Court of King's Bench of Alberta

Citation: Wang et al v Alberta Health Services, 2025 ABKB 328

Date: 20250528
Docket: 1401 10235
Registry: Calgary

2025 ABKB 328 (CanLII)

Between:

Xiaoli Lily Wang and Daiming Robert Li

Appellants/Applicants

- and -

Alberta Health Services

Respondent

Reasons for Decision
of the
Honourable Justice D.A. Labrenz

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[1] This matter involves an appeal from the Assessment Officer's decision awarding full indemnity costs against the Appellants, rendered after the Alberta Court of Appeal's decision in Wang v Alberta Health Services, 2024 ABCA 58, and following a case management conference convened pursuant to Rule 4.10 of the *Alberta Rules of Court*, Alta Reg 124/2010. The Appellants contend that the Assessment Officer's refusal to grant their request for disclosure in connection with the review of the Respondent's costs constituted a breach of procedural fairness because they were not able to meaningfully participate in the process.

I. Procedural Background

[2] The parties have been engaged in protracted litigation since 2014, originating from the Respondent's attempt to conduct an inspection of the Appellants' rental premises pursuant to the *Public Health Act*, RSA 2000, c P-37. The Appellants refused to consent to the inspection,

prompting the Respondent to seek judicial authorization. This gave rise to a series of applications and appeals. The Respondent ultimately obtained an order upholding the inspection in March 2015, with the issue of costs adjourned to a special chambers hearing held in June 2016.

[3] On June 8, 2016, Justice Jeffrey awarded costs to the Respondent on a solicitor-and-own-client indemnity basis for most steps taken, fixing the amount at $120,673.00 (the "Initial Costs Order"). The Order was filed on June 13, 2016. Justice Jeffrey found that such an award was warranted considering the Appellants' “vexatious approach” to the litigation. The Order also included a discretionary term permitting the Respondent to waive a portion of the costs contingent upon the Appellants issuing a retraction and apology—an offer which the Appellants have not accepted.

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[4] On May 30, 2019, the Respondent filed an Appointment for Assessment of Costs.

[5] The matter proceeded before the Assessment Officer on June 20, 2019 (the "Assessment Hearing"), resulting in the certification of the Respondent's costs as set out in the Bill of Costs.

[6] On July 22, 2019, the Appellants filed an appeal of the Assessment Officer's decision pursuant to Rule 10.44 of the *Alberta Rules of Court*.

[7] Subsequent steps and delays ensued, culminating in an appeal to the Court of Appeal in ***Wang v Alberta Health Services***, 2024 ABCA 58. As a result of that decision, the Appellants were directed to request a case conference pursuant to Rule 4.10 of the *Alberta Rules of Court* to determine the appropriate procedural path forward. Following the case conference, on May 29, 2024, Justice Wilson issued a procedural order stipulating that the appeal would proceed subject to the following terms:

> 4. The issues to be decided at the appeal are:
>
> (a) whether to provide the actual names of the persons performing the legal work shown by initials in the Bill of Costs; and
>
> (b) whether to provide details of the work performed by those initialized individuals which is presently redacted from the Bill of Costs.
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> 5. No other issues may be raised at the hearing of the appeal without leave of the Justice hearing the appeal.

[8] This procedural history results in the present appeal decision.

II. Issues

[9] Pursuant to Justice Wilson's procedural order, the Court must consider two issues on appeal:

i. Should the Respondent provide the actual names of the persons performing the legal work shown by initials in the Bill of Costs?

ii. Should the Respondent provide details of the work performed by those initialized individuals, which is presently redacted from the Bill of Costs?

III. Background on the Bill of Costs and Assessment Hearing

[10] The Bill of Costs under appeal was submitted by the Respondent's counsel, Ivan Bernardo K.C., of Miller Thomson LLP.

[11] The Bill of Costs submitted by the Respondent claimed a total of $307,975.50, comprising: (i) the costs awarded under the Initial Costs Order, which had already been satisfied; (ii) an order of Nixon A.C.J. in the amount of $4,000.00, also previously paid; and (iii) costs in the amount of $14,327.00 that had been disallowed by Justice Jeffrey. While the Respondent sought costs for additional appellate proceedings, no claim was made in respect of the Appellants' appeal to the Supreme Court of Canada, which amounted to $32,854.50. Accordingly, the unclaimed fees totaled $171,854.50 (being the sum of $120,673.00, $4,000.00, $14,327.00, and $32,854.50), leaving a balance of $136,121.00 in claimed fees. The Respondent also claimed disbursements of $1,746.38 and applicable GST, resulting in a total claim of $137,901.98.

[12] The Bill of Costs was presented in tabular format, with columns labeled "Date", "Initials", "Narrative", and "Hours". An additional column titled "Hours Attributed to Supreme Court of Canada" was included; however, as previously noted, the Respondent did not seek recovery of those costs.

[13] The "Initials" column in the Bill of Costs identifies 32 individuals who contributed to the file. Mr. Bernardo K.C., acted as lead counsel, supported primarily by two junior associates, along with various articling students and paralegals. The hourly rate applied uniformly across all timekeepers was $315. Notably, while the Bill of Costs reflects this consistent rate, the transcript of the Assessment Hearing (p. 33, lines 17-41) suggests that the Assessment Officer may have been under the impression that junior counsel, paralegals, and students were billed at lower rates than Mr. Bernardo K.C. It is possible that the Respondent applied a blended rate of $315 per hour; however, this is not explicitly clarified in the record. The Assessment Officer was provided with an unredacted copy of the Bill of Costs and the Appellants were provided with a copy which fully redacted the "Narrative" column.

[14] At the Assessment Hearing, the Appellants objected to the Bill of Costs identifying timekeepers solely by their initials, arguing that disclosure of full names was necessary in the public interest. In response, Mr. Bernardo K.C. explained that the Bill of Costs was derived directly from invoices issued to the Respondent, which, in accordance with the firm's and Respondent's billing practices, identified personnel by initials rather than full names. The Assessment Officer accepted this explanation, noting that, in his experience, such a practice was common and consistent with standard billing procedures.

[15] The Appellants further submitted that the narrative descriptions in the Bill of Costs should be disclosed. In response, Mr. Bernardo K.C. asserted that the narratives were protected by solicitor-client privilege. He argued that the entries revealed sensitive information regarding the internal operations of the Respondent, the nature of instructions provided by its decision-makers, and the legal advice rendered. Mr. Bernardo K.C. also relied on section 27 of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (the *"FOIPP* Act”), which permits a public body to withhold information subject to legal privilege, including materials prepared by or for legal counsel in connection with the provision of legal services, or correspondence involving legal advice. As a public-sector entity, the Respondent is subject to the *FOIPP* Act. Mr. Bernardo K.C. also noted that litigation between the parties remained ongoing.

[16] The Assessment Officer declined to order disclosure of an unredacted version of the Bill of Costs to the Appellants. However, he permitted the Appellants to pose specific questions regarding individual entries or dates. In response, both the Assessment Officer and Mr. Bernardo

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K.C. provided summaries of the corresponding narrative descriptions. This process relied on the Appellants formulating targeted inquiries, rather than conducting a comprehensive review of the Bill of Costs. Ultimately, the Assessment Officer concluded that the Bill of Costs was fair and reasonable.

IV. Submissions of the Parties

[17] On appeal, the Appellants make the following arguments with respect to the alleged insufficient disclosure in the Bill of Costs:

- The *audi alteram partem* principle has been breached because the Appellants were not afforded a fair opportunity to be heard before the Assessment Officer's decision was rendered;
- The Assessment Officer "breached principles" because of perceived issues related to his jurisdiction and authority, citing Rule 10.39;
- The Appellants are unable to assess the credibility and eligibility of 32 persons claiming legal fees at purported lawyer rates and moreover there was only one "lawyer of record" on the pleadings, and therefore the Respondent's relationship with the 32 persons is illegitimate;
- Even if the Respondent has claimed solicitor-client privilege, the principle is implicitly waived when legal expenses are paid by a third party;
- The Appellants are entitled to request particulars and orders for records to be produced, under Rules 3.61 and 5.11, respectively; and
- Lastly, the Appellants raise serious allegations regarding the Respondent's and counsel's conduct during the litigation, including suggestions of bad faith and professional misconduct.

[18] The Appellants submit that the Assessment Officer's decision should be revoked and substituted. They seek an order compelling the Respondent to: (i) disclose the full names and professional titles of the 32 individuals identified by initials in the Bill of Costs; (ii) provide detailed descriptions of the work performed by each individual; and (iii) return all legal fees previously paid by the Appellants, together with interest, in the event the Respondent fails or refuses to make full disclosure in justification of the claimed costs. The Appellants further request that a different Assessment Officer be assigned to conduct a fresh review of the unredacted Bill of Costs.

[19] The Respondent submits that the Assessment Hearing was procedurally fair, and that the Assessment Officer's decision was reasonable and should not be disturbed. They contend that the Assessment Officer duly considered and rejected the Appellants' request for disclosure of individual names and narrative descriptions, citing the necessity of preserving solicitor-client privilege. While acknowledging that, in ordinary circumstances, a bill of costs would typically include detailed descriptions of the work performed, the Respondent argues that the unique context of ongoing litigation and the Appellants' conduct justified a departure from standard practice. In their view, the Assessment Officer's decision is entitled to deference, and no palpable or overriding error appears on the record to warrant judicial intervention. Accordingly, the Respondent seeks dismissal of the appeal, with costs.

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V. Relevant Rules of Court

[20] Pursuant to Rule 10.41(1), the Assessment Officer's mandate is to determine whether the costs incurred by a party are "reasonable and proper". In fulfilling this role, the Assessment Officer has the discretion to assess whether a cost was reasonably and properly incurred, to disallow any cost, and to fix the amount recoverable for legal services not specifically addressed in the Schedule C to the *Alberta Rules of Court* (Rules 10.41(1), 10.41(2) and 10.41(3)).

[21] The *Alberta Rules of Court* further provide the right of appeal of an Assessment Officer's decision and that an appeal from an Assessment Officer's decision is an appeal on the record of the proceedings before the Assessment Officer (Rule 10.44(1) and (2)).

[22] Rule 10.38 authorizes the Assessment Officer to require particulars regarding the legal services rendered, disbursements, or other charges claimed, as well as any additional information necessary to determine whether a charge is reasonable and proper. Similarly, Rule 10.39 permits the Assessment Officer to refer questions raised by a party to the Court; however, it does not mandate that every such question be referred. Both provisions are permissive in nature, affording the Assessment Officer discretion to determine the appropriate course of action in the context of the assessment.

[23] Pursuant to Rule 10.45(1), an appeal judge may, by order, confirm, vary, or revoke all or part of an Assessment Officer's decision; substitute a new decision; refer the matter back to the same or a different Assessment Officer; or make any other order deemed appropriate in the circumstances.

VI. Standard of Review

[24] The standard of review on an appeal of an Assessment Officer's decision is deferential as described by Feehan J., as he then was, at para 3 of ***Singh v Noce***, 2018 ABQB 950:

> The decision of the Assessment Officer, or a Review Officer, is to be given deference, as he or she has specialized knowledge and experience in assessing the reasonableness of accounts and is in the best position to assess and weigh the evidence. Interference with the decision is justified only in the application of a wrong principle of law, a finding of fact clearly in error or an assessment amount that is so unreasonable as to constitute an error in principle [citations omitted].

[25] In considering an appeal from an Assessment Officer's decision, the Court must exercise restraint and avoid encroaching upon the fact-finding and evaluative functions reserved for the Assessment Officer. As noted in ***Fraser Milner Casgrain LLP v Kristof Financial Inc***, 2012 ABQB 359 at para 18, the Court "must exercise caution, and must not step too far into the arena of gathering evidence and weighing that evidence". The Assessment Officer is recognized as the expert in the assessment of costs, and deference is owed to their determinations in that regard: ***Equitable Bank (Equitable Trust Company) v Avison***, 2015 ABQB 109 at para 38.

VII. Analysis

[26] Although the Assessment Officer had access to the unredacted Bill of Costs and was able to review the narrative entries in assessing whether the charges were reasonable and proper, the Appellants were not afforded the same opportunity. While they were permitted to raise questions and receive summaries of specific entries during the Assessment Hearing, their ability to

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meaningfully participate in the assessment process was constrained by the limited information available to them. As a result, I find that their participation in evaluating the reasonableness of the claimed costs was significantly impaired. For the reasons set out below, I allow the appeal.

(a) Types of Costs; Reasonable and Proper Costs

[27] Costs are intended to be compensatory in nature, providing reimbursement for the expenses incurred in achieving legal success. A critical distinction exists between "solicitor and client" costs and "solicitor and own client" costs. As explained in ***Barkwell v McDonald***, 2023 ABCA 87 at para 56, citing ***Luft v Taylor, Zinkhofer & Conway***, 2017 ABCA 228 at para 77 [***Luft***]:

> Party and party costs assessed as between a "solicitor and client" include the reasonable fees and disbursements for all steps reasonably necessary within the four corners of the litigation. Costs between "solicitor and own client" allows for "frills or extras" authorized by the client, or which the client should reasonably pay his own solicitor, but which should not fairly be passed on to third parties who become responsible for those expenses. While the two methods of calculation might often result in the same amount, a third party litigant should not be required to pay for unnecessary extra services requested by a client.

[28] This distinction underscores the principle that while a client may choose to incur additional legal services, only those costs that are reasonable and necessary within the scope of the litigation should be recoverable from the opposing party. However, solicitor and own client costs, while awarded only in exceptional cases, are like any form of indemnity costs in that they are assessed on the basis of reasonableness as between the client and their solicitor and are not meant to be penal in nature: ***Luft*** at paras 72-78; ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 19 at paras 124-126; and ***Earth Drilling Co Ltd v Keystone Drilling Corp***, 2023 ABKB 17 at para 28 citing ***Ho v Lau***, 2023 ABKB 15. Even though full indemnity costs generally allow for excesses, it is well established that assessment of indemnity costs is subject to review to ensure that costs are reasonable and proper: Rules 10.31 and 10.33; ***Guarantee Co of North America v Beasse***, 1993 CanLII 16373 (ABKB) [***Guarantee***] at para 13; and ***Kissel v Rocky View*** (County), 2020 ABQB 570 at paras 6, 7, and 34. The question to be answered asks not what an objectively reasonable legal fee would be for the service rendered, but what is reasonable between the client and their own solicitor.

[29] One of the main purposes of a Bill of Costs is to give the potentially liable party an opportunity to object to specific entries that may be open to challenge: ***Al-Ghamdi v Alberta***, 2017 ABCA 151 at para 4. When the reasonableness of an account is in dispute, supporting evidence must be provided to enable proper review and analysis: ***GO Community Centre v Clark Builders and Stantec Consulting Ltd***, 2020 ABQB 203 at para 162; Guarantee, at para 13.

[30] In ***Gichuru v. Smith***, 2014 BCCA 414 at para 104, the British Columbia Court of Appeal held that the assessment of special costs—and by extension, full indemnity costs—must be grounded in evidence, with the paying party given an opportunity to challenge the reasonableness of the claim. Although the case interprets *British Columbia's Supreme Court Civil Rules*, BC Reg 168/2009, its underlying principles are relevant. Notably, adequate disclosure is essential to enable a meaningful challenge to the objective reasonableness of a bill of costs. As the Court stated at para 114, "it is difficult to conceive how a proper examination of the party's reasonably incurred legal fees can be made without disclosure of the party's file."

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[31] Nevertheless, while a paying party has the right to challenge the reasonableness of the costs and must have access to adequate information to do so, there is a concern that the party will use this as an opportunity to prolong assessment by "requiring microscopic review of the services undertaken by counsel for the successful party": ***Gichuru*** at para 109.

[32] Considering the Appellants' prior conduct in these proceedings, as comprehensively outlined by Justice Jeffrey in the Initial Costs Order, I remain concerned that their approach continues to reflect an effort to delay or otherwise misuse the litigation process. These concerns are pertinent both to the present appeal and to the assessment proceedings. Notably, during the Assessment Hearing, the Appellants appeared to contend that the Respondent's Bill of Costs and corresponding legal work should align with the efforts and invoicing of their own counsel. I accept the explanation provided by Mr. Bernardo K.C., who clarified that such discrepancies were to be expected, particularly in circumstances where the Appellants independently engaged with government officials regarding the litigation, thereby necessitating responsive action and legal advice from the Respondent's counsel. Moreover, the Assessment Officer recorded a troubling remark from the Appellants and perceived a risk that the Appellants intended to "issue a lawsuit against everybody who is named" in the Bill of Costs. The Appellants also persist in challenging the award of full indemnity costs, notwithstanding that the applicable scale of costs has already been conclusively determined.

[33] The Appellants rely on Rules 3.61 and 5.11 of the *Alberta Rules of Court* in support of their request for disclosure, citing ***Croy v Alberta***, 2022 ABQB 575, and ***Kaddoura v Hanson***, 2015 ABCA 154. Rule 3.61 permits a party served with a pleading to request particulars from the opposing party concerning matters raised in that pleading. Rule 5.11 authorizes the Court, upon application, to order the production of a record in specific circumstances, such as where the record has been omitted from an affidavit of records or where privilege has been improperly claimed. However, a Bill of Costs does not constitute a "pleading" within the meaning of the *Alberta Rules of Court*, and no affidavit of records is at issue in the present matter. Accordingly, neither rule is applicable. The decision in ***Elkin Injury Law v Smith***, 2025 ONSC 1384, is similarly inapposite, as it addresses the service of an affidavit of documents, which is not relevant to the circumstances before this Court. Likewise, ***Akpan (Re)***, 2024 ABCA 232, is distinguishable, as it concerns a court-initiated motion relating to the improper notarization of documents by legal counsel.

(b) Privilege and Waiver of Privilege

[34] The Respondent asserts solicitor-client privilege broadly over the Bill of Costs, raising the question of when such privilege may be properly claimed.

[35] Solicitor-client privilege is a foundational element of the legal system, recognized not merely as a rule of evidence but as a principle with quasi-constitutional status. The Supreme Court of Canada has characterized it as "nearly absolute", underscoring its critical role in maintaining public confidence in the administration of justice: ***Pritchard v Ontario (Human Rights Commission)***, 2004 SCC 31 at paras 17–18. The privilege arises where the four conditions articulated in the Wigmore framework are satisfied: (i) there must be a communication; (ii) made in confidence; (iii) between a client and a professional legal advisor; and (iv) for the purpose of seeking, formulating, or receiving legal advice. See ***Descôteaux v Mierzwinski***, [1982] 1 SCR 860 [***Descôteaux***]; ***Solosky v The Queen***, [1980] 1 SCR 821 at 837; and ***R v Campbell***, [1999] 1 SCR 565 at para 49. The scope of the privilege extends beyond the

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mere request for legal advice and the advice itself; it encompasses a continuum of communications that are directly related to the provision of legal advice: ***Samson Indian Nation and Band v Canada***, [1995] 2 FC 762 (FCA), as cited in ***Hirch v Lethbridge***, 2024 ABCA 127 at para 28.

[36] Courts have consistently adopted a broad interpretation of solicitor-client communications, extending the protection of privilege beyond direct legal advice to include related materials such as legal opinions, billing records, and documents prepared in anticipation of settlement or trial. There exists a prima facie presumption that solicitor-client privilege attaches to a lawyer's billing records. This principle was affirmed by the Supreme Court of Canada in ***Maranda v Richer***, 2003 SCC 67 at paras 30–33, where the Court held that legal accounts are presumptively privileged, notwithstanding that the case arose in a criminal context. The Alberta Court of Appeal has confirmed the applicability of this presumption in civil proceedings, as articulated in ***Gault Estate v Gault Estate***, 2016 ABCA 208 at para 21. However, the presumption is not absolute and may be rebutted upon a showing that disclosure of the billing information would not reveal or compromise privileged communications.

[37] As noted in ***University of Calgary v Alberta (Information and Privacy Commissioner)***, 2019 ABQB 950 at para 14, there exists a degree of tension between the provisions of the *FOIPP* Act and the common law principles governing solicitor-client privilege. Under the *FOIPP* Act, the burden rests with the public body—in this case, the Respondent—to establish that the applicant has no right of access to privileged information. However, in ***Ontario (Ministry of the Attorney General) v Ontario (Assistant Information and Privacy Commissioner)***, 2005 CanLII 6045 [***Ontario***], the Ontario Court of Appeal relied on ***Maranda*** to hold that the presumption of privilege attaching to a lawyer's billing records must be rebutted by the requester. In the present case, this would place the onus on the Appellants to demonstrate that the information sought does not attract solicitor-client privilege.

[38] The presumption of privilege established in ***Maranda*** may be rebutted through application of the "assiduous inquirer" test. As articulated by the Ontario Court of Appeal in ***Ontario***, at para 12, this test considers whether there exists a reasonable possibility that an assiduous inquirer—armed with publicly available background information—could, through the disclosure of legal billing details, deduce or infer communications protected by solicitor-client privilege. Where such a possibility exists, the information remains protected and is not subject to disclosure. Conversely, if the information is determined to be neutral and incapable of revealing privileged communications, it may be disclosed without infringing upon the privilege.

[39] The issue of implied waiver of solicitor-client privilege has been considered by various courts in the context of claims for full indemnity costs. In such cases, the assertion of entitlement to elevated costs may, in certain circumstances, give rise to an implied waiver of privilege. The Appellants rely on ***Stayura Well Services Ltd v Vision Credit Union Ltd***, 2022 ABQB 490 [***Stayura***], in support of this proposition.

[40] In ***Stayura***, Justice Lema considered an appeal from a master's decision concerning the application of solicitor-client privilege to legal billing records. The case involved Stayura Well Services Ltd. (SWS), the borrower, and Vision Credit Union Ltd. (VCU), the lender. SWS sought to quantify its indebtedness to VCU and compel the discharge of VCU's security. In doing so, SWS challenged the inclusion of legal fees—incurred by VCU in defending two actions initiated by SWS—as part of the outstanding debt. SWS requested disclosure of the

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underlying legal accounts, while VCU asserted solicitor-client privilege over those records. Master Birkett ordered disclosure, finding that fairness required it, and relied on ***PetroFrontier Corp v Macquarie Capital Markets Canada Ltd***, 2022 ABCA 136 [***PetroFrontier***], and ***Descôteaux***. The Master concluded that by incorporating the legal fees into the debt claimed, VCU had implicitly waived privilege over the corresponding legal accounts.

[41] Justice Lema upheld the Master's decision, concluding that VCU had, by seeking to recover its legal fees from SWS, placed the nature and character of those fees in issue, thereby waiving privilege over the legal accounts to the extent necessary to assess their propriety. The Court emphasized that a party cannot both assert privilege and simultaneously rely on the privileged material to prevent disclosure of the legal accounts. In such circumstances, fairness and transparency require disclosure. However, the waiver is not absolute and must be narrowly construed to apply only to the extent necessary to resolve the issue raised—in that case, the quantification of the debt inclusive of legal fees. Lema J stated at para 61 as follows:

> Per the guidance in paragraph 39 of ***Plazavest***, [VCU] can react or otherwise screen out information unrelated to the "description of the legal work done and the fees charged for that work, "but must disclose sufficient information to "allow [SWS] to make an informed decision as to its obligation to pay [a given bill]".

[42] While ***Stayura*** concerned the recovery of legal costs pursuant to a contractual arrangement—thereby introducing the additional consideration of whether the claimed costs were recoverable under the terms of that contract—the principles articulated by Justice Lema are equally instructive in the present context. Specifically, they are applicable to the determination of the Appellants' responsibility for reasonable solicitor and own client costs. The underlying rationale—that a party cannot assert privilege while simultaneously placing the privileged material at issue—applies with equal force in assessing cost entitlement outside a contractual framework.

[43] The Court in ***Stayura*** referred to a few cases, as also discussed by the parties, that provide relevant guidance for the current situation.

[44] In ***1400467 Alberta Ltd v Adderley***, 2014 ABQB 635, the Court addressed the issue of waiver of solicitor-client privilege in the context of a shareholder dispute involving legal advice and billing rendered to a corporate entity. The central question was whether Lynco Construction Ltd. (Lynco) was the client entitled to assert or waive privilege over the documents in question. The Court held that documents acknowledged to be protected by solicitor-client privilege must be disclosed to Lynco, either because Lynco was the actual client, or, alternatively, because privilege had been waived by virtue of Lynco having paid for the legal services. In either scenario, Lynco was entitled to access the documents.

[45] In ***Ritter v Hoag***, 2003 ABQB 978 [Ritter], Justice Burrows noted at para 5:

> The Defendants observe that though solicitor-client costs would be justified, they do not wish to subject their solicitor-client bill of costs to taxation at this point in the action. To do so they would have to waive their privilege in respect of the information contained in the account. They propose instead that I award them quadruple Column 5 – that is double the party-party costs which would otherwise be awarded. In my view, awarding a greater multiple of Column 5 than would

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> otherwise be awarded is a reasonable way to eliminate the confidentiality concern. [emphasis added]

[46] The Respondent submits that ***Ritter***, involved solicitor-client costs rather than full indemnity solicitor-client costs, as is the case here. On that basis, the Respondent argues that the need to scrutinize the entries in the Bill of Costs is reduced, as full indemnity costs may permit a greater degree of excess. While acknowledging the distinction, the Court finds that the principles articulated in ***Ritter*** remain applicable.

[47] In addition, the Appellants cited ***Plazavest Financial Corporation v National Bank of Canada***, 2000 CanLII 5704 (ONCA) [***Plazavest***], which was also referred to in ***Stayura***. In this case, the Ontario Court of Appeal provided the following analysis in connection with a contractual agreement to pay legal fees, and the public interest component that requires the court to maintain a supervisory role over disputes relating to the payment of lawyers' fees:

> … A third party who has agreed to pay a client's legal bills is entitled, subject to any sustainable solicitor- client privilege claim, to information in the client's possession which is relevant to the determination of whether the legal bills are properly payable by the third party.
>
> I would think that in the normal course, a client in the position of National should provide copies of the legal bills to the third party who was responsible for paying those bills. If the client has legitimate concerns that the bills will reveal information protected by the solicitor-client privilege, the client should provide the third party with a description of the legal work done and the fees charged for that work which will protect the privilege but still allow the third party to make an informed decision as to its obligation to pay that bill. [paras 38 and 39]

[48] While the Respondent correctly observes that the Ontario Court of Appeal's decision, involved legal fees incurred in the context of a loan transaction and turned on the interpretation of Ontario legislation, the principle admits potentially of broader application. Specifically, where solicitor-client privilege is asserted, and a third party has a legitimate interest in understanding the nature and reasonableness of legal fees, the Ontario Court of Appeal states that it is appropriate to provide a general description of the work performed and the fees charged. This approach facilitates informed decision-making while preserving the core of the privileged communication. Counsel for the Respondent does not appear to dispute the appropriateness of this practice.

[49] Indeed, counsel for the Respondent submits that the approach taken in this matter aligns with the guidance provided in the authorities cited in ***Monco Holdings Ltd v BAT Development Ltd.***, 2005 ABQB 851 [***Monco***]. Specifically, the Respondent provided an unredacted version of the Bill of Costs to the Assessment Officer for confidential review. Thereafter, Mr. Bernardo K.C., in conjunction with the Assessment Officer, offered a general oral summary of the work performed, structured so as not to infringe solicitor-client privilege. When the Appellants raised concerns regarding entries, Mr. Bernardo K.C. and the Assessment Officer furnished additional context and clarification. The Respondent maintains that this process struck a reasonable balance between preserving solicitor-client privilege and affording the Appellants a meaningful opportunity to challenge the costs claimed, consistent with the principles articulated in ***Plazavest***.

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[50] The Court does not accept the Respondent's reliance on ***Monco***, as determinative of the issue. While the Court in ***Monco*** offered useful commentary on solicitor-client privilege in the context of cost assessments, Justice Veit expressly declined to decide whether a litigant who seeks reimbursement of all legal fees paid can maintain solicitor-client privilege over their lawyer's account. Moreover, in the specific circumstances of ***Monco***, Justice Veit concluded that costs for the special chambers hearing should be awarded under the appropriate column of Schedule C, rather than on a full indemnity basis. As such, the decision does not directly address the implications of asserting privilege while simultaneously seeking full indemnity costs, and its applicability to the present matter is limited.

[51] A review of the Record of the Assessment Hearing also reveals that procedural unfairness occurred due to the Appellants' lack of access to sufficient information necessary to make meaningful submissions regarding the reasonableness of the statement of account. While Mr. Bernardo K.C. provided general information about the structure of the legal team—identifying himself as lead counsel and noting the involvement of junior lawyers, paralegals, and students—the Appellants were limited to a "question and answer" format that constrained their ability to probe further. Without knowing the roles, qualifications, or expertise of the 32 individuals listed in the Bill of Costs, the Appellants were unable to ask targeted questions or effectively challenge the necessity or appropriateness of the work performed by each individual.

[52] Mr. Bernardo K.C. also indicated during the Assessment Hearing that his standard hourly rate exceeded $315, and that the billing rates of other individuals involved in the matter were lower. However, these individual rates were not disclosed either during the hearing or in the Bill of Costs. The Assessment Officer observed that the involvement of junior lawyers, paralegals, or students—who purportedly billed at lower rates—represented a cost-saving measure, stating that "it's a savings to those that have to pay for them." Yet, without disclosure of the actual hourly rates for those individuals, the Appellants had no means of verifying whether any savings were in fact realized.

[53] The Bill of Costs listed a uniform rate of $315 per hour for all 32 individuals, thereby obscuring any differentiation in billing rates and undermining the Appellants' ability to assess the reasonableness of the charges. It is also significant to observe that, after Justice Veit's decision in ***Monco***, this Court has clarified the law in ***Stayura***. In ***Stayura***, the Court held unequivocally that a party cannot assert solicitor-client privilege while simultaneously placing the privileged material at issue. This principle reflects a growing recognition that fairness and transparency in cost assessments require a party seeking reimbursement of legal fees—particularly on a full indemnity basis—to disclose sufficient information to permit meaningful scrutiny. As such, Stayura represents a more recent and authoritative articulation of the limits of privilege in the context of cost recovery.

[54] The Appellants also raised concerns about multiple individuals recording time on the same date. In response, both Mr. Bernardo K.C. and the Assessment Officer provided only limited explanations. Mr. Bernardo K.C. explained the overlap by stating: "... on one day, four lawyers did something – that's very typical. Something will come in. A step will happen. As the lead lawyer, I will assign tasks to different people, and there is no duplication in that so it's quite normal – for example, if you look, the file comes in, a step needs to be taken." However, from the Appellants' perspective, they were unable to meaningfully question what those steps were, why they were necessary, or whether duplication had occurred, as they lacked sufficient detail about the roles and responsibilities of the individuals involved. The Appellants attempted to

challenge the descriptions, asking: "You know, it's easy to put something under those – to say they do something, but how can they justify what the description --", to which the Assessment Officer responded, "[t]hat's my job." He further stated: "You tell me what you want looked at, and I am going to give you a rough description, within the parameters of the law, as to what was done and whether I think it was reasonable or not." He continued: "So ask your questions. I will look at the bill of costs and I will look at the descriptions of the services that were provided and I will give you a little summary, because your issues are – or the allegation appears to be that either too many people are working on the file or too many people are doing the same thing on the file or you have been double billed." The onus was placed on the Appellants to identify specific dates of concern, with the Assessment Officer stating: "Just give me the dates. We are going to look at the specific dates, please, that you want to raise." As a result, the Appellants were denied the benefit of a complete record that would have allowed them to understand the progression of the matter and to ask informed, targeted questions about the work performed. This limited their ability to meaningfully participate in the assessment process.

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[55] The foregoing examples illustrate just some of the challenges the Appellants faced in attempting to meaningfully participate in the Assessment Hearing. They were provided with minimal information—limited primarily to the hourly rate, the number of hours claimed, and the total amount sought. With respect, while deference must be given to the expertise of the Assessment Officer, this raises a fundamental question: did the Appellants receive sufficient disclosure to enable them to ask meaningful questions during the hearing? The answer is no. Instead, the Appellants were left to speculate. The process lacked the transparency and procedural fairness required to ensure that the assessment was conducted on an informed and equitable basis.

[56] In the present case, by seeking full indemnity costs, the Respondent has directly placed the validity and reasonableness of those costs in issue, thereby "raising the issue." Had the Respondent instead sought costs in accordance with Schedule C of the *Alberta Rules of Court*, its accounts would not have been subject to the same level of scrutiny. Nevertheless, the Court has already found that exceptional circumstances justified the award of full indemnity costs. Now that such an award has been granted, there is a practical onus on the Respondent to provide sufficient disclosure to enable the Appellants to meaningfully challenge the reasonableness of the claimed costs during the assessment.

[57] The operative principle from this Court's implied waiver jurisprudence is that a party seeking to recover solicitor-and-own-client costs implicitly waives solicitor-client privilege to the extent necessary to substantiate its claim for reimbursement. This waiver flows from the intentional act of seeking indemnity for legal fees and is grounded in the principle of fairness, which requires that the party expected to bear the cost be given a meaningful opportunity to assess and challenge the reasonableness of the claimed fees. As Justice Lema observed in ***Stayura***, while the Respondent may redact or withhold information unrelated to the nature of the legal work performed and the fees charged, it must nonetheless disclose sufficient detail to enable the Appellants to make an informed assessment of their potential obligation. At the same time, the Assessment Officer must scrutinize any disclosure of solicitor-client privileged information, balancing it against the requirements of natural justice, and should only compel disclosure where it is truly necessary to ensure procedural fairness.

[58] This Court's decision in ***Stayura*** aligns with the reasoning in ***PetroFrontier***. As the Alberta Court of Appeal stated at paragraph 44, "it is not necessary for a party seeking to

establish waiver of privilege to show that the detriment they will suffer if the privilege is maintained exceeds the harm that will befall the privilege holder if the privilege is lost." As Kirker and Strekaf JA emphasized, "the inquiry is not a balancing exercise."

[59] In this case, as set out above in great detail, the Respondent has broadly asserted solicitor-client privilege over the Bill of Costs, claiming it contains sensitive information pertaining to the Respondent. The Appellants challenge this assertion, arguing that solicitor-client privilege cannot be claimed unless a solicitor-client relationship exists with each of the 32 individuals listed in the Bill of Costs. They contend that such relationships were "clearly not the case," thereby questioning the legitimacy of the privilege claim over the entirety of the document. Given the Appellants' past conduct and ongoing litigation, the Respondent's concerns as to the potential motives of the Appellants in their desire to obtain the names of the 32 persons and fully unredacted narratives are not unwarranted.

[60] For example, much of the Appellants' submissions focus on the status of the 32 individuals identified by initials, alleging that they lack a "legal right to recover so-called legal fees." They rely on cases such as ***Baiden v Vancouver (City)***, 2010 BCCA 375, and ***Nero v Canada Post Corporation Fleet Management***, 2003 ABQB 1061. However, these authorities are distinguishable, as they address co-counsel or outsourcing arrangements that are not applicable in the present case. I accept the Respondent's submission that Miller Thomson LLP was the sole firm retained on the matter. There is no evidence to suggest that Mr. Bernardo K.C. operated a separate practice or that the 32 individuals were not employees of the firm or not engaged in work on the file. Moreover, I place no weight on the Appellants' unsupported insinuations of misconduct, including allegations of professional negligence, fraud, evasion, or civil liability, or claims of "unjustified expenses" in relation to legal fees and disbursements. These matters are properly within the jurisdiction of the Assessment Officer and are not appropriately addressed in this appeal.

[61] While the Assessment Officer may have believed that the evidence before him was sufficient to justify the amounts claimed, the heavily redacted Bill of Costs deprived the Appellants of a meaningful opportunity to participate in the assessment process. The Respondent's extensive redactions were overzealous, particularly in circumstances where, consistent with ***Stayura***, solicitor-client privilege was implicitly waived by the pursuit of full indemnity costs. Nonetheless, I remain mindful that any disclosure of privileged information must be carefully tailored to minimize intrusion upon the privilege, while still ensuring procedural fairness. The Assessment Officer ought to have directed the Respondent to produce a revised Bill of Costs with tailored disclosure—limited to what is necessary to allow the Appellants to make informed submissions regarding the reasonableness of the claimed costs. Should the Respondent object to disclosing such information, it would be incumbent upon the Assessment Officer to deny recovery of the associated costs.

(c) Issue 1 - Should the Respondent provide the actual names of the persons performing the legal work shown by initials in the Bill of Costs?

[62] Partially. I accept the Appellants' concern regarding the presence of only one lawyer of record, yet 32 individuals listed on the Bill of Costs. However, this concern is misplaced. Rule 2.24(1) defines a "lawyer of record" as the lawyer or firm whose name appears on a commencement document, pleading, affidavit, or other document filed or served in an action as acting for a party. This designation has no bearing on the composition of a bill of costs. A lawyer

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of record may be supported by numerous colleagues, particularly in complex or long-running matters. It is entirely appropriate for those individuals—whether associates, partners, or legal staff within the same firm—to contribute to the file and to have their time and fees reflected in the Bill of Costs.

[63] The Appellants' argument that Mr. Bernardo K.C., the original lawyer of record, operated as a sole practitioner in partnership with Miller Thomson LLP is both irrelevant and unfounded. This appears to stem from a misunderstanding of Mr. Bernardo K.C.'s professional corporation and the nature of his relationship with the firm. I accept the Respondent's submission that all 32 individuals listed in the Bill of Costs were employed by, or affiliated with, Miller Thomson LLP in a professional capacity. It is well established that legal fees may appropriately include time billed by lawyers, paralegals, and legal assistants who contributed to the matter.

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[64] During the Assessment Hearing, Mr. Bernardo K.C. acknowledged that he did not believe the names of the individual lawyers involved in the matter were protected by solicitor-client privilege. However, he also expressed uncertainty as to the relevance or purpose of disclosing which individuals had worked on the file.

[65] Based on the above, I find that the Respondent should provide a description for each of the 32 persons, consisting of:

(i) initials;

(ii) working title/position;

(iii) year of call (if applicable) or years in the profession; and

(iv) an explanation of their role/expertise on the matter,

to provide a fulsome disclosure of the personnel working on the matter. I am not convinced that the Appellants need the full names of the 32 persons to challenge the reasonableness of the costs and appreciate the concerns raised by the Respondent and the Assessment Officer with the Appellants having access to this information.

(d) Issue 2 - Should the Respondent provide details of the work performed by those initialized individuals, which is presently redacted from the Bill of Costs?

[66] Yes. Solicitor-client privilege was implicitly waived when the Respondent elected to pursue solicitor-and-own-client costs. By doing so, the Respondent necessarily placed the character and reasonableness of those legal expenses in issue. It would be unfair to allow the Respondent to rely on solicitor-client privilege to shield the very information that the Appellants require to scrutinize the statements of account and to respond meaningfully, in accordance with the principles of natural justice. As previously noted, while the Respondent may redact or withhold information unrelated to the nature of the legal work performed and the fees charged, it must nonetheless disclose sufficient detail to enable the Appellants to make an informed assessment of their potential obligation. At the same time, the Assessment Officer must scrutinize any disclosure of privileged information, ensuring that such disclosure is limited to what is truly necessary to uphold procedural fairness.

[67] I accept the Appellants' concern that they are entitled to a description of the legal work performed to assess and, if necessary, object to the reasonableness of the services claimed in the Bill of Costs. The ability to evaluate the necessity and proportionality of the work is a fundamental component of procedural fairness. The Respondent's assertion of solicitor-client

privilege over the narratives in the Bill of Costs is ambiguous—particularly as it is unclear whether privilege is claimed over all narrative entries or only specific portions. Greater clarity is required to determine the appropriate scope of disclosure.

[68] Without limiting the generality of the foregoing, the Respondent should minimally provide a copy of the Bill of Costs that sets out the following information:

(i) Standard hourly rate for each person who provided legal services to the Respondent, together with hourly rate billed to the Respondent and an indication of the discount provided in that hourly rate from the individual's standard billing rates; and

(ii) A work description. This work description can consist either of a partially redacted narrative from the existing Bill of Costs, or a tailored neutral narrative providing information about the nature of the work performed by the billing individual without providing disclosure of legal advice sought or received unless it is necessary to justify the associated legal fees in the Bill of Costs. The Assessment Officer should ensure that the description contains disclosure of sufficient detail to enable the Appellants to make an informed assessment of their potential obligation and to ensure procedural fairness.

(iii) The disclosure must contain the standard hourly rate for each person who provided legal services to the Respondent.

VIII. Conclusion

[69] Pursuant to Rule 10.45(1), the matter shall be remitted to a different Assessment Officer. The Respondent is directed to provide the Appellants with the disclosure mandated by this decision, including a revised Bill of Costs, no later than 60 days prior to the rescheduled assessment hearing.

[70] Given the history of this matter, including the Appellants' vexatious approach to this litigation, and the general approach of this Court not to award costs to self-represented litigants for their time and effort, each party shall bear their own costs.

Dated at Calgary, Alberta this 28th day of May 2025.

D.A. Labrenz
J.C.K.B.A.

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Appearances:

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Self Represented Litigants

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For the Respondent

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