

Court of King's Bench of Alberta

Citation: Howland v Foster, 2025 ABKB 586

Date: 20251014
Docket: 2403 16310
Registry: Edmonton

Between:

Matthew Lawrence Howland

Appellant

- and -

Ronald S. Foster (KC) - Family Law Solutions

Respondent

**Memorandum of Decision
of the
Honourable Justice C.D. Millsap**

Appeal from Review Officer Decision by
Dennis Pawlowski, Review Assessment Officer

Filed the 21st day of October, 2024

Introduction

[1] This appeal involves a question of whether a client can rely upon a Litigation Budget (“Litigation Budget”) provided by a lawyer as an amendment to a retainer agreement. The Court finds that in some circumstances it can, and that these circumstances were present in this case. As such, the discussions around the Litigation Budget were sufficient to amend the retainer agreement and effectively cap the legal fees at a fixed number.

[2] On February 16, 2022, the lawyer, Mr. Foster, and the client, Mr. Howland, signed a formal retainer agreement. The retainer agreement provided for billing based on time spent at hourly rates on Mr. Howland’s family law matter.

[3] On February 1, 2023, about a year following the execution of the retainer agreement a trial date was set, and Mr. Foster forwarded a Litigation Budget for the trial. The Litigation Budget estimated the trial costs at \$200,000.00. Upon receiving the budget Mr. Howland signed it and sent an email stating that he could not exceed the amount outlined in the Litigation Budget. Mr. Foster did not respond directly to Mr. Howland’s statement. This response by Mr. Howland is critical to this analysis, as is the fact that Mr. Foster did not take any steps to either clarify his position or dissuade Mr. Howland from treating the budget as a fee ceiling.

[4] The trial took place in December 2023. Leading up to the trial Mr. Howland deposited the quoted \$200,000.00 fee and Mr. Foster provided regular accounts for his time as the file progressed. In the middle of the trial Mr. Foster issued an account that depleted the balance of the \$200,000.00 retainer. In the same account he deferred billing for “unbilled time” until after the decision in the trial was rendered. Mr. Foster also advised Mr. Howland that they would not come in on budget.

[5] After receiving the largely positive decision, on August 8, 2024, Mr. Foster issued invoice #4490 for \$38,492.00 for the “unbilled time”. Mr. Howland disputes this invoice, asserting that it exceeded the Litigation Budget and that no further billing was expected or permitted by the contract.

Contractual interpretation: Retainer Agreement vs. Litigation Budget

[6] Under Canadian law, the parol evidence rule generally holds that when the whole of the contract has been reduced to writing, extrinsic evidence is not admissible to add to, subtract from, vary or contradict the written contract: *Harco Enterprises Ltd. v Knelsen Sand and Gravel Ltd.*, 2021 ABQB 263 at para 147. Accordingly, evidence that would add to, subtract from, vary or contradict a contract is not admissible. However, evidence of surrounding circumstances can be used as an objective interpretive aid to determine the meaning of the words of the contract: *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 82.

[7] In the within matter, the Review Officer, relying on the parol evidence rule, excluded the evidence of the Litigation Budget and the email exchange. Specifically, he stated that evidence of what occurred following the written contract is not admissible for the purpose of his analysis.

[8] In my view, the Review Officer misapplied the parol evidence rule.

[9] To begin with, Mr. Howland was not challenging the integrity of the retainer agreement. What he was arguing is that the Litigation Budget and the email exchange—a year following the execution of the retainer agreement— modified or amended the retainer agreement. That is, there

was a subsequent agreement that amended the original agreement by capping the total fees that would be billed.

[10] The parol evidence rule does not prevent parties from amending terms of the contract through subsequent agreements nor from introducing evidence to support such amendments. It is well established that parties cannot, by mutual agreement, limit their ability to alter their legal relations through subsequent agreements: **Webster v BCR Construction**, 2012 ONSC 2217 at paras 54 and 56.

[11] Accordingly, the proper framework for analysis is whether the Litigation Budget and the email exchange amended the terms of the retainer agreement. Given that this is an exception to the parol evidence rule, the Litigation Budget and the email exchange could have been admitted as evidence and indeed should have been.

[12] The question to be resolved then is whether the email exchange that included the Litigation Budget, subsequent to the retainer agreement being signed, was sufficient to amend the retainer agreement and cap the fees at \$200,000.00. I find that in these circumstances it was.

[13] A contract is formed when one party makes an offer that is accepted by the other with the intention of creating a legal relationship and supported by consideration: **Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga**, 2021 SCC 22 at para. 35 (*Aga*).

[14] The requirements for a valid contract are according to **Oswald v Start Up SRL**, 2021 BCCA 352 at para. 34 (*Oswald*):

- a) there must be an intention to contract;
- b) The essential terms must be agreed to by the parties;
- c) The essential terms must be sufficiently certain;
- d) Whether the requirements of a binding contract are met is determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties;
- e) The determination is contextual and must take into account the communications between the parties and the conduct of the parties both before and after the agreement is made.

[15] Where terms are vague, ambiguous, or incomplete, no meeting of the minds can be found: **West Auto Sales Ltd. v Day**, 2024 BCPC 24 at para 36.

[16] Mr. Foster presented the Litigation Budget as an estimate. It is correct that there is no evidence that he intended to be bound by it at the time he presented it, nor is there evidence that he intended that the Litigation Budget should amend the retainer agreement. This fact militates against the Litigation Budget being deemed an amendment to the original contract, but the analysis does not end there.

[17] Upon receipt of the budget, Mr. Howland's email to Mr. Foster did clarify that he could not "exceed" the \$200,000.00 budget. There was no corresponding acknowledgment by Mr. Foster agreeing to treat the budget as a cap and therefore it cannot be said that there was an obvious mutual intention to amend the retainer agreement. However, in these circumstances, the response by Mr. Howland, making clear that he could not exceed the \$200,000.00 fee quote is indicative of HIS intention to amend the original retainer agreement by putting a cap on the total fees. Mr. Foster did not provide an express agreement to this, however his act of continuing to provide services was an implicit agreement that has the effect of binding him to the terms of the

Litigation Budget. It is wholly improper and illogical for a lawyer to provide a fee quote to a client, receive clear instruction from the client to not exceed that quote and then simply proceed to bill time to the file without ensuring that the client is either aware that the budget may be exceeded, or at a minimum advising the client that the budget is not to be interpreted as a fee cap; particularly when the quoted fee is intended to bring the file through to the conclusion of a trial.

[18] While Mr. Foster can argue that the intention was to provide an estimate of anticipated expenses, once Mr. Howland communicates to his counsel that he is relying on that estimate as a ceiling, it is incumbent upon Mr. Foster to take a positive step to either clarify that the estimate cannot be treated as a cap on fees or alternatively to advise the client that he may need to amend the estimate or alter his anticipated amount of hours spent on the file. In this case Mr. Foster provided the quote to his client, his client not only relied on the quote to make an informed decision about whether to continue to use Mr. Foster's services, he clearly communicated that the \$200,000.00 figure represented the limit to his willingness to continue his relationship with Mr. Foster.

[19] The figure quoted by Mr. Foster was entirely within his control, there was no evidence to suggest that it was negotiated or previously discussed. It was a figure proposed by a lawyer to his client that provided a context to the otherwise open-ended retainer agreement. The quote created a reasonable expectation in the client and the client immediately responded with an express reliance on the quote, the lawyer declined to respond to this reliance and as such the fee quote modified the retainer agreement by limiting how many hours could be spent or how much the lawyer could bill for the services.

[20] As noted in *Aga* the determination of whether subsequent interactions amend a contract are contextual and dependant upon subsequent communications and conduct. The important context here is that the amount of time to be spent on the file was entirely under the control of Mr. Foster, that is, Mr. Foster could choose whether or not he took certain steps himself, allocated the work to a student/associate, reduced his hourly fee, or otherwise simply decided to not spend further time on the file at all. The solicitor/client relationship is almost exclusively dominated by the solicitor, unlike many other fees for service relationships. As such, the provision of a budget that contains a final cost should not be undervalued in this analysis. It is effectively the only tool the lawyer can provide to the client that will enable the client to make an informed decision about whether to continue to employ their counsel or whether they can afford to go down the path they are headed. The obvious example is where a client is at a pace where they are faced with a decision to pursue settlement or trial, they would logically want to factor in the cost of the litigation in their own analysis of how acceptable a settlement offer is. If the budget provided by the lawyer cannot be relied upon, or is unreasonably low or high, the decision on settlement and what is in the client's best interests will be impacted.

[21] It was reasonable for Mr. Howland to rely upon the budget in deciding about whether to continue to engage the lawyer and/or requesting that the lawyer take steps to reduce the expected fees. It was also very reasonable and prudent of Mr. Howland to specify that he could not/would not pay any legal fees above the Litigation Budget. He clearly placed a high level of reliance on the budget. At that juncture, where the client expresses a complete reliance on the budget, the solicitor, Mr. Foster, had an obligation to advise the client that it was possible that the budget would be exceeded. Failing to do so only serves to cement the client's reliance on the budget, where the quoted fee is affordable and agreeable, it induces him to continue to employ the lawyer and continue down the path of trial.

[22] Mr. Foster's conduct following the delivery of the Litigation Budget did nothing but confirm to Mr. Howland that he would continue to work for the agreed upon rate and that the total cost would not exceed the estimate. He continued to issue invoices in the same manner and format as he had prior to the Litigation Budget, consistent with the original retainer agreement's hourly billing structure. Notwithstanding the fact that there was no contemporaneous communication from Mr. Foster confirming that the \$200,000.00 estimate was a ceiling or that billing would cease once that amount was reached, his instructions from his client were now clear: "I will pay you your hourly rate for services provided, up to the full amount of \$200,000.00." It is not sufficient for Mr. Foster to say nothing in the face of communicated reliance and simply continue to work on the file, his actions indicate acceptance of the client's position.

[23] It would be absurd for a lawyer to quote an hourly rate and provide a Litigation Budget and have no obligation to limit their services to those contemplated by the Litigation Budget. As indicated above, the relationship is completely lop-sided, an average client, particularly in a family law or criminal law context, would have no reasonable concept of how many billable hours it would take a lawyer to complete a file.

[24] To summarize, where a Litigation Budget or any other document is requested by, or otherwise provided to a client, and the client expresses a clear intention to rely on that budget as a ceiling, if the lawyer fails to clarify or dissuade the client from relying upon it, the budget serves to create a material alteration of the contract and cannot subsequently be unilaterally altered by the lawyer without further agreement. If, unlike in this case, the budget or estimate is provided and the client does not expressly communicate a reliance on that budget, the proposed budget will not automatically serve to amend the retainer agreement, the analysis will be fact specific and dependent on the circumstances of each case.

[25] The appeal is allowed; The Assessment Officer's decision is set aside and there are no further fees payable by Mr. Howland to his counsel over and above the fees that have already been paid. For greater certainty, nothing in this decision requires Mr. Foster to return any fees or disbursements that have already been paid.

Heard at the City of Edmonton on the 15th day of May, 2025.

Dated at Edmonton Alberta this 14th day of October, 2025.

C.D. Millsap
J.C.K.B.A.

Appearances:

Matthew Howland
Self Represented Litigant

David Rechlo
McAllister LLP
For the Respondent