, must then stand in the shoes of a client who authorized a particular course of action on the part of his or her lawyer. Accordingly, the only issue was whether, in pursuing that course of action, the time charged was reasonable in all the circumstances.

THE COST OF THIS TAXATION

[116] Mr. Fraser claims the cost of his attendance at the taxation. Those costs include his airfare and hotel accommodation for three nights. I find this claim reasonable.

[117] Mr. Fraser was clearly lead counsel in this matter. His time, as well as that of Mr. McKiggan, was being questioned and challenged by the Crown. In ordinary course counsel in such a situation should attend a taxation, both to defend his or her account and to assist the taxing officer. On these facts it would be unreasonable to expect Mr. McKiggan to answer all questions, particularly concerning Mr. Fraser's role and the decisions he made concerning the direction of the litigation. Accordingly, I think it entirely proper and appropriate that he attend the taxation.

[118] Mr. Fraser flew on a Saturday, when the return airfare was $1,065.48. If he had come during the week, it would have cost approximately $4,000. Accordingly, in my view, it was entirely reasonable for him to come on a Saturday and to claim hotel accommodation for Saturday, Sunday and Monday, since the total is still much less than it would have been had he travelled to Nova Scotia during the week.

[119] Accordingly, I note here that I am prepared to allow his claim for the airfare, plus hotel accommodation for three nights (totalling $591.78) and the taxi to and from the airport: ($100 at $50 each way) for a total of $1,757.26.

CONCLUDING CALCULATIONS

[120] For the reasons set out above, I tax the total account as follows:

(a) hours allowed (McKiggan) 96.3;

(b) hours allowed (Fraser) 253.2;

(c) total allowable hours 349.5;

(d) hourly rate $180;

(e) total allowable fees, $62,910.00;

(f) federal and provincial taxes at 15% on Mr. McKiggan's time, $2,600.10;

(g) federal and provincial taxes at 14% on Mr. Fraser's time, $6,380.64;

(h) total allowable fees and taxes, $71,890.74;

(i) disbursements claimed by Mr. Fraser, $11,200.52; disbursements claimed by Mr. McKiggan, $2,384.48;

(j) disbursements deducted (as per reasons), $5,154.05;

(k) balance of disbursements allowed, $8,430.95;

(l) tax on allowed disbursements at 15%, $1,264.64;

(m) cost of Mr. Fraser's attendance at the taxation (total), $1,757.26;

(n) grand total $83,343.59.

Dated at Halifax, Nova Scotia this)
11th day of July 2003)
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ADJUDICATOR

) W. Augustus Richardson

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