

Rules of Court Committee

Request for Comments 2012-2

Time to Serve Defendant's Affidavit of Records – R. 5.5(2) and (3)

Denying Authenticity of a Document – R. 5.15

Time Limit for Reviewing a Lawyer's Account – R. 10.10(2)

The new Rules of Court have now been in effect for approximately 18 months. A few rules that may require some adjustment have been identified, but before recommending amendments the Rules of Court Committee is seeking the input of the Bar.

The Rules of Court Committee is now requesting comments from the Bar on the following rules:

- Time to Serve Defendant's Affidavit of Records – R. 5.5(2) and (3)
- Denying Authenticity of a Document – R. 5.15
- Time Limit for Reviewing a Lawyer's Account – R. 10.10(2)

Submissions are requested by September 30, 2012, to be sent to: RCC@albertacourts.ca, or Barb Turner, Q.C., Secretary, Rules of Court Committee, 9833 109 Street, Edmonton, AB T5K 2E8. The Bar is invited to comment on any aspect of these Rules, although the following discussion document is intended to highlight some of the issues identified to date. (Comments on any other Rule are welcomed by the Rules of Court Committee at any time.)

Time to Serve Defendant's Affidavit of Records – R. 5.5(2) and (3)

Concerns have been raised that the time for a defendant to deliver an affidavit of records is unpredictable and too short. Currently, under R. 5.5(2) the plaintiff must serve its affidavit of records at any time within 3 months of being served with the statement of defence. Under R. 5.5(3) the defendant has 1 month from service of the plaintiff's affidavit of records within which to serve its affidavit of records. This creates a situation where the defendant may have from 1 to 4 months from defending to serve its affidavit of records, depending on when the plaintiff serves the defendant with its affidavit of records.

One possible solution is that the time for serving the defendant's affidavit of records start to run from the filing of the statement of defence, but the Rules of Court Committee believes it useful to maintain the existing sequence, and require the plaintiff to file its affidavit before the defendant's affidavit is required.

To remedy this concern, the Rules of Court Committee is considering that a change be made to these rules to require that the defendant's affidavit of records be filed 2 months from the date of service of the plaintiff's affidavit of records. The Rules of Court Committee seeks comment from the Bar on this proposal.

Denying Authenticity of a Document – R. 5.15

Under Rules 5.15(2) and (4) the recipient of an affidavit of documents is deemed to admit the authenticity of the listed documents, unless the authenticity of a document is denied within one month of its production. The new rule carries forward old R. 192(1)(a), which did not appear to create any problems in practice. The Rules of Court Committee has, however, received reports that some counsel are now issuing blanket denials of the authenticity of all documents as a matter of routine. This practice is said to have developed, in part, to deal with tight timelines.

Denying the authenticity of every document defeats the point of the presumption in Rule 5.15(2). It has been suggested that a party should have to generate a list of documents where authenticity is being questioned, and provide particulars, rather than simply provide a blanket denial of all documents. Alternatively, the time to dispute authenticity could be postponed to a later point in the litigation, or a procedure could be put in place to allow a retraction of the deemed admission of authenticity when the relevant facts only come to light later. There would appear to be some advantage to having the issue raised prior to questioning, so that counsel know that the authenticity of the document should be a topic covered. Rule 10.33(2)(b) provides a possible cost remedy for unreasonable refusal to admit.

The Rules of Court Committee seeks comment from the Bar as to whether this practice is widespread, and whether there is a need for a remedy.

Time Limit for Reviewing a Lawyer's Account – R. 10.10(2)

There is an inconsistent practice between Edmonton and Calgary with respect to the time limitation for reviewing lawyer's charges:

- Edmonton's practice for decades (and currently) is that the 6 months limitation in R. 10.10 applies only to a client seeking to review a lawyer's bill, not to a lawyer seeking to have his or her own bill reviewed for enforcement purposes. The relevant deadline for enforcement purposes is imposed by the *Limitations Act*.
- Calgary's practice is that the 6 months limitation applies equally to both lawyers and clients. Applications to waive the 6 month deadline require both lawyers and clients to obtain a fiat. This is usually done without notice, without an affidavit (if you are a lawyer), and without a court file being opened. Fiats are rarely denied to lawyers, unless there is a limitations issue, and are rarely denied to clients.

The Court of Queen's Bench recently had the opportunity to consider rule 10.10(2) in *Twinn v. Sawridge Band*, 2012 ABQB 44. Browne J. concluded at para. 40 that Rule 10.10(2) "applies only to reviews of lawyers' charges initiated by a client, and does not apply to lawyer-initiated reviews". This effectively endorses the Edmonton practice.

Consistent practice in the Province is desirable. Some options that have been considered by the Rules of Court Committee include:

1. Amend R. 10.10(2) to clarify that the 6 month limitation applies to both lawyers and clients. Any extension of time would require an application on notice to the other side.
2. Amend R. 10.10(2) to make it clear that it applies only to the review of a lawyer's bill by a client, in accordance with the decision in *Twinn v. Sawridge*. A client would be required to apply to a judge for an extension of time to have a review officer review an account beyond the 6 month time limitation.
3. Amend R. 10.10 to make the time limit 2 years for both lawyers and clients, consistent with the *Limitations Act*.

It has also been suggested that there should be a requirement for either the retainer agreement or the lawyer's account, or both, to include a reminder to the client of the timeframe to pursue a review of the lawyer's account – thereby improving the client's awareness of the review process, and reducing the number of applications required under R. 10.10(2).

After reviewing the various alternatives, the Rules of Court Committee's present inclination is to recommend that Rule 10.10(2) be amended to increase the time limit to seek a review of lawyer's charges from 6 months to 2 years, and to ensure that this time limit is applicable for both lawyers and clients. The Rules of Court Committee seeks comment from the Bar on this topic.

May 18, 2012