Bound by "Ball-Park" Fee Estimate Lawyer Gets $4,000 Slashed Off Bill

BY LYNN KELLY

TORONTO — Lawyers who toss out "ball-park" fee estimates without letting their clients know when charges are heading out of the stadium may find themselves out of bounds on a solicitor-client taxation.

Slashing almost $4,000 from a bill the lawyer claimed was already $8,000 under value, Master Basil T. Clark bluntly stated that "a solicitor is not entitled to estimate fees in a thoughtless or careless manner with impunity."

What he trimmed as assessment officer earlier this month was what J. Brian MacLean and his wife still owed Toronto's Gardiner, Roberts when Mr. MacLean represented himself on the firm's taxation.

"A solicitor is obliged to be as careful in such estimates as he will be in doing the actual legal work entailed in the retainer," he said. "If areas of uncertainty exist, these should be clearly spelled out and in difficult or costly or complicated matters, it is desirable that it be done in writing."

Master Clark had no problem with the hourly rates charged or the time docketed.

"However I do find fault with the solicitor who does not ensure that when the contract of retainer is entered into, the client has fee information that is as complete and accurate as a careful solicitor can provide," he said. "In this case, the obligation was not met."

On December 11, 1985, Mr. MacLean met with D. C. Poynton - the solicitor who ultimately rendered the account - to discuss his proposed purchase of a hardware and lumber business in Wasaga Beach, Ontario.

Mr. MacLean testified he had already consulted another law firm which quoted him a $20,000 fee he thought unnecessarily high for the purchase.

He said Mr. Poynton estimated fees on the sale of his Toronto home at between $6,000 and $8,000 and that he knew the proceeds from that were the only funds he had to buy the Wasaga Beach business. Mr. Poynton also knew that considerable outside financing would be required.

Mr. Poynton testified that at the meeting, he quoted Mr. MacLean $4,500 to $5,000 for the purchase of the business and a further $850 to $1,000 for an incorporation. He said the quotes did not include the house sale or any work required to arrange financing of the business purchase.

In any event, he said, the fees quoted were only "ball-park" figures based on a straightforward $750,000 asset purchase spread over three categories: land, buildings and equipment; accounts receivable; and inventory.

Once retained, Mr. Poynton turned the file over to Richard F. Stephenson who, with the help of a newly called junior lawyer, performed all legal services outlined in the bill.

While the asset purchase was straightforward, the financing was not and required substantial work. Mr. Stephenson said he told Mr. MacLean the bill would be "substantial because of complications," but denied that Mr. Poynton had advised him about the fee he had quoted at the outset.

Mr. MacLean said that while he was prepared to pay the higher $10,000 fee Mr. Stephenson quoted him because he knew more work was necessary than had originally been anticipated, he was shocked at the $15,200 bill he received from Mr. Poynton.

He said had he known the fee would be that high - indeed, Mr. Poynton told him that was a reduction from the $23,000 it should have been - he would have retained other counsel, tried to restructure the transaction or even looked at other purchase alternatives.

Master Clark pointed out that Mr. MacLean had not changed his instructions nor done anything to cause additional fees and that he was satisifed with the work done on his behalf.

He also noted that no one ever discussed hourly rates with Mr. MacLean, nor informed him that the cost of his legal services was quickly surpassing the original fee quoted to him, even though the same solicitors were part of the transaction from beginning to end and could foresee the probable cost.

Adopting the principle in *Re. Meagher, Shaw and Kirsh* (1981), 12 A.C.W.S. (2d) 288 that fee estimates are to be considered in assessing the reasonableness of an account, Master Clark referred to the Law Society's Professional Conduct Handbook, which comments on this obligation:

> The lawyer should give the client a fair estimate of fees and disbursements pointing out any uncertainties involved, so that the client may be able to make an informed decision. This is particularly important concerning fee charges or disbursements which the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs which may substantially affect the amount of a fee or disbursement the lawyer should forestall misunderstandings or disputes by immediate explanation to the client.

He also cited with approval *Thomson, Rogers v. Croydon Furniture Systems Inc.* (1982), 30 C.P.C. 298, where Master S. M. McBride as taxing officer held that "a solicitor who has given a lump sum fee estimate to a client is under a heavy burden to inform that client without delay of any developments that are likely to increase his fee beyond the estimate."

He went on to say that generally speaking, a solicitor is not entitled to take for granted that a client will accept "a

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substantial increase beyond the estimate."

Master Clark conceded that the nature of legal work often makes it difficult for a solicitor to meet this obligation "with certainty and precision".

But he nevertheless emphasized that "because the solicitor has more information, the solicitor has more obligation and must take the initiative in creating as well defined a retainer as the circumstances and an objective standard of competence permit."

For example, he suggested, explaining to Mr. MacLean the difficulty in controlling fees when a business purchase is financed as his was would have been Mr. Poynton's "first step in shifting the risk of proceeding from his shoulders to Mr. MacLean's shoulders."

Master Clark noted that while Mr. MacLean had been willing to pay $10,000, in fact he paid without complaint $12,608.26 and asked for no reduction on assessment.

Concluding that Mr. MacLean considered that a fair bill, Master Clark agreed without awarding costs of the assessment.

(Reasons in *Gardiner, Roberts v. J. Brian MacLean* are available from FULL TEXT. Cite 821-014, 12 pp.)