Court of Queen's Bench of Alberta

Citation: Rath & Company Barristers & Solicitors v Sturgeon Lake Cree Nation, 2022 ABQB 556

Date: 20220818
Docket: 1801 11136
Registry: Calgary

Between:

Rath & Company Barristers & Solicitors

Respondent/Appellant

- and -

Sturgeon Lake Cree Nation

Appellant/Respondent

Reasons for Decision
of the
Honourable Justice B.B. Johnston

I. Introduction

[1] These two appeals relate to a notice of appointment for the review of a retainer agreement and lawyers charges (the "Appointment") involving Rath and Company Barristers and Solicitors ("Rath") filed by Sturgeon Lake Cree Nation ("SLCN").

[2] The first decision under appeal set aside the Appointment because it was filed but not served within six months of Rath's final account being rendered. Instead, it was served ten days prior to the Appointment date.

[3] The second decision under appeal extended the time for service of the Appointment, notwithstanding that the period for service had expired.

[4] On May 5, 2021, Justice MacLeod directed that the two appeals be heard consecutively before the same Justice of the Court of Queen's Bench.

[5] My reasons on both appeals are set out below. I have issued one decision given both appeals arise from essentially the same facts, both relate to the same Appointment, and both have the same action number.

[6] For the reasons that follow, I allow SLCN's appeal of Master Prowse's decision setting aside the Appointment and dismiss Rath's appeal of Master Farrington's decision extending time for service of the Appointment.

II. Background

[7] Rath represented SLCN in litigation with the federal government relating to its Economic and Agricultural Benefits Claims. On approximately October 9, 2014, SLCN signed a Contingency Fee Agreement with Rath relating to the litigation.

[8] Rath obtained litigation funding. Rath was advanced $10,000,000 by the litigation funders. SLCN was aware Rath obtained litigation funding.

[9] Rath issued their final account for legal services in the amount of $28,577,607.80 on February 16, 2018. Upon receipt of the settlement funds, Rath paid $23,335,236.95 to the litigation funders.

[10] On August 7, 2018, counsel for SLCN obtained a date and time from the Review Officer for an appointment for review of both the retainer and the lawyer's charges and filed the Appointment (Form 42).

[11] The Appointment was not served on Rath until December 24, 2018. The Appointment had a return date of January 3, 2019.

[12] Rath argued before the Review Officer that the Appointment was out of time pursuant to rule 10.10, as it was served more than six months from the date of the final account. The matter was referred by the Review Officer to the Court under rule 10.18, which allows for the review officer to refer certain matters concerning lawyer's charges or retainer agreements to the Court for a decision or direction.

[13] Rath's application to set aside the Appointment was allowed by Master Prowse on December 12, 2019: ***Rath and Company Barristers & Solicitors v Sturgeon Lake Cree Nation***, 2019 ABQB 949 [***Prowse Decision***]. SLCN appealed the ***Prowse Decision***.

[14] SLCN filed an application to extend the time for service of the Appointment under rule 13.5(2). On November 13, 2020, Master Farrington allowed the application to extend time for service: ***Sturgeon Lake Cree Nation v Rath and Company Barristers & Solicitors*** (13 November, 2020), Calgary 1801-11136 (Master) [***Farrington Decision***]. Rath appealed the ***Farrington Decision***.

[15] Each appeal was argued before me consecutively.

III. Rules of Court

[16] The Rules of Court set out below were the ones in force at the time of the Appointment. These Rules have undergone multiple amendments since the time that the Appointment was filed

including that the six month period for reviewing lawyer's charges has been increased to 12 months. Nevertheless, my decision is based on the following Rules in force at the time the Appointment was both filed and served:

> **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 6 months 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.
>
> [...]
>
> (3) If a client obtains an appointment date, the client ***must file***
>
> (a) a notice of the appointment in Form 42,
>
> (b) a copy, in a sealed envelope, of any retainer agreement between the lawyer and the client, if a copy is available, and
>
> (c) if the appointment is for a review of a lawyer's charges, a copy of the lawyer's account that is to be reviewed, if a copy is available.
>
> (4) The client or the lawyer who obtains an appointment date for review ***must serve*** copies of the documents filed under subrule...(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.***
>
> **Client-obtained appointment: lawyer's responsibility**
>
> 10.14(1) If a lawyer is ***served*** with notice of an appointment for a review of the lawyer's charges or retainer agreement, or both, the lawyer ***must file***
>
> (a) a copy of the account, appropriately signed, in respect of which the client seeks a review,
>
> (b) a copy of any time records upon which the account is based, and
>
> (c) a copy, in a sealed envelope, of any retainer agreement between the lawyer and the client whether or not the lawyer intends to rely on them.
>
> (2) The documents must ***be filed*** 5 days or more ***before the appointment date*** or ***within any other period specified by a review officer, and the review officer may vary the period before or after the time limit has passed.***
>
> [...]

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:

...

(c) require notice of the appointment for the review to be served on persons who may be affected by the review or who have an interest in the trust, estate, fund or property from which the lawyer's charges are or may be paid or charged.

(d) give directions about how notice of the appointment for the review is to be ***served;***

...

(g) validate ***service*** of the notice of the appointment or***, if service is impractical or impossible, dispense with service***.

Variation of time periods

13.5(2) The Court may, unless a rule otherwise provides, stay, extend or shorten a time period that is

(a) specified in these rules,

(b) specified in an order or judgment, or

(c) agreed on by the parties.

(3) The order to extend or shorten a time period may be made ***whether or not the period has expired***. [Emphasis added].

IV. Decisions Under Appeal

a. Prowse Decision

[17] Rath applied to set aside the Appointment. Master Prowse set aside the Appointment pursuant to rule 10.10, because notwithstanding the Appointment was *filed* within the six month period prescribed by rule 10.10, SLCN had not *served* the Appointment in time.

[18] Master Prowse noted that "[w]here a statutory provision, including one of the Rules of Court (such as rule 10.10) may be interpreted in more than one way, one should look to the purpose of the provision and interpret it in such a way as to achieve that purpose": ***Prowse Decision*** at para 13.

[19] Further, Master Prowse relied on ***Canadian Natural Resources Ltd v ShawCor Ltd***, 2014 ABCA 289 at para 30 [***ShawCor***] in which the Court of Appeal stated that:

> [t]he Rules have a status comparable to a statute: *Judicature Act*, RSA 2000, c J-2, s.28.1, s. 63. Therefore, the relevant Rules...must, like a provision in a statute, be read in their entire grammatical and ordinary sense, harmoniously with the overall scheme of the legislation, its objects and the intention of the legislature: *Rizzo & Rizzo Shoes Ltd*, [1998] 1 S.C.R. 27 (S.C.C) at para 21: ***Prowse Decision*** at para 14.

[20] From his review of the case law, Master Prowse determined that the purposes of rule 10.10 included:

- giving the client a fair opportunity to challenge a retainer agreement and/or accounts;
- putting lawyers on notice that a client has concerns in case they have an ongoing relationship;
- encouraging clients to voice concerns close to the date they arise, which allows both parties to retain records and make notes relevant to the concerns and helps prevent the difficulty of assessing complaints years after difficulties may have occurred;
- allowing lawyers to anticipate uncollectible receivables, or to know that collected accounts may have to be returned, within a reasonable period of time; and,
- allowing lawyers to have finality of accounts: ***Prowse Decision*** at para 16.

[21] Master Prowse considered three possible interpretations of rule 10.10 including: (i) whether the actual hearing for the review needed to occur within six months; (ii) whether the notice of appointment needed to be *filed and served* within six months, and; (iii) whether the notice of appointment simply needed to be *filed* within the six months. Master Prowse ultimately concluded that an appointment must be *both filed and served* within six months, as this was consistent with the purposes of rule 10.10. Specifically, he noted that "[e]ven though the review hearing is not held within 6 months, the lawyer is put on notice within 6 months that its retainer or accounts are being challenged, it can retain records and make notes to assist in memory, and it knows it cannot necessarily count on collecting its receivables or that its collected accounts might have to be returned": ***Prowse Decision*** at para 18.

[22] Master Prowse ultimately concluded that there is no flexibility in rule 10.10. He however noted that there is flexibility in rule 13.5. Although SLCN's application under rule 13.5(2) was not before him, he found that such application could "address the relative fairness and prejudice which would result in this case if the 6 months was extended": ***Prowse Decision*** at para 23.

b. Farrington Decision

[23] SLCN applied to extend the time for service of the Appointment. Master Farrington relied on the decision of Master Prowse that concluded the Appointment was filed but not served within the timelines required by rule 10.10. As such, he found the late service was fatal to the Appointment unless an extension was granted. SLCN sought an extension pursuant to rule 13.5(2).

[24] Master Farrington considered the factors set out in ***Samson Cree Nation v O'Reilly & Associés***, 2013 ABQB 350 [***Samson QB***], aff'd 2014 ABCA 268 [***Samson CA***], as recently applied in ***West v Logie Family Law***, 2018 ABCA 255 [***West***]. Master Farrington accepted that the threshold to meet the test was not a low one. He was underwhelmed with the explanation for the delay, but did not find any prejudice with the extension for service of four months. He found the litigation funding payment was paid immediately on receipt of payment of the account, so the additional time had no impact on the prejudice analysis. He considered some additional work

may have been done after the filing of the Appointment, but he determined there were financial remedies available to Rath for this additional work.

[25] Master Farrington opined that there was an intent to tax as the Appointment was secured and filed within six months. On the issue of overcharging, he made no conclusion, other than to say there was a significant amount of money at stake and while both sides presented sound submissions on this point, there were arguments that could lead to a conclusion that the ultimate fee may not be commensurate with the work actually done. Finally, he concluded that the relationship between the lawyer and client was not an influential factor given, in part, that the specific litigation related to the impugned account had been completed.

[26] Ultimately, Master Farrington determined the extension was a relatively short one. He found the test for an extension was met, particularly given the lack of prejudice to Rath.

V. Issues

[27] The issues before me are:

1) Did Master Prowse err in dismissing the Appointment under rule 10.10 because it was not served within six months?

2) Did Master Farrington err in extending the time for service of the Appointment under rule 13.5(2)?

VI. Standard of Review

[28] The standard of review for an appeal under rule 6.14 is correctness. An appeal from a Master is *de novo* and no deference is owed: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at paras 3, 19 and 30.

VII. Analysis

a. Master Prowse Appeal

[29] At the relevant time, rule 10.10 provided that retainer agreements or a lawyer's charges may not be reviewed if six months has passed after the date on which the retainer agreement terminated or the account was sent. A reading of the plain language of this provision would suggest that an appointment needed to be *filed*, *served*, and *argued* within the six month period.

[30] However, the analysis does not end there. A literal approach to statutory interpretation has been rejected in favour of a purposive and contextual analysis: ***Chieu v Canada (Minister of Citizenship and Immigration),*** 2002 SCC 3 at para 34.

[31] The modern approach to statutory interpretation requires that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": ***Rizzo & Rizzo Shoes, Re***, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at p 88.

[32] Legislative intent can only be understood by reading the language chosen by the legislature in light of the purpose of the impugned provision and the entire relevant context: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 118.

[33] The principles of statutory interpretation apply equally to the Rules: ***ShawCor*** at para 30.

[34] In applying the modern approach to statutory interpretation, any analysis of rule 10.10 is informed by the stated purpose of the Rules. Although the "purpose" section of a statute carries less weight than a substantive provision, it is still useful for interpretive purposes as a statement of legislative intent: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 451. Nevertheless, purpose language cannot be used to distort the legislation's specific operational words: ***Gallant v Farries***, 2012 ABCA 98, at paras 24-25; ***ShawCor*** at para 32.

[35] Rule 1.2 articulates the foundational purposes of the Rules which include providing "a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way". The foundational rules are consistent with the direction of the Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 that a culture shift is necessary to create an environment promoting timely and affordable access to the civil justice system. This should not only inform the court's interpretation of specific rules, but the overall approach to civil justice matters before the courts: ***ShawCor*** at para 5.

[36] Rule 1.7(1) provides further guidance. The meaning of the Rules "is to be ascertained from their text, in light of the purpose and intention of these rules, and in the context in which a particular rule appears". Such a purposive and contextual analysis also requires a consideration of the specific rules dealing with the right to review retainer agreements and lawyer's charges set out in Part 10 of the Rules.

[37] Our Court of Appeal has considered the purpose of rule 10.10, noting:

> The six-month limit provided in rule 10.10, like the former rule 647, balances the client's right to review a legal account against the lawyer's right to have an account reviewed promptly: *Samson* appeal. Among other things, the limit seeks to make it easier to resolve disputes by avoiding the difficulty of assessing complaints about events years past, puts lawyers on notice that a client has concerns, encourages clients to voice their concerns close to the date they arise and allows lawyers to anticipate uncollectible receivables within a reasonable period of time [...]: ***West*** at para 22.

[38] I agree with Master Prowse that the time limits in rule 10.10 are mandatory. As our Court of Appeal noted:

> A litigant who misses a time limit is *prima facie* out of court. Time limits are not mere free advice; they are law. The dilatory party seeking relief does so on the grounds (*inter alia*) that barring it would be unjust: ***Samson CA*** at para 200.

[39] However, I disagree with Master Prowse's conclusion that the interpretation requiring an appointment to be both *filed and served* within the six month period is the only interpretation that would achieve the purposes of rule 10.10. While Master Prowse's interpretation is consistent with the purposes of rule 10.10, the analysis does not end there. As will be explained below, the requirement of filing (but not necessarily serving) an appointment within six months provides greater consistency with the purposes of the rule.

[40] I note that Master Prowse limited his analysis to rules 10.10 and 10.13(4). He made the following comments:

> Sub rule 10.13(4) states:

> (4) The client or the lawyer who obtains an appointment date for review must serve copies of the documents ... 10 days or more before the appointment date, or within any other period specified by a review officer.
>
> However, simply serving 10 days prior to the review date does not address the 6 month requirement in sub-rule 10.10, quoted at the outset of these reasons.
>
> Counsel for SLCN interprets sub-rule 10.13(4) as some kind of a specific override to the more general 6 month limitation in rule 10.10. With respect, it is not. Taking his argument to the extreme, could a lawyer approach the review officer for an appointment 2 years after an account was rendered and say "don't worry about the timing – I'll make sure I serve the appointment 10 days before the hearing"? Obviously not: ***Prowse Decision*** at paras 6-8. [Emphasis in original].

[41] I recognize Master Prowse's concern about parties laying in the weeds and waiting a lengthy period of time to serve an appointment. Indeed, such conduct would run contrary to the policy reasons underlying rule 10.10. I also agree with the comments of ACJ Rooke that "there is an off-setting public policy provision that lawyers are not to be subject to surprise taxation after many years in a complex and lengthy case unless the retainer allows that": ***Samson QB*** at para 23.

[42] However, I disagree with Master Prowse's interpretation of rules 10.10 and 10.13(4) for a number of reasons. First, rule 10.13(4) would seem by its plain language to speak to the time requirement for service of an appointment relative to the review. Rule 10.13(4) provides that an appointment must be "*served*" at least ten days before the appointment date. Rule 10.13(4) addresses the service requirement for an appointment by ensuring that it is served at least ten days before the appointment date.

[43] Second, and perhaps more importantly, a contextual reading of Part 10 (Division 1) suggests that the concerns of delay are mitigated by the requirements in the Rules themselves and the authority that the Rules have given the review officer to control the process before them.

[44] As noted above, rule 10.13(4) directs that service may be "within any other period specified by the review officer." Therefore, to avoid the mischief envisioned by Master Prowse, the review officer is authorized to provide prescriptive timelines around service should they feel the need to do so.

[45] Further, rule 10.13 provides that a lawyer or 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). Once an appointment date is obtained by a lawyer or client, they are then required to "*file*" a number of documents including a notice of the appointment in Form 42. In other words, there is no ability to file the appointment and thereby comply with the six month time period in rule 10.10 without first obtaining the appointment date. Again, the review officer has control over the timing of the process as it is the review officer who dictates the appointment date. Furthermore, and to state the obvious, Rule 10.13 does not state that the lawyer or client must "*file and serve*" the documents identified.

[46] Consistent with the above considerations, the words "*file"* and "*serve*" are specifically used elsewhere in Part 10 (Division 1) to delineate between the requirements. For example, rules 10.13(3) and 10.14(2) address specific filing requirements, while rule 10.13(4) speaks to service.

While not specifically in issue on this appeal, other rules under Part 10 (Division 1) also expressly provide timelines for filing, service, or both: see, for example, rules 10.13(2), 10.26(4) and 10.26(5).

[47] Also, in numerous instances there is discretion for the review officer to determine specific time limits as they relate to filing or service. Rule 10.14(2) provides that a review officer may vary the time for filing either before or after the time limit has passed. Rule 10.14(3) allows for additional discretion on the part of a review officer in relation to filing deadlines. Rule 10.17(d) provides a review officer with the ability to give directions about how a notice of appointment is to be served. While not germane to this appeal, I note that the newly amended rule 10.17(h) now provides that a review officer may:

> 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.

[48] In my view, the amended rule 10.17(h) is further demonstrative of the discretion vested with review officers in directing the conduct of a review hearing.

[49] As discussed above at para 16, rule 10.13 delineates between which documents a client or lawyer must *file*, and the timeframe for when such documents must be *served*. The fact that a review officer may, on proof of service, proceed to tax an account despite the absence of the party served (rule 10.16) further supports an interpretation that service need not occur within the express confines set out in rule 10.10, but rather, to ensure that service takes place prior to a party attending before the court looking to review an account. This procedural step is expressly spelled out in rule 10.13, while rule 10.10 is silent on this issue.

[50] What, precisely, must occur is not discernable from a plain reading of rule 10.10(2). I concur with Master Prowse's analysis that interpreting this rule in a manner requiring an account or retainer agreement to be reviewed within a six month (now one year) period is not reasonable as the time period could pass due to delays outside of the control of the parties, such as a backlog in obtaining an appointment spot given a review officer's scheduling availability.

[51] In order to obtain a review of an account or retainer agreement, either party (lawyer or client) must file the court document which initiates the review process (Form 42) and supporting evidence within six months of the final account being sent to the client. The parties agree on this point. That is, there is no dispute that an attempt to *file* a Form 42 request more than six months after the final account has been sent will run afoul of rule 10.10.

[52] Rather, the issue is whether rule 10.10 is best interpreted as requiring both *filing* and *service* within six months. I find that it is not.

[53] To do so would, in my view, make service of the appointment date an essential element of rule 10.10 without expressly stating this fact. It would mean that parties would be *prima facie* unable to obtain closure on an account by operation of something akin to a limitations issue without being expressly notified of the effect of a failure to *serve*, as opposed to simply *commence*, their Appointment for a review.

[54] This interpretation runs contrary to other rules which expressly put parties on notice as to the time in which certain documents must be served, and where the failure to do so may be fatal to one's ability to look to the court for a remedy. For example, in matters which originate by way of Statement of Claim, the Rules provide that:

> 3.26(1) A statement of claim ***must be served on the defendant within one year after the date that the statement of claim is filed*** unless the Court, on application filed before the one-year time limit expires, grants an extension of time for service.
>
> (2) The extension of time for service under this rule must not exceed 3 months.
>
> (3) ***Rule 13.5 does not apply to this rule*** or to an extension of time ordered under this rule. [Emphasis added].

[55] In my view, if a mandatory limit is imposed by the Rules, this will generally be expressly set out in wording of the governing rule. If a rule (such as rule 10.10) is unclear on this point and requires interpretation, it must be read in light of the whole of Subdivisions 4 and 5 of Part 10. This includes reference to rule 10.13(4), which as noted expressly provides that *service* must occur *ten days prior to the appoint date*. On this point, I disagree with Master Prowse that such an interpretation would essentially elevate rule 10.13(4) to a rule "over-riding" rule 10.10. Rather, when read together, these two rules make it clear that Form 42 (and supporting evidence) must be *filed* within the six month period provided in rule 10.10 and *served* upon the party opposite at least ten days prior to the appointment date.

[56] This interpretation is supported by other rules in Part 10, Subdivision 5, which deal with appeals from a review officer's decision. Again, there is no ambiguity as to when filing and service must occur. For example, rule 10.26(4) provides that a party who wishes to appeal a review officer's decision to a judge must "*file* and *serve*" its notice of appeal, the record of the proceedings and any written argument "within one month" after the after the date of the review officer's decision. This is consistent with the Rules expressly delineating time limits in instances where the failure to follow the same may be fatal to a party's ability to seek a remedy.

[57] I find that Master Prowse's interpretation of rules 10.10 and 10.13(4) runs contrary to the plain language of these rules and does not give sufficient import to the wording of other rules relevant to the review process or sufficient credit to the review officer for managing the procedures before them.

[58] I find that when examined in their entire context, the express words of the rule support an interpretation that an appointment must be *filed* but *not served*, within the six month period articulated in rule 10.10. This conclusion is also consistent with a contextual and purposive analysis as discussed above, while concurrently giving effect to the plain language of the relevant rules and the authority given the review officer by them. The requirement that an appointment date be obtained from the review officer, and the overall discretion accorded to the review officer in setting time limits, addresses the mischief Master Prowse raised in his decision. Reading rule 10.10 as it relates to filing in conjunction with rule 10.13(4) as it relates to service is internally consistent with the overall wording and purpose of Part 10 (Subdivision 4) of the Rules.

[59] As I stated above, I agree with Master Prowse that statutory timelines are mandatory. However, in this case, the mandatory requirement in rule 10.10 relates to filing and not service. I therefore allow SLCN's appeal of Master Prowse's decision.

b. Farrington Appeal

[60] Rath appeals the decision of Master Farrington which allowed the extension of time for SLCN to serve its Appointment on Rath under rule 13.5(2).

[61] Having allowed SLCN's appeal of the ***Prowse Decision***, the issue of whether the time for service of the Appointment should be extended is moot. However, had I found that Master Prowse did not err in his decision, I nonetheless would have dismissed the appeal of the ***Farrington Decision*** for the reasons that follow.

[62] A client who has failed to commence review proceedings within the six month limitation period, is *prima facie* out of court.

[63] However, rule 13.5(2) provides the court with discretion to extend a time period specified in the Rules. The decision to extend time to review a retainer agreement or lawyer's charges is discretionary and is to be exercised in the interests of justice considering the policy and principles underlying the rule: ***West*** at para 14.

[64] The six non-exhaustive factors to be considered in an application to extend time for review include delay, prejudice, first intent to tax accounts, evidence of overcharging, agreement as to amount, and the relationship between lawyer and client: ***Samson QB*** at paras 169-232; ***Attila Dogan Construction and Installation Co Inc v Bennett Jones LLP***, 2015 ABQB 407, para 33 [***Attila Dogan***].

[65] In applying the above factors, I have assumed that the Rules required that the Appointment be filed and served within six months and that SLCN is out of time to have the charges reviewed unless the extension is granted.

(1) Delay

[66] SLCN offered little evidence to explain its delay in serving the Appointment, other than they had a different view of the interpretation of the requirements for service under rule 10.10.

[67] SLCN relies on the guide for parties seeking review entitled "Dealing with the Time Limit for a Review" and published on this Court's website by Alberta's Review and Assessment Offices (version in force as of January 1, 2018) (the "Guide"). While not binding on this Court, I note that under the heading "Understanding the Time Limit Rule" it states:

> What must occur within the 6 month period is not what it seems to be from a plain reading of Rule 10.10(2). The Rule seems to suggest that the account must be reviewed within the 6 month period – but if this were so, then the period could expire due to factors beyond a party's control. A review might be delayed due to the party's sudden illness or some other unforeseen factor. Moreover, the scheduling or rescheduling of a review will always depend on the Review Officer's availability. For these reasons, the Rule has been interpreted so as to require that review proceedings be commenced within the 6 month period. Review proceedings are commenced by the filing of a Form 42... Filing the form opens a court file for the review and thus "commences" the review proceedings.
>
> From the foregoing, it should be apparent that an account is in time for a review if a Form 42 for its review is <u>filed</u> within 6 months of the date on which the account was sent to the client. Booking a date for a review or <u>preparing</u> a Form 42 for filing has no relevance to the Time Limit Rule...: Guide, at page 3 [Emphasis in original].

[68] Judicial interpretation of rule 10.10 first occurred when Master Prowse made his decision, which was after SLCN missed the deadline to serve the Appointment.

[69] Given the lack of jurisprudence on the topic and the lack of clarity in the applicable Rules, I accept that SLCN held a genuine view that they need only file the Appointment within the six month deadline and had to serve it at least ten days before the scheduled date. In these circumstances, SLCN's reason for not having served the Appointment within the six month time period is a reasonable excuse for the delay even though based on an incorrect interpretation of the Rules and the law.

[70] I do not accept SLCN's argument that the delay was related to the preparation of the Chief Kappo affidavit as there is insufficient evidence in the affidavit to support this notion. The initial affidavit of December 19, 2018 does not include any evidence concerning a decision of when to effect service. In Chief Kappo's subsequent affidavit of August 23, 2019 he provides no compelling reason for the delay other than stating his belief (based on advice from counsel) that service must have been effected ten days prior to the hearing. In the same affidavit, Chief Kappo states that he met with counsel to provide his recollection of events on October 16, 2018. There is no reason provided as to why this could not have occurred at an earlier date. Chief Kappo deposes that he first obtained outside legal advice concerning Rath's accounts in March of 2018, after engaging in conversations with other Nations about the nature of the legal fees they incurred in settling similar claims. Again, this does not provide an adequate explanation for the December service.

[71] I agree with Master Farrington that SLCN's delay in serving the Appointment was a conscious decision. It troubles me that counsel for SLCN waited until Christmas Eve to serve an Appointment with a return date of early January. Certainly, such action virtually guarantees that Rath would have insufficient time to prepare and nothing substantive would occur on the date set for the Appointment. Instead, it would almost invariably result in an adjournment of the review while Rath prepares its response. That stated, I have considered that much like the requirements for service of certain originating documents, there is nothing technically contrary to the Rules in waiting until the 11th hour to serve such documents. In this case, unfortunately for SLCN, they wrongly believed they were waiting for the 11th hour to serve the Appointment when in fact their deadline for service had expired some four months earlier.

[72] The above raises the question I must grapple with on this factor: does SLCN's conscious decision to delay serving the Appointment for four months and very close to the review date disentitle it to an extension of time for service? I find it does not. Since SLCN had a reasonable (albeit incorrect) view as to the requirement of service of the Appointment under the Rules, their conduct in delaying service could be seen to be less blameworthy than a litigant that inadvertently misses clear deadlines or that knows of the deadlines but still misses them.

[73] Having found that SLCN's excuse for the delay is reasonable, I still need to consider the length of the delay itself under this factor.

[74] Unlike the facts in many cases relied on by Rath, the Appointment was filed within the six month timeline and the delay in service was only four months. I do not find a four month delay to be so excessive such as to deny an extension. Instead, I find the period of delay to be a factor favouring an extension.

(2) Prejudice

[75] In terms of prejudice, I agree with Master Farrington that there was no incremental prejudice to Rath associated with the additional four month delay in service. Specifically, the

amounts paid to the litigation funders were paid shortly after receipt of payment of the accounts. Rath did not wait a six month period, ensure there was no Appointment served, and then pay the litigation funder.

[76] I also agree with ACJ Rooke that "generally a taxation within a 2 year limitation period is not prejudicial to the respondent of a taxation": ***Samson QB*** at para 201. In the case before me, ten months elapsed from when the account was rendered to when Rath received notice of the Appointment.

[77] Nonetheless, I accept that "there is some prejudice, although not quantifiable" by virtue of "the simple fact of potentially disturbing collected revenue": ***Attila Dogan*** at para 45.

[78] Rath further argued that SLCN benefitted from the late service of the Appointment, as this resulted in Rath continuing to do work on other ongoing matters, including on their education claim. Between July 2018 and October 15, 2018, Rath filed pleadings, retained expert witnesses, produced an expert report, brought a bifurcation motion and had begun document production in relation to this claim.

[79] However, as Rath acknowledges in their brief, the Law Society of Alberta's *Code of Conduct* prevents counsel's withdrawal except in limited circumstances. Indeed, Rath acknowledges that given those sections of the *Code of Conduct* dealing with contingency fee agreements, they would not have been able to withdraw regardless of when they were served with the Appointment, and that Rath continued to perform work on the education file until they were instructed not to do so by SLCN. Specifically, the evidence shows that Rath continued to provide legal services related to the educational benefit claim until June 2019 notwithstanding having been served with the Appointment in December of 2018.

[80] I acknowledge that an argument exists that if the Appointment had been served earlier, the relationship may have deteriorated faster and instructions from SLCN not to continue may have been given sooner. However, we are talking about a four month differential, and this argument is speculative.

[81] Finally, I acknowledge Rath's argument that the mere absence of prejudice should not be sufficient to permit taxation beyond the six month period: ***Poundmakers Lodge v Scott & Co***, 2002 ABQB 745 at para 19. While this is correct, an absence of prejudice alone is not a determinative factor. The criteria for assessing whether an extension should be granted must be "weighed together in context as a whole": ***Attila Dogan*** at para 35.

[82] Notwithstanding that there may be some prejudice to Rath from the four month delay in service of the Appointment, I do not see that such prejudice is not capable of being remedied or dealt with through the course of the review process and the imposition of costs or other financial remedies. For the reasons above, I do not see the prejudice in this case to be so sufficient as to deny an extension.

(3) First Intent to Tax

[83] SLCN filed the Appointment within the six month period required by rule 10.10. However, they did not notify Rath until December 24, 2018 when they served the Appointment. There is no evidence that SLCN provided any indication to Rath that it was planning to have the retainer agreement or lawyer's charges reviewed before serving the Appointment. As such, Rath first became aware of SLCN's "intent to tax" ten months after their last account was rendered and paid.

[84] In ***Samson***, it was argued that the client's failure to provide any notice of an intent to tax, or even that it was contemplating taxation, weighed strongly in favour of declining to grant leave to extend the time limits for taxation. ACJ Rooke accepted this argument and noted that where a party "seeks equity and asks the Court to exercise its discretion", it does not merit equity where it comes to court with unclean hands.: ***Samson QB*** at paras 213 - 214.

[85] In this case, SLCN made a strategic decision to wait until December 24, 2018, to serve the Appointment on Rath. Although I question the judgement of SLCN, I do not find such conduct is suggestive of coming to court with unclean hands.

[86] I also recognize that the facts of this case are distinguishable from ***Samson***, considering that the extension sought in ***Samson*** was significantly longer than the ten months at issue in this case.

(4) Evidence of Overcharging and (5) Agreement as to Amount

[87] This Court is not determining the merits of the reasonableness of the retainer agreement or the lawyer's charges. What is required is a consideration of whether the client's complaint appears to have sufficient merit to justify a review notwithstanding that the deadline for seeking it was missed: ***Lewis Estates Communities Inc v Brownlee LLP***, 2013 ABQB 508 at para 35.

[88] The intent of this factor is to ensure that the procedural technicality of a regulatory limitation date does not shield overcharging by lawyers to clients: ***Samson QB*** at para 218. I agree with Rath that if overcharging is a factor, so too is any reduction of accounts: ***Attila Dogan*** para 48. This, however, will be part of an analysis of the merits during the actual account review. For the purposes of the present application, SLCN has provided sufficient evidence to demonstrate that their concerns regarding the final account have merit. In so finding I note, in part, the evidence provided in Chief Kappo's August 23, 2019 affidavit that following the issuance of Rath's account, he engaged in discussion with other Treaty 8 Nations and learned that they settled their claims for Agricultural Benefits for significantly lower legal fees.

[89] Further, there would appear to be some arguments that relate to the validity and enforceability of the retainer agreement including there may have been a lack of formal compliance with the provisions of rule 10.7: ***Tallcree First Nation v Rath & Company***, 2022 ABCA 174 at para 20 [***Tallcree***].

[90] I make no conclusion regarding the strength of such arguments, only that there appears to be at least some evidence that SLCN may be able to argue a lack of compliance with the formal requirements including with rule 10.7(3).

[91] As the majority of our Court of Appeal recently noted:

> The reasonableness of a retainer agreement should be measured on an objective basis having regard to the risks, facts and prospects underlying of the retainer: *Morrison* at para. 27(a). Reasonableness is to be determined based on the circumstances that existed when the retainer agreement was entered into: R. 10.19(2). An unexpectedly high fee does not necessarily mean that the agreement was unreasonable. Clients should not routinely be able to walk away from agreements they have made with their lawyers. In determining "reasonableness", consideration must be given to the interests and expectations of both the client and the lawyer: *Morrison* at para. 27. As the Review Officer noted, a client's

> unhappiness often first manifests itself after the lawyer has done all the work and incurred all the risk.
>
> Some of the factors commonly considered are the financial circumstances of the client, the risks involved, the client's knowledge of the risks and the implications of the agreement, whether liability was admitted, the expected attitude of the defendant, the risk that the lawyer might be paid nothing for his or her work, the amount of work likely to be involved, the responsibility for disbursements, and the expected time that the retainer might be in effect: ***Tallcree*** at paras 58-59.

[92] There is also some evidence of concerns related to the reasonableness of a 20% contingency fee on a claim in excess of $100,000,000 based on circumstances extant at the time the retainer agreement was signed. At the time, the Government of Canada had expressed an intention to make a settlement agreement in the foreseeable future. Further, the time limit set out in the Specific Claims Legislation had not expired and the fee may be seen as significant in proportion to what hourly time arrangements would have been. Again, I am not making any determination of the merits, nor am I dismissing the arguments and evidence put forward by Rath. However, I find that the above raises sufficient issues that warrant a review by a review officer notwithstanding that the six month deadline was missed by four months. To find otherwise would be to allow a procedural technicality to shield a lawyer from a client review of a single account in the tens of millions of dollars.

(6) Relationship between Lawyer and Client

[93] This factor considers the relationship between the client and lawyer and whether because of that relationship, either side had, through their dealings, given the other a reasonable expectation of certain conduct. The fairness of granting an extension will be assessed with regard to the nature of the relationship (as well as the history) between the parties, and how this relationship might inform on those reasonable expectations.

[94] The relative sophistication of the parties may also be considered: ***Samson CA*** at para 83; ***Attila Dogan*** at para 36.

[95] The parties in this case had a relationship since 2000. The legal services related to lengthy and complex treaty litigation relating to Treaty 8 Agricultural Benefits. The relationship continued for over four months after the Appointment was filed. It continued for another five months following service (i.e.: until June of 2019).

[96] As argued by Rath, SLCN was a sophisticated client that had engaged with separate legal counsel in the past, and that had a part-time corporate legal counsel on staff during Chief Kappo's tenure.

[97] It is true that SLCN did not advise Rath that they had concerns with their account. They failed to provide any advance warning of the taxation, and they continued to take the benefit of Rath's legal services, which are all valid considerations under this factor: ***Samson QB*** at paras 230-231. However, I have not seen sufficient evidence that the relationship between Rath and SLCN was such that Rath would have come to expect or did expect SLCN to have acted differently than it did. Nor have I seen sufficient evidence that SLCN expected that its conduct and approach to the review of the retainer agreement and lawyer's charges was acceptable to Rath given their relationship.

[98] Ultimately, I do not see that the relationship between Rath and SLCN weighs against or in favor of an extension.

(7) Other Factors

[99] Rule 13.5(2) requires a consideration of the interests of justice considering the policy and principles underlying the rule. In addition to the six criteria outlined in ***Samson***, it is also important to consider the social context of this case. Specifically, at the heart of this dispute is the appropriateness of a retainer agreement with and the fees charged to SLCN, being a First Nation. It is in the interests of not only our justice system but for society that First Nations be recognized and treated fairly. To deny SLCN an opportunity to have a review with millions of their dollars at stake simply due to a procedural technicality resulting in late service by four months would not be fair treatment.

[100] As noted by this Court in ***Attila Dogan***, the above factors are not necessarily exhaustive. They should be weighed together against the evidence put forward on the application and considered as a whole.

[101] Based on my weighing of the factors considered above, the interests of justice support an extension of time.

[102] If the appeal of the ***Prowse Decision*** was not allowed, I would uphold the ***Farrington Decision*** to extend the time limit to permit the review of the accounts and retainer agreement in accordance with rule 13.5(2).

VIII. Conclusion

[103] The appeal of the ***Prowse Decision*** is allowed.

[104] The appeal of the ***Farrington Decision*** is moot. However, in the event I had not allowed the Prowse appeal, I would have dismissed the appeal of the ***Farrington Decision*****.**

[105] The parties may speak to costs within 30 days of this decision.

[106] I thank counsel for their excellent written and oral submissions.

Heard on the 21st day of April 2022.
Dated at Calgary, Alberta this 18th day of August 2022.

B.B. Johnston
J.C.Q.B.A.

Appearances:

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