CV 05606

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the taxation of solicitor-and-client costs between MACDONALD & ASSOCIATES, Barristers & Solicitors, and SYED MAZHAR UL HUDA, Client

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Taxation of solicitor-and-client costs

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Hay River, N.W.T., on January 18, 1995

Judgment filed: January 27, 1995

Counsel for the Solicitors: David J. MacDonald

The Client appeared personally

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REASONS FOR JUDGMENT

1 This is a taxation of solicitor-and-client costs at the client's request. The issue on this taxation is the effect, if any, of an estimate given by the solicitor as to the total anticipated fees.

2 The taxation was conducted by me, in the capacity of "taxing officer", since it was heard on circuit to Hay River. I heard evidence under oath; I received copies of the accounts rendered by the solicitors to the client as well as copies of correspondence passing between the parties and internal computer "activity reports" maintained by the solicitors; and, I reviewed a transcript of the proceedings for which the client retained the solicitors.

3 The client, Mr. Syed Mazhar ul Huda, is an obviously educated man who holds a responsible position in the civil service. On April 17, 1994, the client was charged with two criminal offences: (1) impaired driving; and (2) having care and control of a

vehicle when his blood-alcohol concentration exceeded the legal limit. He retained the services of Mr. Steven L. Cooper, an associate solicitor in the firm of MacDonald & Associates in Hay River. The client gave instructions that he wanted to contest the charges.

4 On April 28, 1994, the solicitor wrote to the client confirming his instructions. Included in this letter was the following paragraph:

> I confirm that anticipated legal fees will likely be in the range of $1,500.00 to $2,000.00 exclusive of disbursements and GST. In the event that we are required to retain an alcohol absorption expert, I anticipate, at this stage, fees and disbursements of approximately $3,000.00 depending on his or her involvement. Please note that we have no control over the expert's costs, which can, in some instances, be recovered from the Court in whole or in part.

While there was no dispute that the estimate noted above was given, there was a great deal of dispute over what else was said about fees.

5 The solicitor testified that at their first meeting he had a general discussion with the client about fees. At that point he had not yet received Crown disclosure on the charges and so all he could do was advise the client, who was anxious to know the cost, of the usual charge in a "standard" case for this type of trial. He told the client about his hourly fee and that the fee would be based on the amount of time spent. He also advised the client that a good part of the work would be done by an articling student, Mr. Michael Hansen, and gave the rate at which Mr. Hansen's time would be

charged. Mr. Cooper however said he had no specific recall of all he said to the client and he relied to a great extent on his usual practice.

6 The client testified that he was not told either that he would be billed on a time spent basis or what was Mr. Cooper's hourly rate. He thought the estimate was for a lump sum. He acknowledges, however, being made aware of the involvement of the articling student and of the student's fee rate (although he recalls a different rate from that set by the solicitor).

7 On September 8, 1994, the solicitor wrote to the client to outline developments in the case. In this letter the solicitor wrote: "Because our involvement in the file is becoming somewhat more extensive that I anticipated, our fees may be somewhat higher than originally quoted." The solicitor then requested a further retainer of $1,000.00 for "anticipated fees and disbursements on the file". By that point in time the client had been billed four times for a total of $2,118.18 and had paid $1,903.34.

8 On October 25, 1994, the solicitor again wrote to the client enclosing a further account for $1,309.64. In this letter he stated:

9 > We take this opportunity to enclose our further interim statement of account and confirm that we anticipate receiving a further retainer of $1,000.00 for immediately anticipated fees. I confirm that our original quote did not anticipate the time being spent on preparation and submission of reports to the Crown's office and our continued attempts to have an alcohol expert attend. At this stage, we are unable to provide you with a firm quote with respect to expert fees, but will do so at our earliest opportunity. Please be prepared to provide our office with the funds needed to acquire

> the expert for trial on very short notice. We anticipate that our fees will be in excess of the enclosed account and the identified retainer.

10 By November 3, 1994, any need for expert evidence had dissipated but the solicitor wrote to the client as follows:

> I confirm that our additional research, particularly in the area of the potential medical evidence, is increasing our estimation of fees. The estimation of disbursements has been lowered considerably in the absence of the need to call the expert. I anticipate that the trial itself will likely cost between $1,500.00 and $2,000.00 in fees, above and beyond that already billed. This amount may increase, depending upon preparation time necessitated by the increasing complexity of the defense to be presented. I also confirm that we will require at least $2,000.00 prior to the trial date to cover prior accounts and anticipated work in preparation for trial.

On November 4th the client provided a further retainer of $1,000.00.

11 The client testified that when he gave Mr. Cooper the last retainer he told him that this payment "should be enough" considering the earlier quote. It was at this point he started to complain about the costs. He acknowledged that he was not keeping track of the accounts but this was because he had the earlier quote and he assumed the final bill would be close to it. He also acknowledged that Mr. Cooper, at various meetings, informed him of the ongoing state of affairs, but he says that he never gave his solicitor "carte blanche" to do whatever was necessary no matter the cost.

12 The solicitor, on the other hand, testified that the client was told on numerous occasions that costs were escalating but the client said that cost was "no object". the solicitor also mentioned, in correspondence to the client after the fee dispute arose, that Mr. Hansen had sat in on most meetings where fees were discussed and where the client was told that the costs were going to exceed the quotes. Unfortunately I did not have the benefit of evidence from Mr. Hansen at the hearing before me.

13 The client's criminal charges went to trial in Territorial Court on November 17, 1994. He was acquitted on count one but convicted on count two. The penalty was a fine with a period of suspension of Mr. Huda's driver's license. The client was upset by the result. He did not feel that his cause was presented as vigorously as it could have been. The client was equally upset about the total cost charged by the solicitors.

14 After the trial Mr. Cooper rendered a further and final account totalling $3,626.94. He testified that, in accordance with his usual practice, the final account was based on time spent but he took a global perspective on how much was billed to the client and then decided what would be "fair". He further stated that he discounted the fee on the final account by $1,000.00 although this was not noted on the account and the client was only informed of this once the fees were disputed by the client. As it turns out, on examination of the computerized internal activity reports, the actual amount by which the final account was reduced was $897.00.

15 By the end there were six accounts rendered to the client totalling $7,063.36 inclusive of fees, disbursements, and goods and services tax. Of this sum the total amount billed as fees was $5,642.00. The sum of $4,160.02 remains unpaid.

16 I note that the accounts, while itemized by date and a general description of the activity, do not indicate by whom the activity was performed, nor the hours spent, nor how the fee is calculated in reference to either Mr. Cooper's or Mr. Hansen's respective hourly rate. After examining the activity reports, however, I am satisfied that — unlike some of the problems I identified in the taxation of another firm's accounts in the case of Cooper et al v England, [1994] 7 W.W.R. 345, [1994] N.W.T.R. 305 — all of the time was at least recorded on the internal activity reports and there has been no duplicative billing for Mr. Cooper and Mr. Hansen.

17 The client does not dispute the fact that the work reported was done. Indeed it may be said that there is no dispute that the work was necessary in that the solicitors honestly felt it was needed to be done. The client simply says that the total fee was too much for the service. He had an expectation of a certain fee and, if he had known that the cost would be as high as it turned out to be, he would have at least considered other options.

18 A solicitor is entitled to reasonable compensation for his or her services. The factors to be considered are set forth in Supreme Court Rule 551:

> 551. Barristers and solicitors are entitled to such compensation as may appear reasonable to be paid by the client for the services performed, having regard to
> (a) the nature, importance and urgency of the matters involved,

(b) the circumstances and interest of the person by whom the costs are payable,
(c) the fund out of which they are payable,
(d) the general conduct and costs of the proceedings,
(e) the skill, labour and responsibility involved, and
(f) all other relevant circumstances, including, to the extent hereinafter authorized, the contingencies involved.

Included within these factors, in particular subrule (b), is the reasonable expectation of the client as to the amount of the fee.

19 In the above-noted England case, I discussed the obligations on solicitors when billing on an hourly basis. I also noted the need for care when giving estimates to clients. The clients are dependent upon their solicitors for advice and information. They usually have no idea how much any type of service should cost. It is to be expected, therefore, that clients will want to receive an estimate of anticipated fees. It is incumbent upon a solicitor to provide as much guidance as possible to the client in such matters including clearly spelling out any contingencies or uncertainties.

20 The Canadian Bar Association's Code of Professional Conduct, adopted by the Law Society of the Northwest Territories in 1989, sets out the following commentary in relation to the need to avoid controversies over fees:

> The lawyer should give the client an early and fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision. When something unusual or unforeseen occurs that may substantially affect the amount of the fee, the lawyer should forestall misunderstandings or disputes by explaining this to the client.

21 In this matter the solicitor provided an initial estimate of $1,500.00 to $2,000.00. All other written references to costs in the initial letter related to potential costs of experts. The solicitor and client disagree on what further information was given about the potential fees. In some instances the testimony of the client is expressly contradicted by the solicitor and vice versa.

22 As I also noted in the England case, the burden of proof on a taxation of a client's account always lies on the solicitor. Any doubt or ambiguity is to be resolved in favour of the client. It is worth repeating what was written by Lord Denning in Griffiths v. Evans, [1953] 2 All E.R. 1364 (C.A.), at page 1369:

> On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last hundred years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it....The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.

23 Based on all of the evidence I am satisfied that the client understood he would be charged on a time spent basis but he expected the total fee to be at least in the range of the estimate. An estimate by its nature must permit some minor variation. It is not a guarantee. An estimate, while not a contract, still has, however, some contractual effect.

24 In Price et al v. Roberts & Muir (1987), 25 C.P.C.(2d) 166 (B.C.C.A.), McLachlin J. (as she then was) wrote (at pages 169 - 170):

> In my opinion, there is no contradiction between the contractual term that the law firm's charges would be calculated on the basis of the specified hourly rates and the imposition of an approximate limit on those charges. If, however, an ambiguity did exist, I agree with the Chambers Judge that it would fall to be resolved against the law firm on the basis of the contra proferentum rule.
>
> Depending on the circumstances, a lawyer may not be bound by an estimate, if for example, he or she does work outside the estimate at the request of the client, or if the client by his or her conduct unduly increases the amount of the work, or if unforeseen circumstances add a new and unexpected dimension to the work. Such work would not fall within the estimate. Such factors, however, do not figure in the case at Bar. This was a case of the law firm significantly underestimating the amount of work entailed in taking the client's case to trial.

25 In Price the solicitor told the client that the fee would be calculated on a time spent basis and also estimated that the "full cost" of the action would be approximately $20,000.00 to $25,000.00. This estimate was later varied upward as the solicitor realized that the costs were more than anticipated. The accounts finally were approximately $10,000.00 more than the last estimate. The court reduced the accounts to the amount of the last estimate.

26 In Hunter v. Roe, [1990] 6 W.W.R. 85 (Sask. Q. B.), the solicitor estimated total fees at $5,000.00. The eventual fee was over $9,000.00. On review the court

reduced the fee to $6,000.00 because the solicitor did not make it clear to the client that the initial estimate might be exceeded.

27 In Romano Construction Co. v. Loopstra, Nixon & McLeish, [1989] O.J. No. 2275, the Ontario Court of Appeal reduced an account from approximately $90,000.00 to $75,000.00. In doing so the court stated that "it appears that the total bill as rendered was much in excess of the reasonable expectation of the client based on the correspondence from the solicitors to the client in the course of the litigation."

28 In this matter I note that the issues addressed by the solicitor in preparation for trial and at the trial were at least in contemplation at the time he wrote to the client giving the initial estimate: the possibility of retaining expert evidence, the investigation of the client's medical condition, the need to document the client's movements on the night of the offence. I also note that the only uncertainty addressed in that letter was the expert's cost. In addition, the solicitor phrased his estimate as "I confirm" that anticipated legal fees will be in the range of $1,500.00 to $2,000.00.

29 As the case progressed, the solicitor did advise the client as to increasing costs but these were addressed by asking for further retainers of $1,000.00. It seems to me that there was a "rolling" estimate but, after the first letter, no clear cut estimate as to the total cost. Shortly before trial an estimate of $1,500.00 to $2,000.00 was given for the trial itself. Yet the final account alone charged fees of $2,678.00.

30 I find I need not pass judgment on the quality of the work (as much as I am sure the client would like me to do). Suffice it to say that there is nothing to suggest that the work was not performed competently and with a view to protecting the client's interest in respect of the charges he was facing.

31 In my opinion this matter comes down to, as was said in the Price case, a situation where the solicitor significantly underestimated the amount of work entailed in the case. He failed to set out clearly, in writing and at an early stage, the complete terms of the retainer arrangement and the uncertainties inherent in taking on this type of case. The total amount charged to the client as fees is well beyond what I find was the reasonable expectation of the client.

32 For these reasons, I reduce the fees by $2,000.00. Since this is net of taxes, the total reduction from the outstanding bill is $2,000.00 plus $140.00 for goods and services tax leaving a balance owing to the solicitors of $2,020.02. This amount is to be paid by the client within 30 days failing which the solicitors may take out judgment for it.

33 There will be no costs of this taxation.

John Z. Vertes
J.S.C.

Dated at Yellowknife, NWT
this 27th day of January, 1995
Counsel for the Solicitors: David J. MacDonald
The Client appeared personally

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