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A custodian of a lawyer's practice is not a "mere warehouseman"

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Cases Considered:

Polis v. Edwards, 2010 ABCA 59

There are few written decisions on the rights, liberties, powers and immunities of custodians appointed by the court to wind up or manage another lawyer's practice pursuant to the *Legal Profession Act*, R.S.A. 2000, c. L 8, section 95. *Polis v. Edwards*, 2010 ABCA 59 adds to that small body of law, although its ability to do so was limited by the fact the appellants were self-represented — and apparently not very well self-represented at that. The Court of Appeal notes (at para. 4) that there were at least 23 different issues or grounds of appeal set out in the appellants' joint factum and, although there might have been more, they were incomprehensible in law. Nevertheless, one legal question of interest to more than the parties was squarely before the Court of Appeal and that was the question of whether a custodian is entitled to tax the accounts of the member of the Law Society of Alberta (LSA) whose legal business they were appointed to manage or wind up. That question was, not surprisingly, answered in the affirmative.

I wrote an earlier post, A Custodian of a lawyer's practice is like a . . . [what?], on the judgment appealed from, Polis v. Edwards, 2009 ABQB 520, a judgment of Madam Justice Jo'Anne Strekaf that decided the matter on a factual basis instead of addressing the legal question of whether a custodian can tax accounts. I had indicated I thought this omission was regrettable, particularly as I thought the answer to the question was an easy one. That earlier post sets out the convoluted facts of this case briefly, but some recounting is necessary here in order to understand the Court of Appeal's apparent exasperation with the appellants and their arguments.

The appellants, Gerri Lynne Polis and Jason Fraser, had been resisting a taxation of their accounts with suspended former Cochrane lawyer, Mary Jo Rothecker, for well over a year. Unique to the legal profession, taxation of lawyers' accounts is an inexpensive and simple way for clients to get, in effect, a second opinion about their lawyers' bills. The *Alberta Rules of Court*, Alta. Reg. 390/68, provide that any eligible party has the right to have a lawyer's account (a.k.a. bill of costs) reviewed by a taxing officer, who has the authority to allow, reduce or disallow the fees and charges as he or she sees fit. Lawyers are also eligible parties and may tax their own accounts, usually in preparation for suing on them.

The appellants raised the issue of whether the custodian was an eligible party with authority to tax Rothecker's account when they both appeared at the first date set for taxation, which was back in November 2008. Subsequently Polis applied for an order barring the custodian from taxing the Rothecker-Polis/Fraser accounts. Justice Wilkins heard that application on January 19, 2009 and ordered the taxation proceed on February 24, 2009. On February 11, two weeks before the date of the rescheduled taxation, Polis filed a Notice of Appeal of the order granted by Justice Wilkins. However, her appeal was struck by the Registrar on March 16, 2009 and subsequently deemed abandoned. The matter came before Justice Strekaf because part of Justice Wilkins' order directed Polis to deliver to the custodian nine banker's boxes of Polis/Fraser documents that had been in Rothecker's possession so that the custodian could make copies of relevant documents before the taxation. Polis failed to obey this order. On January 30, 2009, Justice Strekaf directed Polis deliver up the boxes by February 2, 2009. However, on February 4, 2009, Justice Strekof stayed her own order because Fraser had not been a named party to the application before Justice Wilkins. The stay allowed a new Appointment for Taxation to be served on both Polis and Fraser. Fraser then applied to set aside the Appointment for Taxation and, after several adjournments, on August 31, 2009 that application was finally heard by Justice Strekof.

In the matter heard by Justice Strekof on August 31, where all parties were represented by legal counsel, Fraser's substantive argument was that a custodian appointed in respect of a member of the law society pursuant to the *Legal Profession Act* is not entitled to tax the accounts of the member. However, the custodian argued that Justice Wilkins had already ordered the taxation of the Rothecker-Polis/Fraser accounts, his order was final as Polis' appeal was abandoned, Fraser was in privity with Polis, the doctrine of *res judicata* applied, and it would thus be an abuse of process to permit the issue of whether the accounts can be taxed to be re-litigated. Justice Strekof agreed with the custodian. She held that both Polis and Fraser were precluded from re-litigating the issue of whether the accounts could or should be taxed. It is that order which was appealed to the Court of Appeal, where it was heard by Justices Jean Côté, J.D. Bruce McDonald and Rosemary Nation.

On the appeal, although the unrepresented Polis and Fraser raised 23 issues in their joint factum, their oral arguments focused on three issues: the question of the custodian's authority to tax, the *res judicata*/abuse of process issue raised by Fraser not being a named party to the application before Justice Wilkins, and the question of the effect of a taxation on solicitor/client privilege. It is those three issues to which the Court of Appeal directed its remarks. Only the first and third matters have significance beyond the specific facts of this case and it is those issues that I will focus on.

A Custodian's Authority to Tax

Polis had originally argued that Rothecker could not tax, negotiate or settle her own accounts because she was suspended. In their factum and at the oral hearing before the Court of Appeal, both Polis and Fraser argued that the custodian of a lawyer's practice could not tax or render the

lawyer's accounts. As the Court of Appeal put it, it appeared they were arguing "that no one can collect any fees owing" (at para. 5).

Polis and Fraser relied upon two documents for this startling argument: the LSA's Guidelines and their Instructions for custodians. Neither of these documents are, of course, law. Neither did either prohibit a custodian of a lawyer's practice from having that lawyer's accounts taxed. Instead, the appellants' argument was that "their silence on the topic is critical" (at para. 6).

Polis and Fraser ignored the fact there is relevant law. Rothecker's custodian was appointed pursuant to the *Legal Profession Act* by an order of the Court of Queen's Bench, at the request of the LSA and with the consent of Rothecker. The *Legal Profession Act* authorizes the Court of Queen's Bench to appoint custodians. Section 95(1) of the Act allows the court to appoint a custodian of a suspended lawyer "to have custody of the property of the [lawyer] and to manage or wind up the legal business of the [lawyer]." The court order initially appointing the custodian of Rothecker's practice gave the custodian care and control of the property and legal practice of the suspended lawyer and the power and authority to "manage and maintain" that lawyer's legal business and practice and to "deal with the property" of the suspended lawyer (at para. 7). "Property" was defined to include everything related to the lawyer's business and easily included accounts receivable. A subsequent Court of Queen's Bench order directed the custodian to wind up the suspended lawyer's practice. It stated that the custodian was "not required to determine or render accounts on behalf of the [lawyer] and is not required to set or collect accounts receivable or fees, or disbursements owing to the [lawyer]" (at para. 9). In other words, the custodian had no duty to collect fees owed to the suspended lawyer. They were, however, at liberty to do so. In addition, the subsequent order affirmed the powers given the custodian in the first order.

Any LSA Guidelines and Instructions could not, of course, override or contradict the legislation and court orders. Contrary to the appellants' assertions, they did not pretend to do so either. Part E.5 of the LSA Instructions said that the custodian "is not responsible for determining or setting the amount owed to the practice by reason of any performance of duties by the lawyer"; that is the lawyer's duty. But as the Court of Appeal took pains to point out (at para. 14), that Instruction does not forbid the custodian to do such work and it does not forbid the lawyer from authorizing that work be done by the custodian. Thus the Court of Appeal concludes (at para. 18) that "the Custodian had ample power to render an account for work done by the lawyer but not yet billed, and to enforce and collect accounts owing, which must of course include taxing accounts."

Taxation and solicitor/client privilege

The issue of privilege in connection with taxation of accounts appears to have been less than fully argued. The Court of Appeal states (at para. 40) "[t]here were a few stray mentions of privilege in the appellants' factum" and the appellants filed a late book of authorities on the last business day before the appeal that was all about privilege and then mentioned privilege a lot during their oral argument. The appellants' main point seemed to be a concern that privileged information would appear on the public record if the taxation proceeded.

In recounting this issue, the Court of Appeal went on to note (at para. 41) that Fraser made the argument that "everything is privileged, including the accounts from the lawyer, and that it would be a breach of privilege to hold a taxation." He did not cite any law or authority for this proposition. Apparently, the appellants wanted to exclude all of the lawyer's records as privileged and limit the taxation to one statement by a former bookkeeper of the suspended lawyer who supposedly told Polis that nothing was owing by the appellants to Rothecker. As the Court of Appeal notes wryly (at para. 42), "[t]hat would be a wonderful argument for anyone who had a lawyer's bill for which he or she denied owing the full amount." It is not, of course, the law.

The appellants appear to have also argued that even if the lawyer could require a taxation without violating privilege, a custodian could not. The Court of Appeal notes (at para. 43) that if a custodian cannot tax, then "every lawyer in Canada with an unpaid account would have to handle every step in the collection and taxation process herself or himself . . .". With respect to the specific situation of a custodian, the Court of Appeal admonishes (at para. 46) that a "custodian is not a mere warehouseman." The *Legal Profession Act* authorizes the appointment of custodians with complete control over and possession of all the records of certain lawyers. As such, it is obvious that it authorizes custodians to see otherwise privileged documents. Law firm partners, outside counsel, paralegals and others typically see clients' privileged documents. As the Court of Appeal put it, "[n]o sensible client hires a law firm and expects that one lawyer will see the file, and no other human being ever will."

In addition to the fact the custodian must see otherwise privileged documents, the Court of Appeal notes (at para. 49) that a taxation does not put such documents on the public record: "Taxations are usually held in the taxing officer's office or private meeting room. If the lawyer's file is lent to the taxing officer, he returns it with the allocatur (his decision), and does not place it on the public court file."

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The Court of Appeal thus dismissed the Polis and Fraser appeal. With this result, the taxation of their accounts with Rotheker should proceed apace. However, considering the number of court orders and applications it took to get to this point, there might be little reason for optimism in thinking that the amount of the suspended lawyer's bill to Polis and Fraser will be resolved soon. It should be though. One of the most noticeable aspects of this Court of Appeal judgment is the number of comments which barely conceal the Court of Appeal's annoyance with the appellants and their arguments, comments such as the following (emphasis added):

- ". . . there are also 13 other brief passages in their factum which are <u>extremely hard to understand</u>, and <u>do not seem to allude to</u> any propositions of law familiar to us" (at para. 4)
- "An order of a superior court is <u>not a nullity</u> . . ." (at para. 11)
- "For most of the accounts, this issue of powers may be <u>moot anyway</u>" (at para. 19)
- "This complaint about production leaves <u>a bad taste</u> . . ." (at para. 24)

- "(Ms. Polis' affidavit states baldly that the note was got by "duress". Without descending to particulars, this allegation was not pursued in oral argument.)" (at para. 28)
- "If [Fraser] took no part in the legal proceedings and gave no instructions to anyone to speak for him (none of which he has sworn to), he is the author of his own misfortune" (at para. 34)
- "We find Mr. Fraser's allegations of lack of privity extremely far-fetched." (at para. 37)
- "There were a few stray mentions of privilege in the appellants' factum, but nothing very intelligible." (at para. 40)
- "A custodian is not a mere warehouseman. There is nothing shocking about seeing papers. . . . No sensible client hires a law firm and expects that one lawyer will see the file, and no other human being ever will." (at para. 46)
- "Their affidavits bulge with argument. Both of them swear that they want, expect, and demand that the Custodian protect their interest and take charge of things." (at para. 47)
- If we were to answer all the arguments and possible grounds of appeal found in the appellants' factum, their oral argument, their authorities, and their lengthy affidavits (even ignoring the 13 incomprehensible passages in the factum), this would be near the beginning of this judgment, rather than its end. In our view, the other points made lack merit and are not worthy of any more discussion than that found above. It is quite possible that some of them are no longer being pressed, or are simply to be used to persuade someone that the bills should be lower, a question for the taxing officer. (at para 51)

Courts usually conceal their impatience with poor arguments made by self-represented litigants better than this. In a post that I wrote two years ago, Security for Costs on Appeals by Impecunious and Vexatious Litigants, I had wondered whether the Court of Appeal was becoming impatient with what appeared to be an increasing number of self-represented litigants. Dealing with self-represented litigants in the superior courts can be extremely frustrating. Perhaps the Court of Appeal's language in *Polis v. Edwards* is meant to be a strong hint to the appellants to change their ways. Given the decisiveness and tone of the Court of Appeal's dismissal of the appellants' arguments, one would hope that the issue of the amount of the Rothecker-Polis/Fraser account, which has been the subject matter of at least six different orders in these proceedings, is finally laid to rest.