

In the Court of Appeal of Alberta

Citation: Samson Cree Nation v O'Reilly & Associés, 2014 ABCA 268

Date: 20140826

Docket: 1303-0177-AC

1303-0178-AC

Registry: Edmonton

Appeal #1303-0177-AC

Between:

**The Samson Cree Nation, and Chief Marvin Yellowbird, on behalf
of himself and all other members of the Samson Cree Nation**

Appellants
(Applicants)

- and -

O'Reilly & Associés

Respondent
(Respondent)

Appeal #1303-0178-AC

And Between:

**The Samson Cree Nation, and Chief Marvin Yellowbird, on behalf
of himself and all other members of the Samson Cree Nation**

Appellants
(Applicants)

- and -

Parlee McLaws LLP

Respondent
(Respondent)

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Barbara Lea Veldhuis**

**Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice O'Brien
Concurred in by The Honourable Madam Justice Veldhuis**

Appeal from the Order by
The Honourable J.D. Rooke, Associate Chief Justice
Dated the 18th day of June, 2013
Filed on the 5th day of July, 2013
(2013 ABQB 350, Docket: 0903 19534; 0903 19141)

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**Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté**

A. Introduction

1. What is the Suit For?

[1] Facts are important in this case, but their importance only emerges once one has an idea of the competing basic contentions of the two sides.

[2] What are these two appeals? They are an attempt after almost 20 years of paid legal bills, to litigate the entire basis for billing.

[3] The evidence cited in the respondent's factum, para 47 in the *O'Reilly* appeal confirms that (though there are minor discrepancies in page or line numbers). These statements are also confirmed by the evidence cited in the other respondent's factum (para 20 in the *Parlee* appeal).

[4] The appellant client wishes to steer away from the facts. Instead it suggests that there should be broad rules of law which would put rigid duties on any lawyer discussing a retainer or fees with his or her client. The appellant cites case law about very different facts and issues. The respondent law firms suggest that these appeals are governed by the evidence, the issues, and the Queen's Bench judge's fact findings. They say that the contracts here were valid and answered all the questions.

[5] There is no need today to write a comprehensive textbook governing virtually all future assessments or reviews of Alberta solicitors' bills to their clients. It suffices to state those rules of law applicable in this case, and to apply them in the light of the facts here.

[6] Therefore, facts are important.

2. Need to Remember Fact Findings

[7] Facts are doubly important here for another reason. The oral and written argument on appeal did not always pay attention to the Queen's Bench judge's fact findings. The fact findings by the Queen's Bench judge under appeal are in his Reasons, 2013 ABQB 350, 564 AR 169.

[8] The appellant's argument often implicitly suggested either that the Court of Appeal should assume facts, or that the Court of Appeal should ignore the Queen's Bench judge's fact findings, and make its own. That contradicts much case law, including *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, 286 NR 1.

B. The Facts

[9] The Queen's Bench judge took great care with this case, reserved decision for months, and wrote painstaking and lengthy Reasons on all the topics.

[10] I have listed and reassembled the judge's many detailed fact findings. The list is Appendix A to this judgment. In addition, the Queen's Bench judge found that all the facts recited in Part II of the respondent O'Reilly's Court of Queen's Bench brief (pp 2-18) were correct. For brevity, I will merely list here some of the factual highlights of the judge's express findings.

[A] The appellant client sought out the two counsel in question, and retained their law firms to commence and run a very complex aboriginal and treaty lawsuit against the federal Crown in the Federal Court. The suit claimed over \$1.385 billion, and ran for about 20 years, including a segmented trial. The appellant client had many other legal, accounting, and administrative advisers (other than the respondents), and monitored billings and all other steps carefully.

[B] When retained, the two counsel were then with very small law firms. (Later one of them joined a larger firm.) At face-to-face meetings, each counsel refused to work on any kind of a contingency basis. Each insisted on being paid on a straight-time basis. The parties discussed the matter. Then the appellant client agreed to pay each law firm for each hour worked, at an agreed hourly rate for each lawyer. The client then insisted on and got a detailed billing format created by the client. The client and counsel expressly agreed that each periodic account (usually monthly) would be final for the work or time covered, and that there could be no later bonuses or deductions, no matter what happened later.

This was a continuous retainer, not an entire contract, but with periodic billing. The appellant client had a number of its trained consultants and employees review each detailed account, approve each account, and pay each account. (Payment stopped only the last few months at the very end of the relationship.) This was a sophisticated informed client.

[C] The only evidence on those topics led by the appellant client was from its in-house accountant who came on the scene later. He largely confirmed the respondents' evidence, and did not contradict it.

[D] The appellant does not challenge the hourly rates charged, nor the number of hours worked. (See Parlee Extracts, pp PR 64, 65; cf pp PR 66-68.) The concerns now advanced by the appellant were not voiced at the time by the client, who knew all about the facts and the work done by the lawyers each month. The general and historical evidence was put in at trial by one law firm, and the appellant client paid for it, years before the appellant stopped paying bills near the end.

Even when it stopped paying, the appellant client did not tell either respondent firm of its concerns, nor of its decision not to pay. Indeed the client took steps to conceal

those concerns. The client knew that it had a right to “tax” (review) legal bills, but delayed doing so for a while. In the meantime, the client got work on the second Supreme Court of Canada appeal from one of the respondent law firms, which work it hoped not to have to pay for.

The Queen’s Bench judge found that there was serious prejudice to the Parlee firm when the appellant client decided to stop paying, but to conceal its thoughts or any access to them, and thereby to go on getting more work from the Parlee firm for the last Supreme Court of Canada appeal while not paying and having hidden hopes of a big set-off. The judge found that the appellant lay in the weeds. (See Reasons, paras 179, 188, 197, 200, 201, 211-14, 218, 219, 229-31, and see Appendix A, Part 4.) Parlee’s factum, paras 11-18, 28, 33 cites the evidence, which supports the findings of prejudice to Parlee (though there is about a 4% error as to the amount of accounts unpaid). (Paragraph 19 has a typographical error in the date of a paid account, but that does not affect the result.)

- [E] The Parlee law firm unilaterally reduced its hourly-rate monthly bills by about \$1.877 million.

There is no *prima facie* evidence of overbilling.

There was no good reason for the client to delay requesting taxation (review). For the most part, the Queen’s Bench judge declined to exercise his discretion to extend the time for that (except for the last few bills by the Parlee firm).

C. The Issues

[11] The appellant client now has but two comparatively narrow concerns. First, that the amount of time spent at trial leading evidence on general and historical matters about treaty and aboriginal rights was disproportionate to the results achieved at trial, and to the Crown’s shift in its position during the trial (which I discuss in Parts H and J.2 below). And second, that the number of hours spent on an appeal to the Supreme Court of Canada exceeded the estimate given earlier by one of the respondents. But that estimate was not a guarantee or ceiling. But this is not a taxation, nor an appeal from one. It is a suit about whether it is too late to tax the bills, and what is the proper basis for billing fees.

[12] Therefore, these are the important issues, and where I discuss them:

- Can a solicitor contract with the client on the basis for charging fees? (Part D)
- If so, is any special procedure necessary? (Part G)
- Did the parties validly contract on the type of fee here? (Part E)
- Did the parties validly contract on whether monthly bills would be fixed, or tentative? (Part F)

- *Limitations Act* (Part H)
- Deadline for taxing (Part I) and extending it (Part J)
- Onus of Proof (Part K)

D. Can the Parties Contract for a Basis of Billing?

[13] The “old” Rules of Court in force before October 2010 plainly apply to this case. (See Queen’s Bench Reasons, paras 149 ff.)

[14] Neither party contends that there was a contingency fee contract, even though the appellant occasionally hints that there should be an element of that. There is no evidence of such an arrangement. Contingency fee contracts are newer in Canadian law, and in Alberta they require writing and some formalities. None of that applies here.

[15] But agreements between solicitor and client about the basis for billing are very old law. After all, the relation between solicitor and client is basically contractual. See **McDonald Crawford v Morrow**, 2004 ABCA 150, 348 AR 118 (para 58); Cordery on *Legal Services*, p E-1701 (para 3151) (9th ed looseleaf, April 2011 update).

[16] The appellant argues that “lawyers’ accounts are not ‘simply a matter of contract’”, and that a court may “assess the reasonableness of the lawyer’s fees on a *quantum meruit* basis and do so notwithstanding that the client may have agreed otherwise.” (factum in Parlee appeal, para 32). If the contract with the client defines the fee topic in issue, then either there is no room left for the court’s “inherent jurisdiction”, or to invoke it would be to deny that the parties can make a binding contract on the topic.

[17] A retainer contract binds. See **Steinke v Hajduk Gibbs**, 2014 ABQB 34, 96 Alta LR (5th) 155 (paras 51, 54), and authorities there cited.

[18] In Alberta, from the outset the Rules of Court stated that solicitors and their clients could contract for the basis of billing, and the Rules gave examples of some of the types of fee arrangements which they could make. (The Rules still say that.) At the relevant time here, former R 615 governed:

615. A barrister and solicitor may make an agreement with the client, respecting the amount and manner of payment of the whole or any part of past or future services, fees, charges or disbursements in respect of business done or to be done by the barrister and solicitor either by a gross sum or by commission or percentage or by salary or otherwise and either at the same or at a greater or less rate, than the rate at which he would otherwise be entitled to be remunerated, subject to taxation.

[19] Note that that Rule expressly allows a contract for

- a gross sum,
- a commission,
- a percentage,
- a salary, or
- other basis.

[20] The word “salary” is quite flexible, and has more than one meaning. It need not be confined to a fixed amount per week or month. It can also just refer to pay (to an employee). See 14 *Oxford English Dictionary* 387 (2d ed 1989); *Ballentine’s Law Dictionary* 1133 (1969). And workers are often paid by the hour.

[21] I have seen no authority which suggests that such a contract cannot call for fees based upon the number of hours which the solicitor devotes to the file, at a certain hourly price. And a number of authorities recognize and give effect to just such contracts: ***McDonald Crawford v Morrow***, *supra*; ***Steinke v Hajduk Gibbs***, *supra*, paras 54, 70, 79, n 23.

[22] Alberta case law confirms common knowledge that contracts for billing by hour at a fixed rate have become very frequent in Alberta since the late 1970s.

[23] Indeed, new R 10.5, which is similar to old R 615, expressly adds “an hourly rate” to the permitted list of bases to bill.

[24] Sometimes the argument of the appellant client (or occasional statements in some reported cases) seems to suggest a qualification. For some reason or other, any such fee contract, or any such legal bill, supposedly had to conform to the various tests found in the “default” mode of taxation (review), i.e. old R 613 (new R 10.2).

[25] But that suggestion is impossible, especially in Alberta. First, it is illogical. If the parties can legally contract for one billing method, and do, how can using that method be superseded or modified by a different method? Second, the suggested method or overlay (R 613) is only a default mode, absent anything else. Indeed new R 10.2 makes that clear (“Except to the extent that a retainer agreement otherwise provides . . .”). See ***McDonald Crawford v Morrow***, *supra*, para 18; ***Canada Life Casualty Insurance Co v Pahl*** (1997) 207 AR 65 (para 15(1)).

[26] Third, both the old and the new Rules expressly state that the fee contract can impose a basis for fees “at a greater or less rate, than the rate at which [the barrister and solicitor] would otherwise be entitled to be remunerated . . .” (old R 615; new R 10.5(3) is similar).

[27] There is one *dictum* which suggests that a fee contract may bind only the solicitor, not the client. See Funduk M. in ***Molstad Gilbert v Douglas Rentals*** [1983] AJ #664. But that was a

decision about contingency fee agreements. They have a very special history and legislative régime, and are governed by different Rules of Court not applicable here.

[28] A contract binding one side but not the other would be almost unique in the common-law world, and I can conceive of no reason to try to create such an odd creature here. I know of no Alberta decision which reaches such a conclusion with respect to fee contracts which are not contingency fees.

E. Did the Parties Agree on How to Bill?

1. Introduction

[29] As noted, the Queen's Bench judge repeatedly found that the client and the law firms clearly contracted on this subject. The solicitors were to be paid for hours worked, no more and no less, with no later adjustments. And the number of dollars per hour was agreed too. (See Reasons, paras 58, 69, 111, 113, 115, 225 and 228.)

[30] No oral argument suggested any reversible error in those fact findings (only in the number of times that later Parlee covering letters used the word "interim").

[31] Indeed the appellant's only witness agreed with the respondents' evidence, and the chambers judge's conclusion: see Parlee extracts, pp 373-74, and 376-77.

2. Agreement with O'Reilly

[32] The appellant client's factums surprisingly assert that that fact finding about O'Reilly's contract was based simply on the fact that the client had a budgeting and review process and paid the individual accounts (para 20, cf paras 80-81). Reference to the Queen's Bench judge's Reasons shows that that assertion is very incorrect. For one thing, the Queen's Bench judge acted on very clear direct firsthand evidence, not merely on inferences. Details of the evidence are cited in the respondent O'Reilly's factum (paras 137-39), which recitals are correct and support the respondent's statement.

[33] The appellant's oral argument also suggested that it was illogical and dangerous to rely on the client's having a budget review process and paying the monthly accounts. But the chambers judge merely used that as one piece of confirmatory evidence, and in my view it is both relevant and has significant weight.

[34] Nor can one suggest that the budget review of one monthly bill is useless, unless one assumes that the basis for billing is heavily influenced by final victory or loss.

[35] The appellant client briefly complains that the direct evidence was oral not written (paras 23, 58 of factum in O'Reilly appeal). But it was uncontradicted, and Alberta law does not require writing. That former requirement of writing in the 1914 and 1944 Rules was dropped when R 615

was passed in 1968. The Rules on contingency fee contracts required writing, but R 615 on other fee contracts did not. Nor did any other Rule on contracts without a contingency, require writing.

[36] In any event, the appellant client admits that later O'Reilly sent a letter confirming that fees were simply hours times rate (Parlee appeal, para 9 of factum).

[37] The appellant also quotes (para 57) an unreported decision of a Registrar of the British Columbia Supreme Court saying that "reasonableness" of fees depends on many factors, and that fees should not be set "simply by reference to the amount of time expended" (citing *Davis & Co v Jiwan*, 2006 BCSC 658, paras 219, 221). (Appeals from that decision were dismissed.) That Registrar's decision does not say that parties cannot contract for a different and more specific basis for billing (on which see Part F below). And that speaks of the facts in that *Jiwan* case. I see very little similarity between the facts or issues in that case and this one.

[38] The appellant's oral argument said that O'Reilly's discussion of billing on an hourly rate was in the context of rejecting a contingency retainer. I do not see that that undermines the chambers judge's fact findings and conclusion; quite the contrary. See subpart 4 below.

[39] The appellant's counsel also argued orally that O'Reilly never specifically said that the monthly accounts were final. I disagree.

[40] Unlike the appellant's factum, the respondent's factum correctly summarizes a great deal of the evidence. That evidence strongly supports the Queen's Bench judge's fact finding. The evidence comes from that respondent and also from the appellant client itself (paras 10-20). As noted, the appellant led no contrary evidence (para 48).

[41] I emphasize that there has never been any suggestion of any actual palpable error in finding a clear fee agreement in the O'Reilly case, let alone an overriding error.

[42] This important (factual) ground of appeal against O'Reilly and his firm is completely hopeless, doubly so in light of the standard of appellate review.

3. Agreement with Molstad and Parlee

[43] First, the appellant complains that though there was a letter confirming that Molstad's fees would be simply hours times rates, it did not talk about monthly or periodic billing (paras 9, 11). But those are different topics. Admittedly Molstad confirmed one topic in writing. Even if he did not confirm in writing another topic, I cannot see that that has any particular relevance. That is no ground to doubt the fact finding about the first topic. (Exactly what the appellant's factum's para 85 is about is unclear. If it has anything to do with the basis for billing, it is on the same point.) Of course I am only speaking here about whether oral agreements need written corroboration, not about the desirability of giving the client information.

[44] That is all that the appellant's factum says about the Queen's Bench judge's findings that the appellant and Molstad and his firm contracted to fix the basis for billing.

[45] The respondent Parlee's factum recites the evidence supporting the Queen's Bench judge's fact finding that fees would be hours times hourly rate (paras 34-36, 61). That recital is correct, and the evidence supports the judge's fact finding. Again, there was no contrary evidence. No one who negotiated for the appellant and made the fee contract gave any evidence.

[46] Once again, it is impossible to upset the Queen's Bench judge's fact findings on the subject. There is much evidence to back them up, and really no contrary evidence.

4. Likelihood

[47] Much case law suggests (as does the appellant) that courts should be careful where oral fee agreements are concerned. So I will add a few more comments, though they are not legally necessary, given the clear evidence and fact findings.

[48] Maybe in the 1950s, a contract to pay a lawyer simply for hours worked at a rate per hour, would not have been common. But the legal world and billing practices are very different now. Gone are the days when a long trial meant one which went over two days, and examinations for discovery were only a few hours long. Even allowing for changes in purchasing power, litigation then was rarely over really large sums, especially in Alberta.

[49] Even back then, a contract to pay legal fees on the basis of time alone was legal and authorized. English, Northwest Territories and Alberta Rules have continuously authorized such contracts since the 1880s.

[50] The lawsuit to be commenced here was against a huge, experienced, well-funded and well-staffed defendant, the federal government. It had access to archives and a lot of legal research. The suit was partly historical and constitutional, and also based on the law of trusts. It made a number of distinct claims over different activities and omissions. It claimed a vast sum, ultimately over a billion dollars. Clearly discovery would be extremely protracted. Litigation taking 20 years might have sounded pessimistic in 1989, but not impossible; it was patent that the suit would run more than five years.

[51] Both O'Reilly and Molstad were in tiny law firms then, with virtually no resources. Even the Parlee firm, to which Molstad later moved, was not large by national firm standards, nor large for this massive lawsuit.

[52] The client stood to recover hundreds of millions from the suit (and actually did), and maybe even to make over a billion dollars. And the defendant is very solvent. So the client would have run serious dangers with any billing arrangement which could take account of the results of the suit, or even take account of the amounts in issue. On that basis, the lawyers could have ended by collecting fees far in excess of fair usual rates. Especially if some settlement or capitulation, even a partial one, occurred.

[53] Under such a billing basis, no one would have had any idea for many years what the fees would be. So certainty had value for both the client and the lawyers.

[54] I will begin by describing the value to the lawyers of certainty and the great dangers of uncertainty. Then I will look at the client's need for certainty.

[55] The appellant wants to have later taxation based on optional R 613, which is in effect to a considerable extent a contingency agreement. Had the lawsuit failed, then such taxation could ultimately have allowed much less than hourly rates, despite the clear fee contracts.

[56] That would entail significant danger for the law firm, though of course less than what a pure contingency agreement would. No law firm could tie up a big fraction of its producing lawyers for years on one single file while receiving fees well below normal, in the hopes of a big return if and when their ship came in.

[57] These investments of time (and expenses) were colossal for a tiny law firm.

[58] Any idea that any ordinary Canadian bank would finance such a semi-contingency gamble for such sums that long, especially on a long-term (not a call-loan) basis, seems to me highly improbable.

[59] Furthermore, this client was an Indian Band with very significant annual revenues, but which had lost one of its very big assets. So pay-as-you go fees made sense for it too.

[60] Did the lawyers' right to send out monthly legal bills change that? That depends. What if there were any right to reduce the total bill significantly at the end? If the monthly cheques were just an advance against an unknown sum to be unpredictably fixed many years later, then practically speaking, a big fraction of that money would not be spendable by either law firm. Yet money paid out to staff and landlords and other suppliers is gone forever. Law firms typically have high expenses and overhead, which consume a significant fraction of their gross revenue.

[61] What if a law firm had to pay out most of each month's gross revenue to its creditors, and rendered its client appropriate skilful heavy legal services, yet later might well have to repay a significant fraction of that revenue suddenly and at once, on one turn of the cards? That firm would operate for years one step away from a very dangerous fiscal crisis. Only partners with frugal habits could hope to withstand such a crisis.

[62] Nor is all the rest of the monthly client cheques not spent by the firm on employees or creditors of the law firm, profit to the firm either. It is revenue, but much of it is a fair payment for the partners' personal labor.

[63] Of course the dangers which I point out here depend in part on taxation being postponed for many years; they would be smaller if taxation had to occur within two years or so. But taxation 18 years later is precisely what the appellant client here has attempted, and now argues that the law allows.

[64] I cannot avoid repeating the key point. Injecting any degree of pay for results, or poor pay for poor results, is directly contrary to the retainer contracts, which allowed neither upward nor downward adjustment for results in court.

[65] The appellant client did not approach O'Reilly and Molstad because they were handsome; it sought them out because they had a proven track record in large complex aboriginal litigation with contented aboriginal clients. But O'Reilly and Molstad and their families had to eat and clothe themselves too.

[66] No law firm can dare to put most of its eggs in one basket, and no law firm can tie up most of its eggs in baskets for many years.

[67] I see nothing improbable in the fee contracts which the Queen's Bench judge found had been made.

[68] And once such a contract was made with O'Reilly, is it surprising that the same client a little later would make the same deal with Molstad over the same lawsuit?

[69] If two law firms work together on the same lawsuit for the same client, how could one firm work on a contingency or part-contingency basis, and the other firm on a straight-time basis? What part of the ultimate recovery would be considered for the fee of the law firm with the contingency agreement?

[70] The actual deal found by the Queen's Bench judge is probable. But the one postulated by the appellant would be one-sided and unworkable, with very large risks for the law firms and maybe no possible bonus to offset that. It would create dangers for the client too. It is very improbable.

[71] The appellant client's desire now to change the fee bargain after the suit has ended, is doubly unfair.

[72] The appellant turned down an offer by the defendant Crown to settle for \$137 million. That offer was open to accept until November 2004. And after the Supreme Court of Canada gave leave to appeal, the appellant again decided not to make an offer to settle, and to proceed with the appeal, despite the risk of costs. The appellant carefully considered its options and decided to run the risk of continuing the litigation. (See O'Reilly's affidavit, para 96, and paras 39 and 49 of O'Reilly's factum.)

[73] During most of the lawsuit, the executives of the appellant client knew the suit and its progress and were happy with them. But a new Chief was elected in 2008, and in December 2009 he persuaded the new Council to seek to tax the accounts. (See EKE pp A179, 180, 181-82; EKE p A5, paras 25, 27, 28.)

F. Did the Parties Agree on Whether Monthly Bills Would be Final or Tentative?

1. Issues Influence Each Other

[74] A number of arguments in this case assume that this issue about finality of monthly bills is freestanding and entirely independent of any agreed basis to bill. So even if the law firms won one of these issues, supposedly they would start again at square one (and bear the onus of proof too) on the other issue.

[75] I doubt that there is any basis at all for that assumption. If the two topics (fee basis and finality of bills) have any independence at all, it is purely metaphysical.

[76] If billing is to be purely for hours worked, at a fixed rate, then postponing taxation (review) for what could be a long time has very little point. And postponement can work much harm, or make taxation impossible. Given the agreed basis for billing, taxation would be to question whether certain work was unreasonably undertaken, in light of what was known and should have been known when it was done. (And to check arithmetic and use of the right rates.)

[77] So purely work-based billing makes final monthly bills more than merely possible; it makes them much more sensible. Taxation adds certainty. If one has already created 95% certainty for any one bill, why wait many years to make that bill 100% certain?

[78] A taxing officer's later trying to discover what counsel had or had not known 15 years before, about the strategy of the opposing side in a lawsuit, would be very difficult. It would be much easier if investigated promptly.

[79] Conversely, billing depending in part on later events (not billing just for work done) is virtually impossible to review before all those later events have occurred. In a lawsuit, that could sometimes depend on the last appeal.

[80] Therefore, whether the parties agreed on the basis to compute fees, and what that basis was, helps to shape what they want from any bills rendered before the end of the lawsuit (or work being done). That will make more probable one type of monthly or periodic billing than another (final vs tentative).

2. Contractual Interpretation

[81] Parties are free to make impractical contracts. But where there is doubt about what deal they made or how to interpret its words, courts can and should lean toward what is practical and workable and achieves their aims. See *Trinier v Shurnaik*, 2011 ABCA 314, 515 AR 148 (para 34); *Schmidt v Wood*, 2014 ABCA 80, 569 AR 345 (paras 11-12).

[82] There is an even more fundamental rule of contractual interpretation. Where a contract has several clauses or parts or terms, or the same parties make two or more contracts at the same time on the same or related topics, the court interprets them together, not in isolation. They are to be

interpreted, if possible, to make the parts work harmoniously to achieve the overall goal, not to make the parts clash. See *Humphries v Lufkin Industries Canada*, 2011 ABCA 366, 68 Alta LR (5th) 175 (para 13). That has been expressly applied to fee contracts: *McDonald Crawford v Morrow*, *supra* (para 59, agreed to by para 15).

[83] So a contract (or part of a contract) on the basis of fees, and a second contract (or part of a contract) on the nature of monthly legal bills, working well together, is much more probable (especially between informed experienced parties). Two which clash are improbable. The client's experience and sophistication is an important factor: see *Steinke v Hajduk Gibbs*, *supra*, para 68, and authorities there cited.

3. What Was the Deal

[84] In oral argument, counsel for the appellant suggested that the respondents essentially argued that a statement about paying monthly based on hourly rates, is automatically a statement of finality of monthly bills. I do not agree that that is the argument of either respondent, and I have not relied on that argument.

[85] O'Reilly cites a great deal of law to show that parties are free to contract on this topic of periodic accounts, and whether they did is a question of fact (para 54). So does Parlee (paras 40-57). The authorities cited on the point are good law. Though most are only persuasive, one (*McDonald Crawford v Morrow*, *supra*) is binding in Alberta.

[86] The Queen's Bench judge found that the parties agreed that each periodic bill (usually sent monthly) would be final as to the work which it described. The fee could not be changed later, and no bonuses could be added nor deductions be subtracted later, even for later events, happy or unhappy. (See Reasons, paras 118, 141, 234(d).)

[87] The O'Reilly factum correctly cites much evidence which supports that fact finding (paras 57, 60, cf para 74). So does Parlee (factum, paras 61-67, though the hiring was not quite so long after the retainers). The Queen's Bench judgment held that the onus of proof was on the respondents, but they met it (para 31).

[88] The appellant's evidence on this topic is by its professional accountant who supervised checking and paying the legal accounts. He understood that each periodic account and its payment were final. (See Parlee extracts, pp 369, 370, 371.)

[89] In the O'Reilly appeal, the appellant client's factum says little about this vital factual question. Paragraph 37 suggests that it is a question of law, not fact, ignoring the contract issue. That factum relies on the client's factum in the other (Parlee) appeal.

[90] In that Parlee appeal, the appellant client again says that a later post-contract letter was silent on the point (paras 9, 11) (which is not of much weight: see subpart 4 below). Paragraphs

27-31 of that factum are merely on which Rules of Court apply, including the question of old Rules vs new Rules.

[91] A big problem is that the appellant's factum in the Parlee appeal airily brushes past the evidence of Molstad by mistakenly calling it a "bare assertion". In fact, it was sworn evidence, and there was no contradictory evidence. Despite minute quibbles as to the wording (in para 80), the only evidence led by the appellant confirmed Molstad's evidence on this point.

[92] Paragraphs 35-58 of the appellant's factum go in detail through some British Columbia and Ontario (and old English) case law on when a periodic (monthly) account can be final, suggesting that courts should be slow to reach such a conclusion, though largely admitting that the question is one of fact and that the parties can so contract. That factum also suggests a duty to tell the client not only what he is contracting for, but the effect of it (paras 46 ff). See my comments below in Part G. And the appellant's factum suggests that the solicitor has the onus of proving that he did it. Note my comments on onus below (Part K).

[93] The only Alberta authority which the appellant cites on the subject is a brief introductory *dictum* about the onus on the solicitor to prove that the client understood, in **McDonald Crawford v Morrow**, *supra*. The passage quoted is not about periodic accounts, but is much more general. The issue in the **McDonald Crawford** case was not quite that either; it was whether the solicitor could properly charge a bonus at the end for winning the suit, all in the context of how to interpret a particular fee contract. One reason that I say that the quotation in **McDonald Crawford** was a *dictum*, is that there was no possible dispute as to the terms of the contract there; it was written. And the Court of Appeal there did not refuse to apply the fee contract. Quite the contrary; the Court did apply it, and imposed a fee régime meaning that the earlier bills based on time could not be altered later when the very one-sided results of the lawsuit became known.

[94] On the wording of some Parlee letters enclosing bills, see subpart 4 below.

[95] The appellant asserts that the Queen's Bench judge did not "recognize the *quantum meruit* nature of a R 613 taxation" (Parlee appeal factum, para 81). But that is again circular reasoning, ignoring the fact that R 613 is a default mode, and so inapplicable when the contract provides otherwise: see Part D above.

[96] A quibble by the appellant about whether the contractual ban on later adjustments was a ban on increases only, is not convincing (factum in Parlee appeal, para 82). I suppose it is just possible that parties could make such a one-sided contract, so that the accounts would be final as against one side, but not as against the other party. But why a court would presume such an odd arrangement, and force clear disproof of it, escapes me. No authority to that effect is cited.

[97] Paragraphs 91-98 of the appellant's factum summarize the earlier discussion, allege that the Queen's Bench judge ignored the case law in this area, and accuse him of adopting a "lawyer-centric" policy. That is not at all an accurate or fair recital of the judge's careful analysis.

[98] Furthermore, the factum assumes that any injection of the viewpoint or interests of the law firm is illegitimate. I disagree. The court is not simply the client's advocate. It must apply the law and enforce legal contracts, all while respecting the evidence. The appellant never really suggests that the parties **cannot** contract on this topic: so whether they **did** is the big issue. And an important piece of evidence about that has to be each party's knowledge or aims.

[99] There is an even bigger problem. The appellant client's written argument is all about the Parlee accounts; its factums do not mention the O'Reilly accounts. It is true that the paragraphs cited are found in the appellant client's factum about the O'Reilly appeal. But that party's factum on the O'Reilly appeal really says nothing on the topic, except to adopt the contents of its other (Parlee) factum on the topic (see paras 5, 22 of the appellant's O'Reilly factum). (Paragraph 23 of the O'Reilly factum says a little about the evidence, which I have discussed above near the beginning of this subpart 3.)

[100] So the evidence and contract by and with O'Reilly disappear in the shuffle.

[101] The appellant's factum in the Parlee appeal knocks down a straw man, which is whether the Parlee accounts were subject to taxation: see paras 83, and 86-87. Of course they were. There was a time limit for taxation, but even that could be extended under R 647, in appropriate circumstances. Neither respondent firm has ever contested a right to tax.

[102] That factum seems to assume that any "taxation" must be on a *quantum meruit* basis, ignoring contracts, and treating R 613 as an immutable principle, not a default mode. I have explained above why that is legally incorrect (Part D). Once again the appellant's arguments are circular.

4. No Error

[103] All the appellant's lengthy and detailed dissection of some case law, especially from British Columbia, tends to be academically interesting, at times even philosophical.

[104] But here it simply serves to distract. The Queen's Bench judge found express contracts that periodic (monthly) accounts would be final. Of course gross inefficiency, fraud or other dereliction of duty in running the lawsuit could reduce or deny some fees. But poor results in the lawsuit could not do that, especially in a reasonably prompt taxation of the monthly accounts.

[105] The evidence proving that finality contract was substantial, and there was no, or virtually no, evidence to the contrary. The evidence of the appellant client largely was to the same effect.

[106] No factum alleges palpable or overriding error, and there is none.

[107] Some older case law discusses what is an "entire contract", and draws conclusions as to finality of monthly bills. But that is only a default mode, irrelevant when the parties contracted to a different effect. And an entire contract would not go past trial. Here the suit went at least two

appeals beyond that stage. Therefore, it is unnecessary to go into entire contracts and so further lengthen this judgment.

[108] Then the appellant's factum paras 67-84 discusses at length criteria for deciding whether a given account (legal bill) is final or tentative. It fastens on the fact that some routine covering letters by Parlee said that the enclosed account was "interim". And oral argument stressed that more letters did so than the Queen's Bench judge had been told or noted. Again, a few British Columbia cases are minutely dissected.

[109] If there were no contract, or no clear contract, on the subject, I suppose that the face of the later accounts could be evidence of conduct and so give some evidence of their nature. But since there are clear contracts on the nature of the monthly accounts, I fail to see how later particular words, especially ambiguous ones in accounts, can change the contract.

[110] Furthermore, I doubt that there is any error in substance here. The Queen's Bench judge found that Bench and Bar often use sloppy terminology. The word "interim" has long had, and still has, two distinct meanings: 7 *Oxford English Dictionary* 1105 (2d ed 1989). Its first meaning is between two times, or "before then". That meaning has nothing to do with finality vs tentativeness. The second meaning is that the thing is subject to change. The two possible meanings prove that use of that word in correspondence cements nothing.

[111] Nor did the word "interim" on some covering letters from Parlee mislead the appellant client. The appellant's professional accountant, who checked and paid those accounts, testified that he attached no special significance to that word. (See Parlee extracts, p 368.)

[112] Though the appellant suggests that it could assist solicitor-client harmony to postpone all fee disputes or taxations until the end of the retainer, in modern times that can often go on for some years, in this case almost 20. The offsetting disadvantage of litigating events and decisions 20 years old is obvious. The chambers judge also pointed out the danger to a close and trusting relationship, of hiding facts from the other party (Reasons, para 94; cf para 23). So the judge was alive to the policy and relational issues, and of the need to weigh evidence of the context when deciding facts and weighing time extensions under the Rules. I see no error whatever in that regard.

[113] Once again, the appellant simply ignores the process and tests for upsetting a judge's fact findings. This court cannot possibly upset this Queen's Bench judge's fact findings. There was a contract that the monthly accounts would be final as to what each covered.

G. A Broad Rigid Rule?

1. What Does the Appellant Argue?

[114] The appellant wishes in effect to bypass the Queen's Bench Judge's fact findings and the clear contracts between the parties. To do so, the appellant asserts a number of legal rules about a

lawyer's duty to explain to or advise a prospective client. (See appellant's factum in Parlee appeal paras 45, 49, 51, 53, 58, 60, 94, and factum in O'Reilly appeal para 49.) The appellant suggests that the rules are mandatory, and that any deviation from them makes all fee contracts unenforceable, even void.

[115] These arguments are not entirely clear, and at times seem almost circular. The appellant offers a number of different but overlapping duties, but their practical combined effect is one wide inflexible rule.

[116] In my view, the clear contracts govern and are not overridden. This client had no reasonable expectation that a taxing officer would disregard the fee contracts here. But the appellant strongly relies on this duty to explain, so I must spend some time discussing it.

[117] The appellant cites some case law. I do not suggest that it is all incorrect. But the appellant extrapolates those court decisions to situations where they do not legitimately apply, and such a rule would be pointless, harmful to both sides, and unfair. Appendix B shows how the cases cited should be distinguished.

2. Proper Aim of Duty to Inform

[118] It is true that explanations to clients, oral and written, are a good thing, so long as they are pertinent, accurate, and not confusing. It is especially important that explanations not be contrary to facts, law, or contract. The law, and the tenets of the Law Society, impose duties along those lines. I conclude below that the respondents did enough here to preserve and enforce the contracts. But lawyers should pay careful attention to the need to explain, both in order to obey laws and ethical rules, and also to avoid distressing disputes, or excuses for argument.

[119] In my view, any duty to inform a client or prospective client has two aims. First, to tell and explain to the client what it needs to know and does not know. Second, not to mislead or confuse the client.

[120] Obviously, an "explanation" which is difficult or impossible to understand would meet neither aim.

3. What a Lawyer Should Not Have to Do

[121] Though parts of the appellant's argument sound attractive in the abstract, in the present fact context they do much more harm than good. That is because the appellant's argument has no context or limits and ignores the facts here.

[122] Furthermore, the rule which the appellant postulates is unclear and it would be difficult in practice to know whether it had been complied with. In many cases it would be virtually impossible to perform the supposed duty. That would be very unfair to lawyers and might let

clients choose the basis for billing after the fact. It could often be unfair to clients also: cf the facts in *McDonald Crawford v Morrow*, *supra*.

[123] The devil is in the details. The appellant insists upon a wide, exacting, and always mandatory fixed script which a lawyer always must explain in advance to his or her client.

[124] I am disturbed by the idea that a willing bargain could be overridden for want of some totally superficial and unnecessary explanation of a topic which was already understood, or is academic. I repeat that the contracts here were the product of full discussion with a very sophisticated client. No one agreed to a mere formula of words neither explained nor understood.

[125] What if an accused person, after a full discussion with his lawyer, wanted to plead guilty? Would we force the presiding judge, or one of the lawyers, to warn the accused about nonexistent dangers, or about sentencing provisions in the *Criminal Code* which could not apply to him? If a lawyer is advising an experienced and willing guarantor of his own company's loan, under the *Guarantees Acknowledgement Act*, need the lawyer explain procedures or consequences which are inapplicable? Must the lawyer warn the guarantor that further advances may make the debt balloon, when the guarantee is expressly limited to the sum now being advanced? Surely not.

[126] My concern is not merely abstract or theoretical. The appellant client suggests (or suggested in the Court of Queen's Bench) that now there has to be clear proof that 25 years ago **both** counsel told the appellant two things: (a) that it had the right to tax (review) the bills at the end of the lawsuit, **and** (b) that the effect of the fee contracts was to remove as a basis for billing, most of the factors in R 613. Failing such proof, any agreement to bill on any other basis is unenforceable, the appellant contends. (One wonders whether that advice was supposed to mention the successor to R 613 passed 21 years later.) Yet the contracts were inconsistent with those other bases for billing.

[127] So what the appellant proposes goes much further than basic information. The appellant suggests that in 1989, both lawyers should have told the client that it had a right to have its accounts taxed (reviewed) on a basis the opposite of what the lawyer and the client were contracting for. Or, in the alternative, should have told the client that the proposed fee agreement was a waiver of that right, which right the client then had (appellant's factum in Parlee appeal, paras 49 ff).

[128] The first version of that suggestion does not make sense to me. If there is a clear agreement to pay only for the lawyer's time, it would be simply wrong to tell the client it had a right to have the billing adjusted later (maybe long after), to have payment based instead on very different factors such as results of the lawsuit, or degree of responsibility, or amounts in issue. That ignores R 615. To tell the client about one Rule and not the other, while contracting only under the latter, would be absurd. Pointless procedure would trump substance, and a legal contract would be overridden. The appellant relies on a mention in the *McDonald Crawford* case, *supra*, of a duty to explain effects, but the mention was *obiter*.

[129] Part D above shows that parties can contract to set the basis for legal fees. One cannot upset that law by a duty to “advise” the client of the opposite.

[130] The second version of the appellant’s suggested legal duty is its waiver (paras 45, 49, 51, 60, 71-82 of the factum in Parlee appeal). That version has some superficial attraction. But it is equally pointless and harmful.

[131] Why not explain waiver? Because there is not and cannot be any waiver. Only legal subtlety could frame this agreement as waiver of an existing legal right (to tax under all the R 613 factors). No law gives everyone a right to tax legal bills on a certain basis (eg Rule 613). Rule 613 was not mandatory, but was a mere default mode. Given R 615, it had two preconditions:

- (a) The client has hired the lawyer, and
- (b) The parties did not agree upon a different basis for billing.

[132] Only then would there be a right to taxation under the R 613 factors, and so be any question of waiving that “right”.

[133] Neither precondition existed here. So there was no right which could be waived in this case. The appellant’s proposal for informed “waiver” would merely create a new Catch-22 which the law firm could rarely if ever surmount.

[134] The appellant client asked O’Reilly to act, and inquired about a contingency basis for billing. O’Reilly explained why that would be absolutely impossible for his little law firm. He could act only by being paid for every hour worked at a certain amount per hour, no more and no less. And he had to be paid at frequent intervals. He would not add bonuses later, and the client would not get deductions later. Otherwise he declined to act. The client agreed to retain O’Reilly on all those conditions.

[135] Only in some imaginary parallel universe did the client ever have a right to be billed on, or to adjust its legal bills later to, some different basis. Still less was the client asked to waive some such right. No such variable-fee retainer ever existed. The client went instantly from no retainer to a retainer inconsistent with later adjustment.

[136] Furthermore the suggested broad and inflexible duty to explain all would have to cover many alternative and non-existent hypothetical scenarios. It would be confusing. Lawyers have no duty to give clients confusing advice about their lawsuits or their leases. Why should they have to do that about legal fees?

[137] Legal advice or explanations about fee arrangements should be anchored in the here and now, not be a theoretical textbook.

[138] On this appeal, the appellant need not discuss policy. I doubt that the appellant intends to argue any particular policy (except that explanations are desirable). But when it asks the court to adopt some broad mandatory legal rule, the court must look at policy before adopting the rule.

[139] I find it difficult to think of any policy which would support the suggested wide rigid duty to explain irrespective of the facts. The only policy which I could imagine which would support the fact-free rule suggested must flow from some assumptions. They would have to be along these general lines:

- (a) most lawyers tend to overreach and propose one-sided unfair fee arrangements;
- (b) most clients are inexperienced, vulnerable, and unacquainted with lawyers or legal bills;
- (c) any taxation or review of legal bills to clients should put much weight on an after-the-fact assessment of the wisdom and economy of the entire task given to the lawyer and of its fruits or lack of them;
- (d) any basis for billing other than that is likely a trap for any client, to be permitted only after applying serious inexorable precautions;
- (e) ordinarily the only fair thing to do is to make all legal bills, and payments of them, tentative until the lawyer's task is finished, no matter how long that takes, and no matter what happens in the meantime; and
- (f) the law is to be framed and viewed from the perspective of the client, or of the stereotypical client.

Indeed at times, written argument by the appellant steers very close to some of these assumptions. (See factum in Parlee appeal, first part of para 51, para 65.)

[140] There may well be cases where some of those assumptions are true. But I have grave doubts about any process or rule based on the theory that all of them are always true, or even true the great majority of the time. No other area of today's law advocates such unrelenting stereotyping of people. I will not and need not review the law of every province. But I have grave doubts that any similar assumptions or stereotypes are reconcilable with the established Alberta law. See *McPherson Leslie & Co v Moll*, 2014 ABCA 45, 569 AR 69 (paras 26-27).

[141] Nor should any breach of a duty to explain always or automatically invalidate the bargain made. The implications of such nullity would be devastating. In the medical sphere, that automatic result is contrary to Supreme Court of Canada authority, *Reibl v Hughes* [1980] 2 SCR 880, 114 DLR (3d) 1, 8-9. See Picard and Robertson, *Legal Liability of Doctors and Hospitals in Canada* 98 (4th ed 2007).

[142] A lawyer probably has a duty of care to warn his or her client about dangers, especially when the course proposed is not the usual one. But the lawyer need not warn of very unlikely dangers. For example, a sudden war with his country of citizenship, rendering him an enemy alien; nor the small chance of novel legislation rendering his entire business illegal; nor his opponent in litigation suddenly turning out to be an unsuspected diplomat with immunity from suit. Failure to explain such things could not be professional negligence unless the solicitor knew such a thing was

in the cards. So why should a phrase such as “duty of good faith” import such Lewis Carroll ceremonies?

[143] Even in the medical field, a physician has no duty to warn the patient of all risks. Only risks which are material, special, or unusual need be disclosed: Picard and Robertson, *op cit supra*, at 134-35.

[144] The appellant also suggests another fictitious waiver. This one would not be thwarted by failure to warn, but **created** by ignorance.

[145] Was paying a bill later a waiver of a right to tax (as suggested in para 52 of the appellant’s factum in the Parlee appeal), or to tax on a basis other than hourly rates? Clearly not. Must a lawyer retained by a client explain to the client (for example) that if the client wants to wait 18 or 20 years, and then sue the lawyer for negligence, that that will not be possible? Is the lawyer to tell the client that it has the right not to pay monthly bills, when the express contract is that it **will** pay them? And if there is no contract that the lawyer will wait many years to get paid, how can the client be told that it is giving up rights if later it pays bills?

[146] The notion of later payment as waiver of a right to delay taxation is made even odder by the *Limitations Act* (on which see Part H below).

[147] Still less did the client have a right to tax the accounts on some different basis, such as the results of the lawsuit. Nor was he being asked to waive such a right, despite the appellant’s repeated arguments.

4. What Was the Proper Duty Here?

[148] O’Reilly’s counsel submitted to us that what a solicitor must explain to his or her client is not the same in all cases. It must depend on the facts at hand on that occasion (factum, para 73, repeated in oral argument; cf Parlee factum, para 75). The more one thinks about it, the more sense that submission makes. Just as a judge’s reasons for decision should be based on what is in issue and live, and not be a full textbook on torts or contracts, so should a lawyer’s advice be about real practical issues. A Canadian textbook on fiduciary duties supports this counsel’s submission. See Rotman, *Fiduciary Law*, pp 324, 332, cf p 456 n 191 (2005).

[149] We must recall the factual context here. The lawyers and the client had twice agreed clearly on three things:

- fees would be based on hours worked and nothing else
- accounts would be issued at frequent intervals and paid promptly
- those various accounts would each be final as to the work there billed

(See especially Queen’s Bench Reasons, para 105.) The appellant client was sophisticated in its dealings with the lawyers. The client made no inquiries about the potential for taxation. The

agreements were simple. Their effect is obvious without more elaboration, and would become very obvious as time went on, the system operated, and all the client's monitoring of the work and the details continued.

[150] Paying attention to the actual facts has yet more importance in this legal area. The appellant suggests that taxing (reviewing) an account would be almost useless if it were confined to seeing if the hours were worked and the hourly rates were correct. (The review could also see if the time was reasonably spent: see *CCB Mortgage Investment Corporation v Rohata Development* (1982) 43 AR 137.) There is some truth to the appellant's suggestion; but there is much more truth in the converse of the suggestion.

[151] When taxation should occur, and what it should cover, very much depends upon the proper basis for charging fees. These parties agreed (after discussion) that monthly accounts would be final in the sense that there could be no later upward or downward adjustment, no matter what later happened in the lawsuit. It is evident that the appellant client could have no reasonable expectation that the taxing officer would disregard those fee contracts. The client accepted known legal services accounts, and paid them, for many years on that basis.

[152] One cannot say what a lawyer should tell his or her client about taxation (review) of legal accounts until one knows what is the fee bargain made or being made. Taxation is only a procedure, and it should not shape the substance of the bargain, nor the substance of what is to be explained.

[153] This is not a case in which the client had initially retained either lawyer on a broader or unstated basis and then later the lawyer wished to change the basis. What information and advice a lawyer must give the client then, is a different question not before us.

5. Did the Lawyers Say Enough Here?

[154] It is vital to recall that the two fee contracts here were made at face-to-face meetings with the two lawyers, after full discussion. This is **not** a case where a lawyer merely got a prospective client to sign two pages of legal boilerplate with no explanation.

[155] If a fee agreement was fully discussed and negotiated and freely agreed to, often explanation of it would be mere unnecessary repetition. Maybe signing unexplained legalese would not suffice. Maybe that would be a contract, but unenforceable (or voidable) for want of explanation or advice. But nothing like that occurred here.

[156] Here, the client lived and worked under the fee contracts for a generation, getting experience and independent accounting and legal advice many times throughout. It could at any time have dismissed one or both law firms, or asked for a different contract as a condition of continuing to use their services. It did neither.

[157] The issue is substantial understanding and knowledge, not observing unnecessary forms or manners.

[158] After the bargain with O'Reilly, a little later the appellant client also approached Molstad and the little law firm which he was then in. There was a similar discussion, and a similar deal was struck. The same remarks apply. (A few years later Molstad joined the larger Parlee firm.)

[159] Still less did O'Reilly mislead the appellant client about its rights to tax (Reasons, paras 184-85).

[160] Therefore the respondent lawyers had already explained what they had to before the fee bargains were made, and the appellant client fully understood. And the appellant knew all it had to about taxation.

[161] Any duty to explain was met.

6. Conclusion

[162] The explanations given here sufficed. It would do no good to force a lawyer always to tell the client what was academic, likely to be academic, or was contrary to the facts and the bargain. There is no such broader rule.

H. The Limitations Act

[163] The Queen's Bench judge found that the appellant's attempt in late 2009 to tax (review) and reduce a long series of legal accounts stretching back to the late 1980s, was too late. It violated more than R 647 (which I discuss below in Part I). It also violated the *Limitations Act*, RSA 2000, c L-12.

[164] For about four centuries, times to sue were a patchwork quilt. There were well over a dozen different time limits, found in a very large number of pieces of legislation. Which period applied usually depended upon the nature of the legal claim asserted, and so there was much litigation merely to characterize legally various suits, as that could dramatically affect the limitation period applicable.

[165] The Alberta Law Reform Institute studied the topic thoroughly, and recommended dramatic reductions in the number of pieces of legislation, dramatic reductions in the number of limitation periods, adopting a general limitation period only two years long, removing the legal analysis of the type of claim, and giving limitation periods substantive effect, not merely procedural effect. Then the Alberta government studied the matter further for some years. Ultimately the Legislature repealed most of the old legislation and enacted the *Limitations Act* instead. It fully incorporated the Institute's big recommendations just listed.

[166] The scope of the *Limitations Act* is broad: generally it bars and extinguishes claims brought too late. It applies to more than claims brought by statement of claim: it covers all requests for a "remedial order".

[167] A number of times the Alberta Court of Appeal has recognized the policy and scope of the *Act*, and interpreted it broadly. So has the Supreme Court of Canada. They have held that the *Act* covers court proceedings beyond mere suits by statement of claim. In particular, the Supreme Court of Canada and the Court of Queen's Bench of Alberta held that the *Limitations Act* covers all causes of action by its wide wording: see ***Yugraneft Corporation v Rexx Management Corporation***, 2010 SCC 19, [2010] 1 SCR 649, 401 NR 341, 482 AR 1 (paras 36-41); ***Sharma v 643454 Alberta***, 2006 ABQB 119, 392 AR 353 (para 34).

[168] The Queen's Bench judge here applied that law. The appellant client wishes to reopen all the past legal bills of both respondents (and their predecessors) back to the late 1980s, have the fees reduced, and get a refund. But it used no kind of formal process to request that until December 2009. Indeed it did not even mention any unhappiness with the bills before then, and took active steps to hide its concerns.

[169] The Queen's Bench judge held that those December 2009 claims by Appointment for Taxation were claims for a remedial order and so subject to the usual two-year limitation period (Reasons, paras 123-27). I agree with that legal conclusion. See also ***Lappoehn v Kambeitz***, 2003 ABQB 497, 37 CPC (5th) 386 (M).

[170] The appellant's factum in the O'Reilly appeal does not discuss this topic. But it covers it in paras 99-107 of its factum on the Parlee appeal, which its oral argument simply adopted. The appellant's basic argument is that it depends who is taxing the account. So if a client taxes there is no immediate result of the taxation, and so no remedy, and so no remedial order, and no time limit. I do not agree, either in concept or in detail.

[171] If a taxation reduces a lawyer's bill to his or her client, that is *res judicata*. Either the bill has already been paid, or it has not. If it has been paid, the lawyer must refund the excess, for a number of reasons. No one disputes that. And if it has not been paid, the client's duty to pay is reduced permanently in amount. So I cannot see why an Appointment to Tax (the originating document) is not a request for a remedial order. That it may lead to more than one step or remedy is beside the point. So does a statement of claim for foreclosure, or for an accounting. No one would suggest that they are not within the *Limitations Act*. The key word in the *Limitations Act* is "seek", and that does not connote directness, nor mechanical links: see ***Sharma v 643454 Alberta***, *supra* (para 34).

[172] The Queen's Bench judge found, and the parties agree, that all but a few of the accounts had been paid, including those for the work of putting in the general and historical evidence at trial.

[173] The appellant's factum says that time does not begin to run under the *Limitations Act* until there is a final account; but the chambers judge found that finality of the monthly accounts here, as discussed above in Part F.

[174] Generally, I find the *Sharma* decision, *supra*, convincing. I agree with its statement that limitation statutes have a purpose and are not mere technicalities. The Alberta Law Reform Institute said the same: *Limitations Report #55*, pp 16 ff (Dec 1989).

[175] The appellant client also suggests that the client could not have known that there was an injury until issue of the last Supreme Court of Canada decision. I do not agree. The Supreme Court of Canada confirmed the Federal Court of Canada and Federal Court of Appeal decisions. Indeed the strongest statement about the impugned evidence was in the Federal Court of Canada's decision. Then the Federal Court of Appeal said that it was *obiter* and so not binding on later trial judges, and that evidence needed further reweighing. (The passage concerned is in *Ermineskin Indian Band & Nation v Canada*, 2006 FCA 415, [2007] 3 FCR 245, 357 NR 1, at paras 48-50.)

[176] The client's big complaint was the time which one legal firm spent on putting in evidence of general and historical facts, in the first phase of the trial. The client knew all about that, in detail, at the time it happened. That phase of the trial ended in February 2005. That was clearly billed for (and paid) then, month by month. That showed the injury alleged. And the number of hours involved plainly made it big enough to be worth suing for, if the injury existed. That occurred and was known well outside two years before the Appointments. Even the Federal Court of Appeal decision came out about three years before the Appointments to Tax.

[177] A lawyer's work on a lawsuit is not useless and non-chargeable because it ultimately bears no fruit, still less because it bears modest fruit. No lawyer can guarantee success in litigation. After all, litigation's average success rate is 50%. See *Steinke v Hajduk Gibbs*, *supra* (paras 62 and 96).

[178] Besides giving the appellant client very detailed monthly legal accounts, the respondents also

- (a) gave the client a detailed and comprehensive summary of all expenses incurred in the litigation at the conclusion of the Federal Court trial proceedings, and
- (b) met with the appellant's Chief and Council to discuss the proceedings' status and to keep the client informed about the litigation and its expense.

(Details are correctly recited in O'Reilly's factum, paras 12, 38-39, and 127, and in Parlee's factum, paras 12 and 25.)

[179] The appellant client seems to suggest that the court has an inherent power to tax accounts, which power transcends mere limitation periods. I do not agree with such an idea; this court has held more than once that the Court of Queen's Bench has no inherent power to violate express statutory commands. See *Hansraj v Ao*, 2004 ABCA 223, 354 AR 91 (para 66), and cases there cited; *Kehewin Cree Nation v Mulvey*, 2013 ABCA 294, 556 AR 282 (paras 9-11, 18).

I. Rule 647 Applies

[180] Rule 647 says that an account cannot be taxed more than six months from delivery of the bill, if it was fully paid. (There are complications in the Rules about services completed later, but they do not affect the result, and no one relies on that.) Most of the bills here were paid. A few were not, and for them the time limit is one year, not six months.

[181] The new Rule is R 10.10, and it always uses six months as the time limit. But the Queen's Bench judge and all the parties rely upon R 647, not R 10.10, which only came into force about a year after the Appointments to Tax.

[182] The appellant client argues that the monthly accounts were only tentative, and so nothing had to be taxed until the last (or the final) account. But the Queen's Bench judge properly refuted that: see Part F above. That comes up again in para 53 of the appellant's O'Reilly appeal factum and elsewhere, but I will not keep repeating that discussion.

[183] We must recall that for accounts over two years old, the *Limitations Act* makes R 647 either academic or a mere adjunct reason for decision: see Part H above.

J. Extending R 647's Time Limit

1. Legal Topics

[184] Rule 647 expressly allows the court to extend the time limits in the Rule (and new R 10.10 in effect does so, as it does not exclude the general time-extension Rule in the Rules of Court).

[185] The respondents freely agree with that power, and indeed stress the flexibility and justice which that imports.

[186] Rule 647 does not list specific factors to consider, nor impose express preconditions, for extending the time. That Rule balances the client's right to proof of propriety of a legal account with the solicitor's right to have the client's right exercised promptly: *Lewis Estates etc v Brownlee*, 2013 ABQB 508, [2013] AR Uned 572 (para 28), recon den 2013 ABQB 731; *BA Capital v Focused Money Solutions*, 2012 ABQB 379, [2012] AR Uned 386, JDC 1001 04100 (M June 7) (para 11). Promptness of clients' complaints is important, to avoid the difficulties of weighing the merits of complaints about events years before: *Twinn v Sawridge Band*, 2012 ABQB 44, 531 AR 158 (para 38).

[187] A host of cases on extending various times under the Rules, and forgiving slips in procedure, all name a number of considerations, almost invariably applied. So the general approach and relevant criteria are open to little doubt. The case law on R 647's specific criteria offers no surprises, and is consistent with that law.

[188] The Queen's Bench judge reviewed the case law on extending R 647's times, drew from it a list of relevant criteria, held that the appellant client need not surmount any one of them as a rigid precondition, and weighed all of them.

[189] No party contends that his list of criteria was mistaken, nor that his general approach was, with some minor exceptions which I discuss below.

[190] Nor can I see any error of principle.

[191] The Court of Queen's Bench found that almost every one of the facts respecting almost every criterion favored the respondents, not the appellant client.

[192] The appellant client's factum only in the O'Reilly appeal deals with this topic. (Sometimes other issues discussed elsewhere in this judgment get mixed in that factum.)

[193] The appellant's factum seems to suggest that the Court of Queen's Bench has an inherent power just to bypass or ignore R 647 (para 30), but I disagree, for reasons given above in Part H. Here there is a power to extend times (on a principled basis). So I cannot see why "justice" would dictate ignoring the Rule and its criteria for extensions. See *Shreem Holdings v Barr Picard*, 2014 ABQB 112, [2014] AR TBE d MR 013 (paras 29-32). I do not read the *E* case as allowing the court to ignore an express statutory prohibition. (See *Re E* (1922) 66 DLR 399 (Alta CA).)

[194] The appellant client suggests that the list of criteria for time extensions may not be exhaustive (para 32, factum in O'Reilly appeal). That may be so, but it names only two other important criteria which the Queen's Bench judge supposedly overlooked (para 33).

[195] One is whether the bill is very large. If the appellant means too large, then the Queen's Bench judge did consider that at length. If it simply means large in absolute terms, then I disagree. It is suggested that the bigger the bill, the more likely the work was inefficient and that the bill is too large. That does not give any weight to the agreement on an hourly rate, nor to how much detail the client had of the work done; in this case that was a great detail known by a sophisticated client. Besides, in some complex suits, billing a total of 1000 hours would be patently modest. Conversely, \$15,000 merely to get an uncontested divorce, with no corollary relief being involved, and no matrimonial property, might seem suspiciously high. So might that charge merely for filing a builders' lien. The "overcharging" criterion (which the Queen's Bench judge weighed) makes sense, but mere "charging" does not. In other words, size of fee is relevant only in relation to something, not in the abstract. And here the appellant had considerable success flowing from the suit. (See O'Reilly affidavit, paras 35, 39, 97-103, Parlee Extracts, pp PR 69-72. That letter from the Chief is also Exhibit K to O'Reilly's affidavit.)

[196] The other relevant factor which the Queen's Bench judge allegedly overlooked is whether the solicitor violated a duty to tell the client within the time limit, of the right to tax. (That is repeated in paras 48-51 of the appellant's factum in the O'Reilly appeal.) But in fact the Queen's Bench judge's Reasons do discuss that topic at considerable length (paras 91-105, 184-86, cf 85

and 187). The Reasons just do so in a different Part. See further Parts G.4 and G.5 of this judgment. And the judge's fact findings render the criterion irrelevant in effect in this case.

[197] The appellant's factum also suggests that the considerations for time extension of taxation in the case law need not apply to every case (para 32, factum in O'Reilly appeal). The appellant says when an intent to tax arose is influenced by how clear the client's understanding was.

[198] The factum of the appellant also suggests that whether the delay was **excusable** is virtually irrelevant (appellant's factum in O'Reilly appeal, paras 34-35). That surprises me. Cases on extending other time limits, or curing slips, almost invariably weigh that factor. And it is the one most often relied upon by those seeking such extensions or relief. It has been applied to R 647 or its successor: *Lewis Estates etc v Brownlee*, *supra* (paras 31, 48); *BA Capital v Focused Money Solutions*, *supra* (paras 12, 14).

[199] If the person seeking more time or other relief had no real chance to comply (whether because the time ran out before he or she could physically perform, or because of illness or being misled), that appears to me most relevant. Dropping that factor would be unfair to litigants who have accidentally and understandably missed a deadline. Conversely, parties who knew these rights, and knew the law, and deliberately did not follow the Rules, commonly face an uphill battle, if the delay is more than slight.

[200] We must go back to first principles. 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. If it is not unjust, why should the court interfere and give an indulgence? If the applicant were the knowing author of his or her misfortune, where would be the injustice?

[201] So reasons for delay do matter; they cannot possibly be irrelevant.

2. Factual Issues

[202] Once again the appellant client raises whether accounts were final or tentative, and when the "injury" should have been known (para 37 of factum). I have examined that above (Parts F and H).

[203] The appellant client's argument about prejudice is odd. It argues that there was no prejudice to O'Reilly (factum in O'Reilly appeal, paras 53-58). That may be true of the period within the two years in the *Limitations Act*. But its arguments against any prejudice to O'Reilly in the preceding 19 or 20 years are vague, do not convince me, and do not cite evidence. O'Reilly's factum (para 117) correctly cites the evidence of such prejudice. The evidence is clear and supports O'Reilly.

[204] The Queen's Bench judge said that because of the other issues, he need not say if there was prejudice (to O'Reilly) before the last two years. But if he had to decide that, it would not have been in favor of the appellant client (Reasons, para 199).

[205] Oddly, the appellant's factums say nothing about prejudice to the Parlee firm (or its predecessor). Maybe the factum (on the Parlee appeal) adopts its sister factum (in the O'Reilly appeal) on this subject. But I can find nothing in either factum of the appellant about prejudice to the Parlee firm from delay in taxing, or whether to bar a time extension because of that. Maybe that is because of the Queen's Bench judge's strong finding of prejudice (see para 10(D) above). Yet the appellant's factum in the O'Reilly appeal (paras 32, 52) acknowledges that that is an important consideration to weigh, maybe (in its submission) one of the few important ones. The appellant client's factum in the Parlee appeal does not list extending time to tax as a ground of appeal (para 24). And prejudice may be inferred from inordinate delay: see *Lewis Estates etc v Brownlee*, *supra* (paras 62-64).

[206] The appellant's O'Reilly appeal factum discusses exceeding a time estimate (paras 65-67). The chambers judge's discussion of exceeding time estimates was in the context of whether there was an apparent overcharge justifying a time extension (Reasons, paras 221-22).

[207] In oral argument, the appellant's counsel suggested that Parlee's evidence that it did not know that its accounts were disputed once the appellant was not paying the monthly accounts, lacked credibility. But credibility of evidence, especially undisputed evidence, is for the Queen's Bench judge. The appellant mentions only one possible inference from one piece of evidence, and ignores all the contrary direct evidence, including evidence of context and the relationship between the client and its longstanding lawyers. Once again we cannot ignore the standard of review on appeal.

[208] There is one other factual issue. As noted, the appellant now suggests that one law firm largely spent some months at trial putting in evidence on general and historical topics which (during the trial) turned out not to be important to that part of the trial. That objection does not apply to the other respondent law firm, which was not involved in that work.

[209] But it is by no means clear that that bulky evidence was useless or not later relied upon; the evidence on that topic conflicts in the trial judgment in the Federal Court Trial Division (O'Reilly trial brief, para 132, citing Westlaw version of judgment, vs appellant's factum para 69, which may cite para numbers from 2005 FCC 1622, **not** from Westlaw).

[210] It is important to observe the sequence of events. The appellant's suggestion is that one law firm spent a long time at trial putting into evidence the historical evidence which it had spent years finding and accumulating. It does not complain of the accumulation process, which plainly was needed for a great deal of the statement of claim, e.g. aboriginal rights, trust rights, and treaty rights. Instead the appellant suggests that this evidence was led after various changes of position by the defendant made it unnecessary.

[211] But this general and historical part of the trial (plus one other) were only severed 17 months into the trial. The general and historical evidence was intended to apply to all phases of the trial, not just the first one. Some of those phases of the trial have not been heard yet. Furthermore, the suit claimed that oil and gas under lands outside but near one Reserve, were part of the appellant's traditional lands.

[212] The defendant did not unconditionally admit the appellant's beneficial ownership in all these lands until about the time of the severance, ie 17 months into the trial. Nor did it admit that the capital moneys claimed should be moved to a trust for the appellant until closing oral argument, 27 months still later.

[213] The appellant's officials, including its Litigation Committee, worked closely on the trial with the respondents, and knew fully how and when the evidence in question was being led. There is a good deal of evidence of that in the Extracts of Key Evidence.

[214] The Queen's Bench judge found that the appellant was a very sophisticated client. And he accepted the factual statements in the relevant part of O'Reilly's trial brief. That brief and its evidence citations support this judgment.

3. Fact Findings and Weighing

[215] Here again, the appellant client nibbles at the edges, and recycles other topics, but does not touch the main topic. Whether to extend time under R 647 is largely a factual issue, and many factors must be weighed. To the extent that it is anything else, it is a matter of choices and the Queen's Bench judge had a lot of elbow room to choose. (Many cases use the term "discretion", but it is ambiguous and I am slow to use it.)

[216] The chambers judge made no error when he found that the appellant knew that it had the right to tax bills, and he went into the topic in some detail. (See evidence in EKE, pp A223-24 (Ex D25), answer to Nash undertaking #7, found in O'Reilly brief note 71; cf Nash refusal to answer undertaking #6, also mentioned in that note 71.)

[217] The appellant's factums never suggest any real error in principle, and certainly no palpable and overriding error of fact (and oral argument suggested such error only on a small tangential point under an unrelated topic). Clearly the standard of appellate review is reasonableness and deference. That test is very far from being met here. If I had to, I would weigh the factors as did the Queen's Bench judge; but that is not the test. Nor is the test whether any of the appellant's views on this topic are reasonable. The test is whether the Queen's Bench judge's views and weights were unreasonable. It is impossible to say that. I cannot upset his refusal to extend time.

K. Onus of Proof

[218] The appellant client's factums repeatedly suggest that on many topics, the onus of proof was on the respondent law firms. For example, on these topics:

- (a) whether a bill is too high (O'Reilly appeal, para 63)
- (b) whether monthly accounts were to be final (Parlee appeal, paras 48, 74; O'Reilly appeal, cf para 27)
- (c) effects of a final bill or of a retainer contract (O'Reilly appeal, para 23, cf para 27; Parlee appeal, para 92, cf para 58)

[219] Whether that is always correct is not clear. For instance on topic (b), there is at least one contrary authority: *Brousseau & Associates v Ginther* [1994] AJ #1157, JDE 9203 22901 (M March 4) (para 4). But there is no need to decide that topic here.

[220] That is because it is trite law that the onus of proof only matters in two situations. One is where the trier of fact finds the evidence evenly balanced on the topic in question. That rarely occurs, and did not occur in this case. The second situation is where there is no evidence at all from anyone on that topic. That did not occur here either. See 9 *Wigmore on Evidence*, paras 2486-87 (Chadbourn rev 1981); *Phipson on Evidence*, paras 6-02, 6-03, 6-06 (18th ed 2013); Sopinka, Lederman & Bryant, *Law of Evidence in Canada*, paras 3.26, 3.28, 3.34 (4th ed 2014); *Tetterington v Wiens* (1995) 165 AR 6 (CA) (para 6); *1159465 Alberta v Adwood Manufacturing*, 2011 ABCA 259, [2012] 2 WWR 83 (para 25); *R v Smith* [1989] 2 SCR 1120, 102 NR 205 (at pp 1132-33 SCR, para 28 (NR)).

[221] At times, the appellant client argues or hints that the lawyer has a higher onus of proof (Parlee appeal factum, paras 92 and 48). But the only case cited does not support that proposition. This is a civil case and so the standard of proof is the balance of probabilities, not some higher standard. See Sopinka, Lederman & Bryant, *op cit supra*, paras 5.60, 5.67, 5.69, 5.70.

L. Contracting Out of Right to Tax

[222] The appellant briefly argues that a client cannot validly contract out of the right to tax (assess) within the time frames allowed (Parlee appeal, factum paras 33 and 66). I do not see the relevance of that issue. No party argued for such a contract here, nor suggested that it had been done, nor did the Queen's Bench judge so find. The issue is academic.

[223] If that is another way to recycle the issue about basis of billing, or whether monthly accounts were tentative, then that is already covered (Parts D to F above).

[224] Similarly, the appellant suggests that there is no power for a client to contract out of the right to have the accounts taxed **on the basis of R 613**. (See the appellant's Parlee appeal factum, paras 32, 49, 60, 92, cf paras 33, 65-66, and see appellant's O'Reilly appeal factum, para 28, cf para 50.) That is yet again the argument that the parties cannot validly contract as to the basis for billing, which is refuted in Part D above.

M. Conclusion

[225] The appellant's many arguments are not persuasive, especially in view of the standard of appellate review and the well-founded and strong fact findings here.

[226] The Queen's Bench judge gave the appellant client some relief, and there was no cross-appeal or argument against that.

[227] I would dismiss the two appeals, with costs.

[228] If the parties cannot agree on column or other costs details, or wish to tell the court about important costs facts which it does not know, they may submit written argument of no more than 10 pages each (but only 5 pages for Reply argument). That will be done according to this timetable: each respondent, within 18 days of the date of these Reasons; the appellant, within 36 days of the date of these Reasons; each respondent's reply, within 43 days of the date of these Reasons.

Appeal heard on May 27, 2014

Reasons filed at Edmonton, Alberta
this 26th day of August, 2014

Côté J.A.

I concur:

Authorized to sign for: O'Brien J.A.

I concur:

Veldhuis J.A.

Appearances:

L.D. Andrychuk, Q.C.
for the Appellants (Applicants)

J.S. Peacock, Q.C.
for the Respondent (Respondent) in Appeal #0177-AC

W.J. Kenny, Q.C.
for the Respondent (Respondent) in Appeal #0178-AC

Appendix A

Express Fact Findings by Rooke A.C.J.

Numbers at end of entries refer to paragraphs in the Associate Chief Justice's Reasons.

1. The Lawsuit Against the Crown

Litigation was authorized by client in March 1989, and included breach of treaty and other aboriginal rights (para 7)

Amended statement of claim claimed over \$1.385 billion (para 7)

Suit was extremely complex (para 229)

Accounts were rendered periodically, mostly monthly, from about 1989 to

- June 19, 2008 (O'Reilly)

- October 31, 2009 (Parlee) (para 9)

Trial was split into several phases (para 7, cf para 8, n 4)

Litigation with Crown is still ongoing and Parlee continued to work on it after the Supreme Court of Canada decision (9 Parlee accounts) (para 73, para 229)

The client did not have a lawyer specifically negotiating the retainer (for the client), but it had access to counsel (para 82)

The client certainly had legal advice as to the rights of taxation (para 82)

2. Agreed Basis for Billing

The client instructed counsel how to detail their accounts, and they did (para 58)

There is no evidence to contradict the sworn evidence of the (respondent) counsel as to the basis for the accounts, as to the retainer understanding, or that the accounts were final (para 58, para 61, para 62, para 89)

Summarizes and obviously accepts O'Reilly's evidence on that (paras 59-60)

Nash confirmed the counsel's evidence (para 62, para 69)

The retainer agreement was express and as counsel and Nash described it (para 69, para 89; and see paras 111, 113, 115, 119, 148 and 225; cf para 228)

The retainer agreements being based solely on hours times hourly rates, the agreement “otherwise provides” and so excludes the **Yule** [R 613] factors (paras 111, 113, 115, 225; cf para 114 end, para 119, para 148; and see paras 69, 89)

Up to June, 2008, the client reviewed, approved and paid each legal account (para 209)

The client got regular reporting on the suit and it[s] costs (para 212)

3. Whether Periodic Accounts Were to Be Final

Associate Chief Justice’s finding that the periodic accounts were final, is a fact finding (paras 24, 26, cf para 94, para 116)

Language (terms) about the type of account is commonly used in a sloppy fashion (para 25, n 7, para 45, n 8, cf para 86)

Word “interim” is used re some accounts of Parlee, but only before 2005 (para 86). (Appellant’s oral argument in Court of Appeal disputes this.)

Retainers were neither whole/entire contracts, nor natural break retainers, but were continuous retainers with final periodic accounts, which were neither provisional nor interim (para 118, para 140, para 234(d))

4. Whether to Extend Time to Tax Accounts

Neither the rates nor the hours billed are challenged (para 115)

Having misplaced some accounts is not a credible excuse for not moving to tax (para 171)

The evidence does not support the client’s assertion that the Chief and Council were unaware of the right to tax (para 173)

Reference to taxation “as a last resort” could mean if “necessary”, but evidence is needed, and the client gave no evidence on what that meant (para 182)

There is no evidence that the law firms in any way misled the client re its rights on taxation (para 185)

The client had no reasonable excuse for delay in taxing, but the opposite: it lay in the weeds and **hid** its resolution to pay no more but to collect legal services, and then ambushed the respondent (para 188, para 204, para 206, paras 213-14, paras 230-31, para 233, para 234 (c), (e))

Prejudice resulted to Parlee only, for giving that unpaid work within two years (para 197, para 200, para 234(b)); and if the judge had to look for earlier prejudice, it would not be positive for the client (para 199)

Yet for most of 2009 after the Supreme Court of Canada decision, the client raised no concerns with Parlee and met to discuss the next steps which Parlee would perform (para 211)

5. **Reasons Argued to Have Fees Taxed and Reduced**

General and historical facts issues were lengthy (para 210)

That general and historical facts evidence partly related to the last three issues in the Federal Court of Canada lawsuit which have not yet gone to trial (para 8, n 4, cf para 73)

Issues as to general and historical facts and fees related to that, were raised as early as the Federal Court Trial Division decision in December 2005 (para 205 and for work done before then (para 219))

The only complaint or comment which O'Reilly heard before the Appointment to Tax, was unhappiness that accounts for **Supreme Court of Canada** work were greater than estimated (para 207, including n 19, cf para 221, cf para 223)

The client's only dispute was with the length of the general and historical part of their trial evidence (para 210, para 221; or exceeding estimates for **Supreme Court of Canada** work (para 221))

The estimate of the upcoming Supreme Court of Canada expense was not a guarantee (para 223)

Even the general and historical facts evidence issue is not evidence of overcharging, and there is no *prima facie* case for reduction (para 218)

6. **Other Issues re Extending Time**

Parlee unilaterally reduced its accounts by about \$1.877 million (para 220)

Parlee's relation with the client was very long and trusting (para 230)

There is no evidence of a possible reason to delay taxation – e.g. because of change of Council (para 232)

Appendix B

The facts of the present case are strong and somewhat unusual, especially with respect to the sophistication and degree of checking by the appellant client. The appellant has not tried to put forward any precedent which it suggests has similar fact findings.

I have looked at the authorities which the appellant cites in paras 51 to 60 of its factum in the Parlee appeal, on the subject of fee contracts unenforceable or void for want of enough explanation. They involved situations very different from the present one:

- (a) ***Ladner Downs v Crowley*** [1987] 5 WWR 322, 14 BCLR (2d) 357 had to do with a unilateral letter about billing which the client was asked to sign and return without any explanation. And the signed letter was ambiguous, even contradictory.
- (b) ***Re Romer*** [1893] 2 QB 286 (CA) was about taking security for an unpaid legal bill from a client who had no idea that that might in law be payment and so soon end the right to tax the account. That is a very subtle non-intuitive point which even few solicitors would guess.
- (c) ***Bull, Housser & Co v Mr T International Agencies***, 1999 BCCA 427, 126 BCAC 229, 69 BCLR (3d) 391, was an odd situation. Taxation was premature because 30 days had not elapsed from the final bill (a provision not found in Alberta legislation). The periodical bills were found on the facts **not** to be final. So the facts were very different, and the passages cited are indeed *obiter*.
- (d) ***Davis & Co v Jiwan***, 2006 BCSC 658 is also discussed above in Part E.2. The facts were complex, and there was considerable dispute as to whether the monthly accounts were final. Issues of who had the onus, and interim settlements, further complicated the case. However, it is clear there was no agreement there whether the accounts rendered were final or provisional, and even the law firm's intent on that was qualified. The passages highlighted are not about making a fee contract; they are about settling a fee dispute after the event by compromises without any express contract. There were many other issues as well.
- (e) Lysyk, Dodek & Hoskins, *Barristers & Solicitors in Practice* para 13.49 (looseleaf, as of 2009) is a work digesting cases (much in the manner of the *Canadian Encyclopedic Digest*). On the relevant point, the only case cited is ***Ladner Downs v Crowley***, *supra*.
- (f) ***Nathanson, Schachter v Inmet Mining***, 2009 BCCA 385, 96 BCLR (4th) 342 involved neither any contract about fees, nor even any discussion between the law firm and the clients, as the Court of Appeal stresses (paras 46-47). Furthermore, the law firm did **not** intend to bill by the hour, but rather by taking into account all the circumstances. There had been no mention of the possibility of charging bonuses.

- (g) **McDonald Crawford v Morrow**, *supra* is discussed above several times including Part F.3.
- (h) **Ray, Wolfe v Henry Electric** [1982] 5 WWR 60, 37 BCLR 203 (CA) has facts somewhat similar to the present case, but the **Ray** decision is against the appellant. The passages which the appellant highlights are from the dissent.

There are two more cases which the appellant seems to cite on the same general topic in its factum in the O'Reilly appeal:

- (i) **Borden Ladner v Cohen** (2005) 199 OAC 9 (DC): a case about whether a timely complaint about a legal bill in law constituted a request for taxation, and the proper procedure in Ontario to get one; not a case about a fee agreement at all, let alone invalidating one.
- (j) **Glanc v O'Donohue & O'Donohue**, 2008 ONCA 395, 236 OAC 124, 90 OR (3d) 309 (CA): a case on whether the clients were the shareholders, or a company used as a convenience was, and so on who had the right to demand a taxation. In addition, a specific Law Society Rule in Ontario and its accompanying commentary required that each account state whether the account contained a premium, and that there was a right to tax the account. No such Rule or issue has been shown or raised in the present case.

Therefore, all these cases are readily distinguishable. Some are not on point at all.