Court of King's Bench of Alberta

Citation: Debut Developments Inc v Carbert Waite LLP, 2024 ABKB 630

Date: 20241030
Docket: 2101 12805
Registry: Calgary

Between:

Debut Developments Inc. and Danica Prpick

Appellants

– and –

Carbert Waite LLP

Respondent

Reasons for Judgment of the Honourable Justice D. Jugnauth

Overview

[1] Debut Developments Inc and Danica Prpick appeal the decision of a Review Officer characterizing a series of 10 invoices issued by the Respondent law firm, Carbert Waite LLP, as periodic final invoices. The consequence of the Review Officer's decision was to bar a review of the retainer agreement and 9 of 10 invoices as out of time, pursuant to rule 10.10 of the Alberta *Rules of Court*.

[2] For the reasons that follow the appeal is dismissed. The underlying process before the Review Officer was procedurally unfair and the Review Officer exceeded his jurisdiction when he interpreted the contract between the parties. However, a fresh consideration of the contractual question results in the same conclusion reached at first instance. In the result, only the October 15, 2020 invoice between the parties may be reviewed.

Background

[3] On or about March 15, 2019 the Appellants retained the Respondent in respect of two actions in the Court of King's Bench. In the first action the Respondents were retained to

prosecute a claim by Debut Developments Inc against the Town of Redcliff, Alberta. In the second action the Respondent was retained to defend Ms. Prpick against a claim of defamation.

[4] The retainer agreement included the following language, all of which is relevant to this appeal:

i. "The purpose of this letter (the "Retainer Agreement") is to explain the nature and limitations of our representation and explain our fee arrangements which are set forth in the attached schedule".

ii. "We are not able to provide you with a definitive quote for legal fees and disbursements to conclusion of this matter given the current lack of detailed information and the corresponding uncertainty about the path this dispute will take. However, we will render our accounts on a regular basis and encourage you to ask us for updates as to the status of your account as often as you wish".

iii. Under the heading "Legal Fees & Billing Practices"

1) "Please see the attached explanation of legal fees and billing practices."

2) "My hourly rate on this matter will be $500. In order to help in controlling costs lower, I will use junior lawyers and paralegals as appropriate."

[5] Notably, the retainer agreement did not include any "attached schedule" or "attached explanation of legal fees and billing practices".

[6] Following the commencement of the retainer, the Respondent issued a series of Statements of Account to invoice the Appellants for the work performed over time in relation to the two actions. The first nine invoices were issued as follows:

i)	April 15, 2019	$30,566.26
ii)	May 28, 2019	$58,697.33
iii)	June 10, 2019	$61,817.42
iv)	July 17, 2019	$28,832.11
v)	September 18, 2019	$49,438.65
vi)	October 8, 2019	$49,305.89
vii)	November 13, 2019	$ 4,128.98
viii)	December 30, 2019	$17,673.46
ix)	May 5, 2020	$65,882.63

[7] The Statements of Account were all similarly formatted providing descriptive time records of all persons performing work on the file including the hours worked, a rate for that person, a dollar amount associated with each task, and a summary of fees by person. The Statements of Account also included other charges (such as photocopying and printing), disbursements, tax and an "Accounts Receivable Summary".

[8] The Accounts Receivable Summary provided a point in time update as to the prior accounts receivable netted against payments received since the last invoice and the amount of the current account. The result showed a "current amount due and owing".

[9] The Respondent became dissatisfied with the status of fees and arrears relative to the projected cost of a three-week trial on one of the actions set to commence on December 7, 2020. On August 28, 2020, the Respondent successfully applied to be removed as the Appellants' counsel of record, effectively terminating the retainer agreement as of that date.

[10] Shortly thereafter, on October 15, 2020, the Respondent issued its tenth and final account in the amount of $53,808.98. That invoice was emailed to the Appellants on October 16, 2020.

[11] The covering correspondence to the final invoice advised the Appellants that they "have one year from today's date to request a review of this account pursuant to Rule 10.10 of the Rules of Court by filing a Form 42" and "that there are specific rules that deal with the time limits for this review". That correspondence also included a hyperlink to a Court of King's Bench publication dealing with the time limit applicable to a review.

[12] There is no evidence the Appellants took any steps to raise concerns with the Respondent in relation to any invoice prior to filing an Appointment for Review on October 15, 2021. Notably, the original Appointment for Review was filed one day prior to the expiry of the limitation period set out in rule 10.10(2).

[13] The Appellants then waited until July 20, 2022 to serve the Appointment for Review on the Respondents, which was 11 days ahead of the hearing date scheduled for August 2, 2022. In late July of that same year the Respondent and Appellant exchanged email correspondence in relation to a request by the Respondent to adjourn the hearing.

[14] On July 27, 2022, the Appellants forwarded the email chain between the parties to the Review Officer, together with the Appellants' rationale explaining why they were opposed to an adjournment. In reply, counsel for the Respondent wrote to the Review Officer advising of their reasons to seek an adjournment.

[15] In that same correspondence the Respondent's counsel identified what she characterized as "threshold matters" that needed to be addressed. Specifically, the Respondent identified that the timing of the Appellants' Appointment for Review of the retainer agreement and a majority of the accounts was not in compliance with the limitation period in rule 10.10.

[16] On August 2nd the parties convened before a Review Officer, a transcript of which is included as part of the record on this appeal. Prior to dealing with the adjournment application the Review Officer addressed the threshold matter pertaining to the Appellants' compliance with rule 10.10.

[17] The Review Officer first solicited the Respondent's position. In relation to reviewing the retainer agreement, the Respondent argued the Appellants were out of time given the six-month limit set out in rule 10.10(1) and the Appointment for Review being filed approximately 13.5 months after the retainer was terminated in August 2020.

[18] In relation to the accounts, the Respondent argued that the accounts were "periodic, final accounts". According to the Respondent, *all* accounts were time barred based on the 1-year limit in rule 10.10(2) relative to the date the Appellants received the last account on October 16, 2020 and a hearing date more than 21 months later, on August 2, 2022.

[19] In the alternative, given the Appointment for Review was filed one day prior to the one-year limit, the Respondent argued that if any accounts were reviewable, it was *only* the October 15, 2020 account that had been sent to the Appellants on October 16, 2020.

[20] The Review Officer then solicited the Appellants' position in relation to the application of the limitation period. Unfortunately, the Appellants' reply was non-responsive to the Review Officer's query.

[21] The Review Officer then decided the accounts were "final period accounts" and that he would only permit the Appellants to review the October 15, 2020 invoice. Notably, the Review Officer did not communicate any reasons in support of his decision.

[22] The Review Officer then granted the Respondent's request for an adjournment and adjourned the hearing *sine die* with a suggestion to the parties that they speak with one another to explore the possibility of settlement given the Respondent had implied that it was not necessarily interested in collecting on the October 15, 2020 invoice.

Standard of Review

[23] The Court may only vary or revoke a Review Officer's decision on the reasonableness of a retainer agreement or a lawyer's fees if the decision reflects an error of principle or whether the award is inordinately high or low: ***Steinke v Hajduk Gibbs LLP***, 2014 ABQB 34 at para. 42 citing ***Mercantile Bank of Canada v Keen Industries Ltd***, (1988), 86 AR 311 at 313 (Alta CA).

[24] A Review Officer's decision is entitled to deference on appeal given the specialized knowledge and experience of Review Officers in assessing the reasonableness of lawyers' accounts but is otherwise governed by the principles set out in ***Housen v Nikolaisen***, 2002 SCC 33. Where the decision requires an interpretation of the rules of court and that interpretation is an extricable error of law, the interpretation of the rule is subject to correctness. Where the question is one of fact, or mixed fact and law, the standard of review is "palpable and overriding error": ***Betser-Zilevitch v Prowse Chowne LLP***, 2021 ABCA 129 at para. 12.

[25] The characterization of invoices is a question of contractual interpretation highly dependent upon the facts of the particular case and will often be a question of mixed fact and law. Unless a question of law can be extricated the standard of review for a judge's interpretation warrants deference absent palpable and overriding error: ***West v Logie Family Law***, 2018 ABCA 255 at para. 16 citing ***Sattva Capital Corp. v Creston Moly Corp***, 2014 SCC 53 at paras 50 and 55.

[26] Review Officers may review retainer agreements and lawyer's charges for reasonableness, but they have no jurisdiction to interpret retainer agreements. Any question arising about the terms of a retainer agreement must be referred to the Court pursuant to Rule 10.18(1)(a): ***Rath & Co v Sweetgrass First Nation***, 2014 ABCA 426 at para 3.

Relevant Rules of Court

> **Time limitation on reviewing retainer agreements and charges**
>
> 10.10(1) A retainer agreement may not be reviewed if 6 months has passed after the date on which the retainer agreement terminated.

(2) A lawyer's charges may not be reviewed, whether at the request of the lawyer or the client, if one year has passed after the date on which the account was sent to the client.

Appointment for review

10.13(1) A lawyer or a client may, by request, obtain from a review officer an appointment date for a review of a retainer agreement or a lawyer's charges, or both.

[...]

(4) The client or the lawyer who obtains an appointment date for review must serve copies of the documents filed under subrule (2) or (3) on the other party to the review and any other interested party 10 days or more before the appointment date, or within any other period specified by a review officer.

Review officer's authority

10.17(1) For the purpose of conducting a review under this Division, a review officer may do all or any of the following:

[…]

(h) determine the applicability of a time period specified in these rules in respect of a review conducted under this Division and extend or shorten an applicable time period.

Reference to Court

10.18(1) A review officer

(a) must refer any question arising about the terms of a retainer agreement to the Court for a decision or direction, and

Decision of judge

10.27(1) After hearing an appeal from a review officer's decision, the judge may, by order, do one or more of the following:

(a) confirm, vary or revoke the decision;

(b) revoke the decision and substitute a decision;

(c) revoke all or part of the decision and refer the matter back to the review officer or to another review officer;

(d) make any other order the judge considers appropriate.

Preliminary Matters

(i) The Corporate Appellant

[27] Prior to hearing argument on the merits there were two preliminary matters to address. The first was whether Ms. Prpick, as one of two shareholders and the directing mind of the corporate appellant Debut Developments Inc, should be allowed to appear on behalf of the

corporate litigant. Notably, the other shareholder of Debut Developments is Joel Barrette, who was present in court to assist Ms. Prpick as a McKenzie Friend.

[28] In this case the Respondent was retained by both the corporate entity and Ms. Prpick in her personal capacity vis-à-vis a single retainer agreement. While there were two distinct legal actions implicating one Appellant or the other, the Respondent was retained on both and issued consolidated Statements of Account in relation to all work being performed in relation to both actions. It is also readily apparent that both the facts and argument underlying the appeal is the same for both Appellants such that there cannot be a difference in outcome as between them.

[29] Based on the foregoing, together with the Respondent's consent, I exercised my discretion pursuant to rule 2.23(4) to permit Ms. Prpick to appear as an agent of the corporation to adopt the submissions that Ms. Prpick was making on her own behalf. The hearing proceeded in that fashion.

(ii) The Fresh Evidence Application

[30] On November 17, 2022 the Appellants brought a fresh evidence application into morning chambers seeking to include additional correspondence into the record for the purpose of this appeal. That application was deferred to be heard by the judge hearing the substantive appeal.

[31] Rules 10.26(2)-(3) make it clear that an appeal is constrained to the record that was before the Review Officer at first instance, comprising: (i) the Form 42 Appointment for Review; (ii) the material files by the parties in support of their respective positions, or otherwise required for the review; (iii) the transcript of the proceedings before the Review Officer; and (iv) the Review Officer's certificate.

[32] In this case, the Review Officer made a preliminary decision in respect of those accounts that fell outside of the limitation period and then adjourned the proceeding *sine die* to permit the Respondent to review the Appellants' materials, file materials, prepare for the hearing, and to allow for the parties to consider next steps given his preliminary ruling. Against that context, the Review Officer did not conduct a hearing on the merits and, therefore, did not issue a certificate.

[33] The Appellants also sought to introduce certain email correspondence and other records as fresh evidence. During the hearing the Appellants spoke to each item individually, which made clear that of what the Appellants were seeking was already included in the record and was already before the Court on appeal.

[34] However, correspondence and other documents dated after the hearing on August 2, 2022 were not permitted as fresh evidence given the statutory rule that an appeal of a Review Officer's decision is an appeal on the record as set out in rule 10.26(3). To that end, there is no jurisdiction. Moreover, correspondence and other documents not before the Review Officer could not have influenced his decision or the reasoning now alleged to be in error.

Positions of the Parties

[35] The Appellants assert two primary grounds of appeal that subsume the various arguments outlined in the Appellants' written and oral submissions, namely:

i. **The Review Officer erred by concluding that all ten invoices issued by the Respondent law firm were "final, periodic accounts"**. The Appellants argue there

was only one "account" with the Respondent that covered two independent court actions. The Appellants contend their account remained active until the final invoice was rendered on October 16, 2020.

On this basis the Appellants assert that none of the prior invoices related to their "account" should be time-barred given the Appellants filed their Form 42 Notice of Appointment one day prior to the expiration of the statutory limitation period.

ii. **The proceeding that led to the conclusion above was procedurally unfair**. As self-represented litigants, the Appellants say they were blindsided by the Review Officer's decision to hear argument on the application of the limitation period when the Appellants believed the only point at issue during the hearing was the Respondent's application for an adjournment. In the circumstances, the Appellants say they did not have a fair opportunity to respond or make submissions on this dispositive issue.

[36] While the Appellants' written submission put in issue the Review Officer's decision to deny a review of the retainer agreement, the Appellants resiled from that position during the hearing.

[37] The Respondent argues that the Review Officer did not err. In the Respondent's view, there was never any dispute that the retainer was premised on an hourly fee arrangement. To the contrary, the Appellants' central billing complaint was focused on quantum, and whether certain work should have been done at all. Counsel contends the evidence only pointed one way, which mandated the conclusion reached by the Review Officer.

[38] Further, the Respondent argues that the August 2, 2022 hearing was procedurally fair given the July 28th correspondence put the Appellants on notice of the Respondent's position that some or all of the accounts were out of time. As for the absence of reasons supporting the Review Officer's conclusion, the Respondent says his conclusion implies the Review Officer simply accepted the Respondent's position on the application of the statutory limitation period.

[39] During the hearing the Court raised the question of whether the Review Officer had the jurisdiction to interpret the retainer agreement given rule 10.18 requires a Review Officer to refer such matters to the Court. In reply, the Respondent argued that it was common ground that the parties had entered into time-based fee arrangement and the Review Officer was simply applying the law to the facts. In doing so, the Review Officer did not engage in contractual interpretation of the retainer agreement and, therefore, did not exceed his jurisdiction.

Analysis

[40] I agree with the Appellants that the proceeding lacked procedural fairness. Not because the Appellants were blindsided by the question of the limitation period, but because the Review Officer failed in his heightened duty to assist self-represented litigants understand a critical issue that barred the vast majority of the invoices the Appellants submitted for review. I also find the Review Officer acted in excess of his jurisdiction by interpreting the terms of the retainer agreement in light of questions surrounding its completeness. My reasons follow.

(i) The Appellants received fair notice of the limitation period in rule 10.10

[41] The scope of the initial Appointment for Review included all ten invoices and the retainer agreement itself. In late July the parties engaged in a round of correspondence regarding a proposed adjournment of the review date set for August 2, 2022. The Appellants objected to the proposed adjournment, writing directly to the review office setting out eight reasons underlying their opposition.

[42] In turn, Ms. Halloran (counsel for the Respondent) sent correspondence to the review office setting out the reasons favouring an adjournment, writing in part:

> Additionally, before the application proceeds, there are some threshold matters that need to be addressed. In particular, it appears that the applicants have not complied with the deadlines set out in Rule 10.10. As you will note, the retainer agreement that the Applicants seek to review is dated March 15, 2019. With respect to the accounts, the majority of the accounts were rendered well over a year before the appointment was filed, and we are now more than a year and a half past the date of the final account. As such, it does not appear that the Applicants have complied with the deadlines set out in Rule 10.10.
>
> [Underlining added]

[43] When the parties convened on August 2nd the Review Officer commenced that proceeding by acknowledging the limitation period in rule 10.10 and inviting the Respondent's position on that issue. The Respondent advised that the retainer set out an hourly fee arrangement which meant that the invoices were "final, periodic accounts". Therefore, at least 9 of 10 were time-barred pursuant to the limitation period.

[44] The Review Officer acknowledged that "if these are final periodic accounts … I will not let the client have any accounts beyond the 1 year review". In other words, the question of whether the invoices were (or were not) "final, periodic accounts" was determinative of the application of the limitation period, and ultimately dispositive of 90% of the accounts originally subject to review.

[45] After hearing from the Respondent, the Review Officer inquired of the Appellants whether there "is there anything that you want to comment on in terms of what I have already indicated to you I am leaning towards in terms of allowing you to have reviewed?". The Appellants' reply was wholly non-responsive to the Review Officer's question, instead focusing on billing amounts related to the Respondent's application to withdraw from the record.

[46] Without further follow-up or discussion, the Review Officer concluded the invoices were "final, periodic accounts". Based on this conclusion, the Review Officer restricted the Appellants' review to only the final account.

[47] The Appellants argue they were blindsided by the Review Officer's focus on this threshold question when they came prepared to argue only the Respondent's adjournment application. This position is without merit.

[48] Quite reasonably, this preliminary matter was to be addressed first so the parties would know the precise contours of the review. Objectively, I am not persuaded the Appellants ought to have been surprised by the Review Officer's focus on the limitation period in rule 10.10. Support for my conclusion flows from the following observations.

[49] First, in correspondence dated September 22, 2020 the Respondent wrote to the Appellants to provide a final update on the file following the Respondent's successful application to withdraw. In that correspondence the Respondent fairly set out the following:

> We understand that you have questions regarding our accounts, which we are pleased to address. You can also challenge lawyers' billings through the court's review process. You can find information on this process here: [hyperlink to explanation of the review process].
>
> Typically, a request for a review of the account must be commenced within one year of the date that the account in question was sent. You can find information on this time limit here: [same hyperlink as above].
>
> [Underlining added]

[50] Second, in correspondence dated October 16, 2020 the Respondent sent the Appellants its final invoice, the historical accounts rendered further to the Appellants' request for the same, and an accounting summary of invoices rendered and payments received over the course of the retainer. The Respondent included the following advisory in this letter:

> Please note that you [sic] Debut Developments and you have one year from today's date to request a review of this account pursuant to Rule 10.10 of the Rules of Court by filing a Form 42. You can find information on the review process here: [included hyperlink was the same as the September 22nd correspondence].
>
> Please note that there are specific rules that deal with the time limits for this review, which are covered in this publication found here: [new hyperlink to an Alberta courts publication electronically titled "dealing-with-the-time-limit-for-a-review.pdf"].
>
> [Underlining added]

[51] Third, in the Respondent's correspondence to the review office dated July 28, 2022, Ms. Halloran wrote, "it appears that the applicants have not complied with the deadlines set out in Rule 10.10" and "the majority of the accounts were rendered well over a year before the appointment was filed, and we are now more than a year and a half past the date of the final account. As such, it does not appear that the Applicants have complied with the deadlines set out in Rule 10.10".

[52] The foregoing makes it clear the Appellants were advised by the Respondent on three separate occasions that a review of a lawyer's account was subject to a limitation period. Two of those advisories were appropriately provided close in time to the end of the retainer and the remittance of the final invoice. The third was several days before the appearance before the Review Officer.

[53] Furthermore, the Respondent was express in his reference to the limitation period in the body of his correspondence. He did not simply defer that information to whether or not the Appellants followed the hyperlinks provided.

[54] On these facts, the Appellants claim that they were blindsided by this issue is not objectively reasonable. If the Appellants only came prepared to argue the adjournment, as they contend, that was solely their mistake.

[55] The Respondent twice advised the Appellants in writing of their right to review and of the 1-year time limit. Counsel then expressly put the Appellants on notice that the limitation period was an issue she intended to argue before the Review Officer. On receipt of Ms. Halloran's correspondence, the Appellants ought to have known the limitation period was something they needed to address.

(ii) The Respondent reasonably informed the Appellants of their right to review

[56] In a related claim, the Appellants argue the Respondent owed them a fiduciary obligation to inform them of their right to review – including the applicable limitation period – at the outset of the retainer. According to the Appellants, doing so would avoid situations where, as here, lengthy retainers result in some accounts falling outside of the review period by the time the retainer concludes.

[57] While lawyers clearly owe a fiduciary duty to their clients, the Appellants did not advance any authority for the narrower proposition that lawyers owe a specific duty to inform clients, at the outset of the retainer, of the client's right to review fees and the applicable limitation period.

[58] In ***Samson Cree Nation v O'Reilly & Associés***, 2014 ABCA 268 at paras 118-153 the Court of Appeal addressed in depth a lawyer's duty to inform. Without repeating that lengthy discussion, it is sufficient to say that the Court of Appeal's analysis supports my conclusion in this case that the Respondent reasonably discharged any duty to inform it owed to the Appellants.

[59] Both parties to a contract have obligations. In a retainer agreement, the lawyer is responsible to ensure the quantum of it fees are reasonable, and the work performed is reasonably required in relation to the nature and scope of the retainer. Clients are responsible to identify any perceived issue with fees in a timely manner. This accords with the policy underlying the limitation period in rule 10.10, which strives to balance a client's right of review against a lawyer's right to have that review performed promptly.

[60] The record in this case makes two facts clear. First, the Appellants did not raise any concern about the Respondent's fees until after the retainer terminated. This is so notwithstanding a lengthy relationship between the parties where the Appellants were persistently behind in payments causing them to make accommodations to satisfy the Respondent that its fees were secure.

[61] In this context, it is reasonable to expect the Appellants would have been reviewing the invoices as they were received and raising legitimate questions in a timely manner. Any failure to act prudently in relation to the invoices it was receiving over time is the Appellants' failure alone.

[62] Second, the Respondent discharged any 'duty to inform' it might have owed to the Appellants reasonably and as soon as practicable once the Respondent became aware the Appellants were taking issue with its fees. The Respondent first advised the Appellants of their right to review less than one month following the termination of the retainer, and again several weeks after that.

[63] Had the Appellants acted with dispatch in relation to this information as many as five prior invoices may have fallen within the limitation period. It was the Appellants choice to delay

filing their Form 42 until October 15, 2021. The Appellants must bear any consequential effect of that choice.

(iii) The Review Officer has discretion to control his process

[64] The Review Officer has discretion to control his process and did not render the hearing procedurally unfair by calling on the Respondent first to explain its position regarding the application of the limitation period.

[65] In the pre-hearing correspondence, the Respondent was the party to raise the limitation period as a threshold consideration. It was reasonable for the Review Officer to first and fully understand the Respondent's position before inviting submissions from the Appellants.

[66] Moreover, determining the scope of the review was necessary given the possibility of an adjournment since the parties would need to know how much time to re-book. As later referred to by the Review Officer, a half day would be sufficient for a review of only the final invoice whereas a review of all ten invoices might take the better part of a week.

(iv) The Review Officer failed to ensure the self-represented litigants understood the issue

[67] Unfortunately, after receiving the Respondent's submissions on the limitation period, fairness in the remainder of the hearing was compromised.

[68] Counsel and self-represented litigants alike are expected to know the law, and to prepare and advance their case. However, there is a heightened duty on decision-makers to ensure self-represented litigants understand the process so they can present their case to the best of their abilities: ***Toronto Dominion Bank v Hylton***, 2010 ONCA 752 at para 39.

[69] "Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation": Canadian Judicial Counsel, "*Statement of Principles of Self-represented Litigants and Accused Persons*" at 2 (September 2006). Judges and court administrators should meet the needs of self-represented persons for information, referral, simplicity, and assistance, and do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons: *Ibid* at 4.

[70] Here, the self-represented Appellants were denied a fair opportunity to respond to a threshold issue that eliminated 9 of 10 invoices they wanted to review. That the evidence on the substantive question may have pointed in only one direction, as the Respondent argues, is not valid justification to deny the opposite party the right to be heard.

[71] In this case the applicability of the limitation period turned on whether the past invoices were properly characterized as "final, periodic accounts" versus "interim accounts" subject to later adjustment. While the characterization of the invoices as "final, periodic accounts" was the basis of the Respondent's position and ultimately dispositive of the issue, the meaning of that term was never explained to the Appellants.

[72] Moreover, while the Review Officer initially sought submissions from the Appellants in relation to his inclination to limit the review to only the October 15, 2020 invoice, the Appellants' reply did not respond to this point. The Review Officer then rendered his decision

without further explanation to the Appellants or inviting further submissions from them. This was unfair.

[73] The degree of assistance given by an adjudicator to a self-represented party is a matter of discretion: ***Cold Lake First Nations v Alberta (Minister of Tourism, Parks & Recreation)***, 2012 ABCA 36 at para 32. In this context, where the Review Officer was dealing with a self-represented litigant on a question dispositive of 90% of the accounts at issue, fairness required more.

[74] At minimum, the Review Officer should have: (i) taken time to explain to the Appellants the meaning of, and differences between, final and interim accounts; (ii) the legal effect of characterizing the invoices one way or the other, and (iii) re-invited submissions from the Appellants on this crucial point. The Review Officer's failure to ensure the Appellants understood this critical point undermined the fairness of the proceeding.

(v) The Review Officer failed to give reasons

[75] The law is clear that Review Officers are not required to give extensive reasons. However, a complete lack of reasons may be grounds to refer a matter back to the Review Officer: ***Fraser Milner Casgrain LLP v Kristof Financial Inc***, 2012 ABQB 359 at para 20.

[76] Here, the Review Officer did not provide any reasons in support of his conclusion that the invoices were "final, periodic accounts". While a complete lack of reasons is problematic on its face, the impact on procedural fairness is magnified when the conclusion is dispositive of the question at hand.

[77] In this case the failure to provide reasons gains prominence considering references in the retainer agreement to schedules and enclosures that ostensibly detailed the fee arrangements and billing practices that were missing from the record. To conclude the invoices were "final, periodic accounts" without this seemingly relevant documentation, the Review Officer had to interpret the 2-page retainer agreement in light of the actual invoices submitted for review. In so doing, the Review Officer exceeded his jurisdiction.

(vi) The Review Officer exceeded his jurisdiction

[78] As noted by the Alberta Court of Appeal, the characterization of invoices is a question of contractual interpretation highly dependent upon the facts of the case: ***West v Logie Family Law***, 2018 ABCA 255 at para 16.

[79] The Respondent argues the Review Officer acted within his jurisdiction because there was no dispute over the terms of the retainer, citing the Court of Appeal in ***MacPherson Leslie & Tyerman LLP v Moll***, 2014 ABCA 45 at para 45:

> Rule 10.18 does not say that the review officer cannot touch anything having to do with "the terms of a retainer agreement". Instead, R 10.18(1)(a) says that he or she "must refer any [such] question arising ... to the Court for a decision or direction." "Question" must mean a dispute. That dispute question must be known for the review officer to do that.

[80] On the record before me, I cannot conclude there was no dispute about the terms of the retainer. First, the Appellants had included the retainer agreement in the original scope of the

review, implying the Appellants harboured one or more questions about it. Second, the retainer referred in two places to extrinsic documents regarding fee arrangements and billing practices that were not submitted to the Review Officer. Objectively, given these specific references in the retainer agreement, the absence of those documents was relevant to what the payment terms and billing practices were.

[81] On appeal the Respondent provided an affidavit that confirmed the 2-page retainer was the entirety of the agreement. Counsel suggested in argument the references to the missing schedule and enclosure were unfortunate remnants of boilerplate precedent that ought not to have been included. That may be so, but the Review Officer did not have those submissions or that affidavit at the time of the review on August 2, 2022.

[82] References to missing materials that purport to relate to fee arrangements and billing practices were germane to the question at issue. The Review Officer ought to have made inquiries and provided time for the Respondent to answer and produce the relevant documents, or otherwise confirm their error as clarified by counsel.

[83] Instead, the Review Officer proceeded to interpret the terms of the contract. In doing so, the Review Officer exceeded his jurisdiction. Pursuant to rule 10.18 a Review Officer "must refer any question arising about the terms of a retainer agreement to the Court for a decision or direction". [Underlining added]

[84] Given the characterization of invoices is a matter of contractual interpretation the Review Officer should have referred to the Court the question of whether the accounts were interim or final. Indeed, this was the procedure followed in ***Attila Dogan Construction and Installation Co Inc v Bennett Jones LLP***, 2015 ABQB 407 (***Attila***) when the Review Officer in that case was faced with the same issue.

(vii) The invoices were "final, periodic accounts"

[85] Given the procedural errors above, the Review Officer's decision cannot stand. Having received fulsome submissions from both parties on the proper characterization of the accounts, I will exercise my jurisdiction pursuant to rule 10.27(1)(b) to conduct the analysis afresh. The question to be addressed is whether the agreement between the parties contemplated that periodic accounts sent to the Appellants would be final or interim accounts, as those terms are described in more detail below.

[86] Periodic accounts may be interim or final. An interim account is issued pending a final account and is subject to future adjustment based on a host of considerations, including the outcome of the case: ***Samson Cree Nation v O'Reilly & Associés***, 2013 ABQB 350 at para 45 (Samson QB); ***Attila*** at para 24.

[87] Given their nature, interim accounts are not subject to review individually. If the final account is reviewed, all interim accounts issued leading to the final account are subject to that same review. Final accounts are those that conclude all previously issued interim accounts, or those that are final (and therefore reviewable) in and of themselves without regard to other accounts. ***Samson QB*** at paras 45-46.

[88] The characterization of invoices is subject to contractual interpretation and the principles set out ***in Samson Cree Nation v O'Reilly & Associés***, 2014 ABCA 268: ***Attila*** at para 20. A periodic bill can be final if it was the clear intention of both parties that the bill be final. The

burden of proving that periodic accounts are final is on the lawyer: ***Samson (QB)*** at paras 27 and 31; ***Davis & Company v Jiwan***, 2006 BCSC 658 at para 73.

[89] In this case the agreement dated March 19, 2019 referred to the Appellants retaining the Respondent in relation to two separate court actions. The first was Debut Development's claim against the municipality of Redcliff, Alberta *et al*.; and the second was to defend Ms. Prpick against a claim of defamation.

[90] The retainer letter is clear that the Respondent was unwilling to provide a definitive quote for legal services given the uncertainty surrounding the two actions. However, the Respondent agreed to "render our accounts on a regular basis" and encourage the Appellants to ask for updates on the status of the account as often they wish. In addition, the retainer letter indicated the lead lawyer on the Appellants' matters would bill at $500 per hour, but junior lawyers and paralegals would be used where appropriate to help control costs.

[91] Notably, the retainer letter does not include any reference to fees being subject to future adjustment based on any one or more factors, or any adjustment based on the success of the litigation. The only refence to billing was the reference above to the hourly rate of the lead lawyer and a commitment to use junior or other resources to control costs. This evidence points to a time-based fee arrangement.

[92] This conclusion is supported by the invoices themselves, all of which followed the same format. The accounts set out the detailed records of each lawyer's activity on the file with the associated time and dollar cost.

[93] Following the time records is a summary of the total fees, any courtesy discount applied, and a table showing each lawyer's individual rate, time, and aggregate fee for that invoice. Following this summary is a list of other charges, disbursements, and taxes aggregating into a final amount for the invoice.

[94] The last element of each Statement of Account is an "Accounts Receivable Summary". This summary indicates the amount of the current invoice, adds any previous receivables, and subtracts any payments made in the period to arrive at a "current amount due and owing". This summary is significant because it indicates that any prior invoices that remained unpaid, in whole or in part, became an enforceable debt owed to the law firm. This is inconsistent with the Appellants' contention that the accounts were "interim" and subject to later adjustment.

[95] Most telling is Ms. Prpick's acknowledgement during her submissions that she did not have any expectation other than to pay for the Respondent's time on an hourly basis. Similarly, when invited to point to evidence in the record to support the Appellants' position that the invoices were interim, Ms. Prpick conceded there was none.

[96] The whole of the evidence points to the conclusion that the parties agreed to a time-based fee arrangement that was not subject to future adjustment based on the success of the litigation, or for any other reason. That the Respondent would voluntarily apply courtesy discounts from time to time does not impact on this conclusion. What matters is the agreement the parties reached at the outset of the contract regarding payment terms: ***Attila*** at para 27.

[97] Here, the Respondent's accounts were periodic final invoices.

Conclusion

[98] In the result, the limitation period in rule 10.10 applies to bar the review of the nine accounts that are out of time. The only account subject to review is the invoice dated October 15, 2020 in the amount of $53,808.98. As such, the matter is remitted back to the Review Officer to conduct that review. The parties will coordinate a mutually agreeable date for that purpose.

[99] The Appellants successfully demonstrated a valid ground of appeal that triggered a fresh analysis of the contractual question, but they did not obtain a remedy on the substantive outcome. In light of these mixed results, each side will bear their own costs of this appeal.

[100] I would ask counsel for the Respondent to draft the Order flowing from this judgment.

Heard on July 24, 2024.
Dated at Calgary, Alberta this 30th day of October 2024.

Derek Jugnauth
J.C.K.B.A.

Appearances:

Danica Prpick,
for herself and Debut Developments Inc, self-represented Appellants

J. Halloran,
for the Respondent, Carbert Waite LLP