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The Purposes and Limits to a Client's Right to A Review of Lawyer's Accounts

By: Clayton Swan

Case Commented On: *Eryn B Logie Family Law v West*, 2017 ABQB 339 (*Logie QB*); *West v Logie Family Law*, 2018 ABCA 255 (*Logie CA*).

Recently, the Alberta Court of Appeal addressed an important issue in lawyer-client relations: the right and ability of a client to submit their lawyer's bill for review. The technical term for this process is 'taxation.' The chain of cases that I will discuss begins with a highly contested family law file and a retainer that lasted 3 years. The lawyer-client relationship ended with the client having paid 98.5% of his bill. The client applied to a Master, and received, an order allowing an extension on the time limit for reviewing a lawyer's bill without being required to provide notice to his lawyer or having to justify his request. The lawyer appealed the order and was ultimately successful in the Court of Appeal. This blog post will focus on the reasons of the Court of Appeal and provide some commentary on what this judgment could mean for both clients and lawyers in the future.

The Contested Retainer

The retainer between Eryn B Logie Family Law and Mr. West began in May of 2013 and ended on August 29, 2016; 56 accounts and $305,000 later (*Logie* QB at paras 3 and 4). On September 22, 2016 Mr. West was granted an order by a Master of the Court under Rule 13.38(1) of the *Alberta Rules of Court*, Alta Reg 124/2010 to extend the period for review to include the entire account. Because of this order, the time for review of the lawyer's accounts was extended from a maximum of 6 months to the entire length of the retainer, which exceeded 3 years (*Logie* QB at para 5).

The Rules of Court and Taxation

Taxation is the technical, legal term that describes the process of reviewing a lawyer's accounts. Rule 10.9 of the *Alberta Rules of Court*, Alta Reg 124/2010 allows for the reasonableness of any retainer agreement or lawyer's charges to be submitted to a review officer even if there are agreements to the contrary. This process is subject to rule 10.10 which sets out a 6-month period within which the review process must be started. Rule 13.5(2) allows for modification of any time limit (unless another rule otherwise provides) under the *Alberta Rules of Court* by court order. Rule 13.38(1) grants a Master the authority to empower a review officer to review the entire account, despite the 6-month limitation period set out in the *Rules of Court*.

Before the Queen's Bench

Eryn B Logie Family Law v West, 2017 ABQB 339 (*Logie* QB*)* was an appeal from a Master's order to extend the time for review of the lawyer's account, as such it is reviewed on either a

correctness standard or heard as a new matter if there is new evidence, either way, the Court has little deference for the Master's decision. Before Justice Sullivan Ms. Logie did not fare well. Sullivan J. noted that this is not a novel issue and that there is existing case law setting out what the test is for extending the period for reviewing a lawyer's accounts. The Court referred to *Attila Dogan Construction and Installation Co Inc v Bennett Jones LLP*, 2015 ABQB 407 and noted that it was a discretionary test wherein the following factors are to be considered:

1. delay,
2. prejudice,
3. first intent to tax (assess the accounts),
4. evidence of overcharging,
5. agreement as to amount, and
6. the relationship between lawyer and client (*Logie* QB at para 15).

Justice Sullivan began by finding, contrary to the decision of the Master, that the *Limitations Act*, RSA 2000, c l-12, applied to each of the 56 accounts individually such that there could be no review of any accounts sent more than 2 years prior to the filing of the review (*Logie* QB at para 19). Ms. Logie's small success before Sullivan was this finding that it wasn't the whole 3 years that could be reviewed due to limitations contained within the *Limitations Act*.

Regarding the 6-month limit contemplated by the *Alberta Rules of Court*, Justice Sullivan noted that the decision to extend a time period is at the discretion of the court and not a hard test (*Logie* QB at para 21). Sullivan J. described the benefits of allowing the review of a lawyer's file as an independent confirmation for the client that the lawyer's fees are reasonable and grants the lawyer the "opportunity to justify their fees" before an impartial expert reviewer of lawyer accounts (*Logie* QB at para 22).

The process is described as a mini-trial in which "parties are heard, evidence is tendered, and a decision is made by an unbiased party" (*Logie* QB at para 23). But instead of wasting court resources the matter is funneled directly into the hands of an expert adjudicator, and it "often prevents lawyers from being reported to the Law Society" (*Logie* QB at para 23).

Justice Sullivan held that the lack of legal expertise of the client was a consideration in determining whether to uphold the decision of the Master to allow a review of more than the last 6 months accounts (*Logie* QB at para 24). And held that the bar for allowing review was a low one requiring that there only be "some evidence that the account should be reviewed." Justice Sullivan continued, "As long as there is some evidence that a client, in good faith, seeks an independent review of their legal fees, the fiat ought to be granted" (*Logie* QB at paras 25 and 26). Justice Sullivan did note that the review process must at least have some justification and cannot be used maliciously against lawyers (*Logie* QB at para 27).

Justice Sullivan found that a quote from August 14, 2014 of $85,000 for a 3-week trial amounted to an "agreed upon amount" under the test (*Logie* QB at para 31). He also noted that the significant discrepancy between the quoted amount and the actual amount paid, $305,000, gave cause for concern.

In this case Justice Sullivan ruled that Mr. West's lack of legal training, the failure of either party to discuss the amount being billed and especially the discrepancy between an agreed amount and the final number amounted to "good reason" for granting a review of the total file (*Logie* QB at para 29).

Justice Sullivan put great weight on these three factors. He did acknowledge that Ms. Logie would be prejudiced as she had relied upon the certainty of the funds paid to her, and that "a law firm is entitled to the certainty of honestly earned revenue" (*Logie* QB at paras 32-33). It is difficult to say how much weight he gave to prejudice as a factor in the test as he did not discuss how much weight it should carry. However, it appears as if he weighted this prejudice lightly.

Before the Court of Appeal

Justice Paperny, writing for Justices McDonald and Strekaf came to a different conclusion; finding that Justice Sullivan had "exercised his discretion on a wrong principle of law and failed to consider all relevant considerations" as well as making a palpable and overriding error of fact (*Logie* CA at para 18).

The Court of Appeal noted Justice Sullivan was correct in stating the law initially by referencing the six criteria to be considered but wrong in describing a low threshold for allowing a review (*Logie* CA at para 20). Finding that not only was there no case law to support a low threshold but that implementing a low threshold would run counter to the policy behind the existence of the rule enabling review (*Logie* CA at para 22).

The Court of Appeal held that the benefits of the review process included the right of a lawyer to have an account reviewed promptly, making the dispute process easier by preventing arguments over old files, informing lawyers of client concerns earlier, encouraging clients to "voice their concerns" and setting a period for which a lawyer can be certain about their accounts (*Logie* CA at para 22). In contrast, Justice Sullivan's low threshold provides no mechanism for balancing the lawyer's and the client's rights, such that there was virtually no requirement to consider anything other than the client's "*bona fide* intention to have legal fees reviewed" (*Logie* CA at para 22). It's very easy to have a *bona fide intention* to dispute legal fees even if the

According to the Court of Appeal, Justice Sullivan's test also failed to give effect to the time limit imposed by rule 10.10, as the failure to meet a time limitation ought to place a presumptive burden against the applicant hoping to extend the deadline (*Logie* CA at para 23).

In assessing how Justice Sullivan had applied the factors to be considered, the Court of Appeal found that he had only considered one factor out of the six, overcharging, and that even on that point he had "either misstated the facts or failed to consider his own conclusions on the facts", and the court noted that Justice Sullivan mentioned but did not give much weight to prejudice.(*Logie* CA at paras 26 and 27).

In finding that there was evidence of overcharging, Justice Sullivan had relied upon the difference between a quote in August of 2014 for a 3-week trial and the total price paid over the period September 2014 to May 2015. The Court of Appeal pointed out that the whole period

billed for was not simply for the trial and preparation for trial, making note of the fact that the procedure card for this period is nearly 5 pages long and includes multiple applications for orders in what was a highly contested family law matter involving children (*Logie* CA at para 28).

The Court of Appeal also took issue with the characterization of an estimate for a 3-week trial as an "agreed upon amount" (*Logie* CA at para 29).

The Court of Appeal goes on to consider the rest of the factors, such as the delay in time for applying for a review, the fact that the client had outside legal advice that could have led to a discussion on costs sooner and that there was no evidence as to when the client first developed the intention to have the accounts reviewed (*Logie* CA at para 30). The Court observed that the client could have changed lawyers at any point if they were dissatisfied, especially after the trial, but instead continued his retainer of Ms. Logie for further matters (*Logie* CA at paras 31 and 33). There was some dispute as to the amicable nature of the lawyer-client relationship. Ms. Logie led evidence that it was amicable while the client had filed an affidavit indicating otherwise (*Logie* CA at para 31). Further, the prejudice suffered by Ms. Logie, in allowing a *carte blanche* review of her accounts on this matter was a real prejudice that needed to be weighted appropriately (*Logie* CA at para 31).

Ultimately the Court concludes that completely failing to address 4 out of six criteria, combined with incorrect statements of legal principles and the overriding and palpable factual error of treating an estimate as an agreed upon amount, meant that Justice Sullivan′sexercise of discretion in this matter could not be reasonable (*Logie* CA at para 32).

Instructions for Moving Forward

The Court of Appeal makes two important points in the last 4 paragraphs of its decision. First, that moving forwards, it is probably a good idea for lawyers to inform their clients of their right to submit their accounts for review in the retainer agreement, including the difficulty of gaining an extension on the time to review (*Logie* CA at para 34). And second, the Court questions the appropriateness of extending the Rule 10.10 deadline by means of a without-notice court order. The Court indicated that Masters should require a party seeking an extension under Rule 10.10(2) to give notice to the opposing side and to provide evidence for whether such an order ought to be granted (*Logie* CA at para 36).

Commentary

I want to focus on the first point made in *obiter*. I believe that this case provides important guidance for lawyers and their clients. The issue of a lawyer′s accounts and a client′s right to contest them raises an apparent conflict of interest. The apparent conflict that it is in the lawyer′s interest to get paid and the client′s interest to pay as little as possible. However, promoting a greater awareness of the taxation process can aid lawyers by increasing client confidence in the reasonableness of their bills and thus potentially discouraging (or at least streamlining) disputes, reducing ill-will towards the profession, and preventing lawyers from being sued by properly informing their clients of all their rights.

A lawyer is ethically obligated to act in their client's best interest, including informing them of all their rights; to do this, lawyers are required to avoid taking on files that conflict with either their own interests or a former client's interests. Failure to keep in line with these ethical obligations can result in disciplinary actions from the Law Society or civil lawsuits from wronged clients. Unfortunately for lawyers, some of a client's rights are in conflict with their own interests. The right to taxation is essentially a right against a lawyer's right to be paid for what they bill.

Lawyers have an interest in billing their clients and clients have an interest in being billed what they believe is a fair amount. This is reflected in the review process's need for balancing between what the Court of Appeal called the lawyer's right to a prompt review of their accounts against the client's right, enshrined in the Alberta Law Society's *Code of Conduct* at rule 3.6-1, to only be billed in a fair and reasonable manner, disclosed in a timely fashion. It is important to remember that getting paid is not the lawyer's *only* interest, but in the matter of billing it is hard to not give it significant importance. Thus, by requiring lawyers to inform clients that there exists a means for disrupting their billing process and allowing third-party review it appears that lawyers are being asked to act against their own interest.

In an ideal world, where all lawyers are perfect advocates and can easily set aside their own interest this conflict would not be an issue, but then we would not need any conflict of interest rules at all, and probably in this ideal world clients would always pay on time and as billed.

Billing has always been a contentious matter between lawyers and clients, often the source of much ill-will between the public and the profession. But the fact of the matter is that lawyers provide a specialized service to customers in an ever-specialized world and so they should be compensated for this. While the current payment model as it exists may not be perfect, and there are arguably better models that could be implemented, the review process is a tool that exists right now in the world we live in that can help. By informing the public that this mechanism exists, whereby an independent third party can be utilized to ensure that lawyers are billing reasonably, there is the possibility that some of the divide over costs between lawyers and clients can be bridged

What the review process can do, as Justice Sullivan wrote, is provide to clients, and by extension the public, the reassurance that they are being charged a reasonable amount for those services. Unfortunately, shopping for a lawyer is more difficult than shopping for groceries, where the pricing is obvious and the product is fixed, allowing for an easy comparison of value between different providers; specialized review officers are required to protect those without legal experience from being taken advantage of and to keep lawyers honest.

However, as the Court of Appeal points out, informing a client of their right to submit their accounts for review is also in the lawyer's interest. Especially if the client is informed of the totality of the process, including the parts that protect the lawyer's rights, such as the 6-month deadline. If we assume that the taxation process is a fair and balanced process, then it is in the lawyer's interest to tell clients that they can contest their bills but must do so within the presumed fair rules of the currently existing structure. (The actual fairness of these rules and the review process is up for debate and could be subject for a future research project.)

It is further in the lawyer's interest to inform clients of this right as it may help prevent clients from simply not paying as a means of disputing their bills and actually encourage payments. Simply by informing clients that the lawyer is aware of the existence of a review panel whose sole purpose is to confirm the reasonableness of lawyer's fees may increase a client's confidence in the reasonableness of their bills and thus make clients less likely to contest them. This can help build confidence in clients that their lawyer is not over-billing them.

Arguably, and this point was argued in this case, increasing awareness of the official taxation process could have the potential to open the floodgates for reviewing lawyer's accounts. In response, the Court of Appeal indicated that it would probably be a good thing to have more openness on billing with clients and to have disputes resolved earlier rather than later (*Logie* CA at para 35). It is hard to imagine how the profession trying to hide the right to review from the public is good for the public interest.

To summarize, lawyers ought to inform clients of their right to review accounts because the process includes mechanisms for protecting both parties' rights, it can build confidence in clients and the public that lawyers' accounts are reasonable (which could both reduce ill-will and make paying their bills more likely), and they are ethically obligated to inform their clients of all of their rights, even where they conflict with the lawyer's own rights.

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