

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COOPER REGEL LLP

Barristers and Solicitors/
Respondents

-and-

JESSICA DUTTON

Client/Applicant

MEMORANDUM OF JUDGMENT

Corrected judgment: A corrigendum was issued on June 20, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

INTRODUCTION

[1] Fees and disbursements charged to clients by their lawyers are subject to the supervision of the Court. This is part of the Court’s inherent jurisdiction over its officers, which include the lawyers who appear before it, and is codified in r 654 of the *Rules of the Supreme Court of the Northwest Territories*, R-010-96:

654. The charges of a solicitor for services performed by the solicitor are, notwithstanding any agreement to the contrary, subject to taxation as provided by this Part.

[2] When a client disputes a lawyer’s bill for fees and disbursements (referred to under the *Rules* as a Solicitor and Client Bill of Costs and in common parlance, an “invoice”), the client may ask that they be assessed or “taxed” by a taxing officer, pursuant to r 670. In addition to the more general procedural steps set out in the *Rules*, there are specific steps and requirements set out in rr 681 to 692 which apply

with respect to disputes about lawyers' bills. Those directly engaged in this case are rr 684 to 686.

[3] Rule 684 confirms a lawyer's obligation to file a Solicitor and Client Bill of Costs for taxation. Importantly, it also sets out the consequences for failing to file it. The lawyer (or law firm, as the case may be) forfeits the right to costs unless the taxing officer rules otherwise, and the lawyer can be ordered to repay any amounts paid by or retained on behalf of, the client:

684. (1) On service of an appointment for taxation on a solicitor, the solicitor shall file a bill of costs for taxation by the appointed time.

(2) A solicitor who fails to file a bill of costs under subrule (1) forfeits the right to costs, unless the taxing officer otherwise directs.

(3) Where a solicitor fails to file a bill of costs, the Court may, on the application of the client or the taxing officer and on notice to the solicitor, order the solicitor to repay the whole or any part of any moneys paid to or retained by the solicitor on account of the costs, and the order may be enforced as an order of the Court.

[4] The minimum requirements for the contents of a Solicitor and Client Bill of Costs are set out in rr 685 and 686. It must be signed by the lawyer or member of the firm claiming the costs and it must contain a reasonable statement or description of the services rendered and charges for those services, as well as a detailed statement of disbursements. The former requirement establishes authenticity, and the latter is intended to provide the detail required to the taxing officer to assess the reasonableness of the charges.

[5] In this case, Jessica Dutton ("Dutton") says Cooper Regel, LLP (the "Lawyers") failed to file a Solicitor and Client Bill of Costs in a taxation proceeding and she applies for an order pursuant to r 684(3) requiring the Lawyers to repay all monies she paid to it. The Lawyers have filed a cross-motion seeking dismissal of Dutton's application and an order that its fees and disbursements be assessed on a *quantum meruit* basis.

[6] For reasons below, Dutton's motion is granted, and the Lawyers' motion is dismissed.

BACKGROUND

[7] Dutton retained the Lawyers in early 2021. In July of 2022, she obtained an Appointment for Taxation of the Lawyers' accounts. Dutton filed an affidavit in the taxation, dated July 5, 2022. It included copies of invoices sent to her dated December 6, 2021, and February 25 and May 3, 2022. Notably, the invoices, while itemized by date, did not itemize the fees charged for each service. There was simply a total at the end of each invoice, as well as trust statements for transfers credited to Dutton's account. Dutton indicated at paragraph 3 of her affidavit that the lack of details was her primary concern:

I found Cooper Regel's invoices difficult to understand because while they listed a series of actions which were supposedly taken on my file, they didn't show the amount of time each of these actions took. When I received the second bill . . . I emailed Cooper Regel asking for more details, and a legal assistant there provided me with what she described as a "screenshot from the ledger" covering only the charges from the specific account. . . However despite me having said in that e-mail exchange that I wanted those details going forward, I didn't receive them with the next account . . .

[8] The taxation was first set for July 28, 2022. In addition to Dutton's affidavit, the taxing officer, John Paul Mercado ("Mercado") had before him an affidavit from lawyer Ronald Halabi ("Halabi"), which included a copy of the invoice sent to Dutton dated May 3, 2022, and a printout of a client ledger for work done on Dutton's behalf between March 2, 2021 and June 14, 2022. The Lawyers also submitted a draft party and party Bill of Costs and an Affidavit of Disbursements.

[9] The taxation did not proceed on July 28, 2022; however, Mercado issued directions on several points. These were recorded in a written decision dated August 11, 2022. Included was a direction to the Lawyers to file a Solicitor and Client Bill of Costs before the next taxation date, pursuant to r 684.

[10] Mercado explained his reasoning (as written):

The Bill of Costs submitted by Cooper Regel is based on Party/Party costs that include the service of the taxation and preparing the Bill of Costs which is not what Ms. Dutton is contesting. The purpose of this taxation is to tax the Bill that is being contested by Ms. Dutton and would be in the form of a Solicitor Client Bill of Costs detailing the work that was done including the time spent and fees, and disbursements.

Counsel is to submit a draft Solicitor-Client Bill of Costs as least 5 clear days before the next taxation.

[11] The parties were also directed to submit dates to proceed with taxation.

[12] On November 29, 2023, another taxing officer, Denise Bertolini (“Bertolini”), wrote to both parties with respect to re-scheduling the taxation. Her correspondence included the following (as written):

I don’t see a bill of costs on the court file that is in compliance with Rule 684 to 686. Rule 684 states that “on service of an appointment for taxation for a solicitor, the solicitor shall file a bill of costs for taxation by the appointed time”.

There is a faxed party/party bill of costs that was received by the court registry on July 21, 2022 from Cooper Regal. I don’t believe this is the proper bill of costs that is meant to be submitted for taxation.

[13] On January 8, 2024, Bertolini sent another email to both parties in which she confirmed the taxation would be held on January 24, 2024. She again reminded the Lawyers of the need to file the Solicitor and Client Bill of Costs five clear days beforehand.

[14] By January 23, 2024, the day before the taxation was scheduled to proceed, the Lawyers still had not filed the Solicitor and Client Bill of Costs. Bertolini wrote to the parties that day (as written):

I did not receive the Bill of Costs as mentioned in my email of January 8, 2024 and also mentioned in the Decision on Taxation of Costs dated August 11, 2022.

This morning I received a Party/Party Bill of Costs. What I was expecting was a Bill of Costs that included the dates work was done, the description of the work, and time spent on each item, etc.

The decision of the Taxing Officer, John Paul Mercado dated August 11, 2022 directed that the bill of costs was to be submitted 5 clear days prior to the next taxation. This is so that the taxing officer had time to review it before the taxation hearing. The Rules of Court also say that the solicitor shall file a bill of costs for taxation by the appointment time.

I also sent an earlier email in November 2023 (attached) wherein I reference rules about this from the *Rules of Court*.

I won’t be able to conduct a taxation hearing without the bill of costs or having time to review it before the hearing.

[15] Counsel for the Lawyers responded a few minutes later (as written):

Apologies, I did not understand, nor do I believe that breakdown was ever provided to my office in the fashion in which the bill of costs should be provided. I see in your November 29th email that you said you didn't believe this was the proper bill of cost, but this breakdown that you provided today was not included. Apologies for this oversight, I will have a bill of cost drafted and submitted right way taking into consideration your comments today.

[16] Counsel for each party exchanged additional emails that day, copied to Bertolini, wherein counsel for Dutton expressed his opposition to the Lawyers' plan to prepare and file the Solicitor Bill of Costs that day, noting the deadline was five days before the hearing as set out in Mercado's ruling on August 11, 2022.

[17] Early on January 24, 2024, Bertolini wrote to the parties to advise the hearing would be cancelled due to the Lawyers' failure to comply with Mercado's direction to file the Solicitor and Client Bill of Costs, and stated Dutton's counsel could file an application for an order directing the Lawyers to return the funds pursuant to r 684(3). She subsequently confirmed her decision in written reasons on February 27, 2024.

[18] No appeal was taken from Mercado's or Bertolini's respective decisions.

ANALYSIS

The Parties' Positions

[19] The parties' positions are straightforward. Dutton's position is she is entitled to relief under r 684(3) because the Lawyers did not file a Solicitor and Client Bill of Costs as directed by Mr. Mercado.

[20] The Lawyers argue a Solicitor and Client Bill of Costs was in fact before Mercado and Bertolini before the date of each appointment for taxation in the form of the ledger, which recorded time entries. In support of this, the Lawyers rely on affidavit evidence from Jamie Grift, a legal assistant employed by the Lawyers, where she deposes, in part (as written):

3. In addition to the above, our office was requested to provide a draft Solicitor-Client bill of cost, in the affidavit filed July 21, 2022, by Ronald Halabi. Our system-generated ledger provides a detailed and complete record of the time spent, the date the entry was made, and the cost associated with that entry.

4. The time tracking system Soluno is widely used by my legal profession. When a request for cost was made, we undertook to provide a printout of the information captured on Soluno that details the work completed. My understanding is that a solicitor-client bill of cost is for the courts to gain a better understanding of what services were rendered to the client and the cost associated with it based on the fee arrangement.
5. The information requested was provided to the courts and the taxation officer prior to July 8, 2022.

Discussion

[21] Respectfully, the Lawyers' argument that there was a Solicitor and Client Bill of Costs before the taxing officers cannot succeed.

[22] Jamie Grift's affidavit does not assist the Lawyers. It simply reiterates what evidence was provided to Mercado in Halabi's affidavit on the date set initially for taxation date, and suggests the materials Mercado deemed inadequate in his ruling should have been sufficient. This does not assist the Lawyers. When Mercado exercised his authority and directed the Lawyers to file a Solicitor and Client Bill of Costs, he did so having Halabi's affidavit before him, which had the ledger appended as an exhibit. Given his direction, it is obvious he did not consider the ledger, nor the invoices, was sufficient to constitute a Solicitor and Client Bill of Costs within the meaning of rr 685 and 686.

[23] Once Mercado determined the Lawyers had to file a Solicitor and Client Bill of Costs and gave his direction, the Lawyers had two choices: prepare and file a Solicitor and Client Bill of Costs as directed (and in compliance with rr 685 and 686) or seek review of the ruling. The Lawyers did neither. Although Bertolini reminded them of the need to file the document in emails sent November 29, 2023 and January 8, 2024, it was not until the day before the taxation was to proceed that they made any effort to comply with Mercado's ruling. By that time, the deadline he set, ie. five clear days in advance of the taxation, had passed.

[24] I have also considered the contents of the correspondence from counsel for the Lawyers to Bertolini, specifically her claim she did not understand what was required, and whether that might make a difference in the result. In the circumstances, it does not. Mercado and Bertolini were clear in their directions, each identifying the applicable rules, which the Lawyers' counsel could have reviewed. In his direction, Mercado specifically distinguished between a party and party Bill

of Costs and a Solicitor and Client Bill of Costs. Further, the rules Mercado and Bertolini cited are unambiguous with respect to what must go into a Solicitor and Client Bill of Costs for a taxation held before a taxing officer of this Court, and they are also unambiguous in describing the consequences which flow from non-compliance. Finally, if the Lawyers' counsel was struggling to understand what a Solicitor and Client Bill of Costs is, she should have sought clarification in advance of the filing deadline set by Mercado and reiterated by Bertolini on January 8, 2024. There is no explanation offered as to why the Lawyers' counsel waited until the day before the taxation to ask that question.

[25] The Lawyers have advanced no other arguments in response to Dutton's motion.

CONCLUSION

[26] Taxing Officers carry out their duties under the authority of the Court. The Lawyers failed to comply with the taxing officer's direction to file a Solicitor and Client Bill of Costs five clear days before the taxation. That direction, including the nature of the document to be filed, was clear and unequivocal. No acceptable reason has been offered for the Lawyers' failure to comply. Dutton is accordingly entitled to relief under r 684(3).

[27] There will be an order directing the Lawyers to repay to Dutton all moneys she paid to them, including any which is currently retained in trust. Repayment shall be made within 60 days of these reasons. Dutton is also entitled to the costs of this specific application on a party and party basis. The Lawyers' motions are dismissed. Should there be any dispute as to the amount to be repaid to Dutton, the costs of this application, counsel may seek a date from the Clerk to settle the terms of the order.

"K.M. SHANER"

K. M. Shaner

J.S.C.

Dated at Yellowknife, NT, this
23rd day of May, 2024

Counsel for the Client/ Applicant:

Jeremy Lewsaw

Counsel for the Barristers and Solicitors/
Respondents:

Shantelle Smith

**Corrigendum of the Reasons for Judgment
Of
The Honourable Justice K.M. Shaner**

1. An error occurred in Paragraph 16

Paragraph 16 reads:

[16] (...) noting the deadline was five days before the hearing as set out in Mercado's ruling on August 11, 2024.

Paragraph 16 has been corrected to read:

[16] (...) noting the deadline was five days before the haring as set out in Mercado's ruling on August 11, 2022.

2. The citation has been amended to read:

Cooper Regel LLP v Dutton (Taxation), 2024 NWTSC 22.cor 1

(The changes to the text of the document are highlighted and underlined)

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