
CANADA / JUDGMENT

Nathanson, Schachter & Thompson v. Inmet Mining Corp.

2007 BCSC 724

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 724 Nathanson, Schachter & Thompson v. Inmet Mining Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nathanson, Schachter & Thompson

v. Inmet Mining Corp.

2007 BCSC 724

Date: 20070530

Docket: L042010

Registry: Vancouver

Between:

Nathanson, Schachter & Thompson

Appellant

And:

Inmet Mining Corporation

Respondent

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

(In Chambers)

Counsel for the Appellant

J. Wood, Q.C.

& D.E. Gruber

Counsel for the Respondent

J.J.L. Hunter, Q.C.

& M.S. Oulton

Date and Place of Hearing:

April 16, 2007

Vancouver, B.C.

- [1] Nathanson, Schachter & Thompson LLP ("NST"), appeal from an October 31, 2006 Decision of District Registrar Blok [2006] B.C.J. (Q.L.) No. 2841 assessing the fees due to NST from its client, Inmet Mining Corporation ("Inmet"), under the Legal Professions Act, S.B.C. 1998, c. 9 ("Act"). The fees claimed are \$10,000,000.00. The fees (not including disbursements and government taxes) were assessed by the Registrar at \$5,248,834.94, being the fees already billed and paid by Inmet to NST.

BACKGROUND

- [2] In October, 1997, Inmet sold its Troilus Goldmine, located in northern Quebec, to Homestake Canada Inc. ("Homestake"), a wholly owned subsidiary of a major U.S. gold mining company. The sale price was \$178,200,000.00. The adjustment date for the sale was October 24, 1997 and the closing date was December 16, 1997. The purchase agreement ("Agreement") contained a representation and warranty concerning disclosure that had been made by Inmet:
6. The Vendor represents and warrants
- (c) the Vendor has provided to the Purchasers disclosure of and all information in its possession or control relating to any material fact which could reasonably be expected to have a material adverse effect on the condition (financial otherwise), operations or prospects of the business or the Purchased Assets as a going concern; additionally, the Vendor has provided to the Purchasers all interpretative reserve information in its possession or control pertaining to the Purchased Assets.
- [3] The Agreement entitled Homestake to have access to the assets being purchased to conduct further due diligence prior to closing, with that due diligence process being subject to the following:

8(g) the results of the enquiries referred to in paragraph (f) shall not have disclosed any material adverse fact relating to (i) to the Purchased Assets taken as a whole, or (ii) any asset comprised therein which may be of material value or importance to the operation of the Purchased Assets as a going concern not disclosed to [Homestake] prior to the date hereof in writing

- [4] On November 3, 1997, Homestake began its due diligence and came to the conclusion that the grade of the gold deposit previously disclosed by Inmet could not be reconciled with the information that had been obtained during the due diligence process. Accordingly, Homestake wrote Inmet on November 20, 1997 putting it on notice that paras. 6(c) and 8(g) of the purchase agreement had been breached but that it would be doing additional due diligence before reaching any conclusion regarding whether it would proceed with the purchase.
- [5] On December 5, 1997, Homestake wrote to Inmet repudiating the purchase agreement on the basis of alleged undisclosed material adverse facts.

RETENTION OF NST

- [6] Inmet contacted its regular commercial litigation counsel at Tory, Tory, DesLauriers & Binnington ("Torys"). Mr. James C. Tory Jr. of Torys telephoned Irwin Nathanson, Q.C., briefed him on the situation and indicated that NST would be retained to provide strategic advice and, if the transaction did not complete, to conduct the litigation. There was no discussion on a fee arrangement at that time. The completion of the sale to Homestake did not complete.
- [7] The initial briefing of NST as counsel took place in February, 1998 in Toronto. The initial assessment of the case by NST was that: "it would be extremely difficult to overcome the apparent non-disclosures by Inmet."
- [8] An action for specific performance or, alternatively, for damages was served on Homestake on February 23, 1998. Homestake defended, pleading that it was relieved of performance because of the alleged breach by Inmet of paras. 6(c) and 8(g) of the Agreement. There was also a plea of fraudulent misrepresentation alleging that senior officers and employees of Inmet knew or suspected that the assay database of Inmet was flawed. Homestake counter-claimed for damages which were said to arise as a result of their reliance upon the alleged misrepresentations of Inmet.

THE TRIAL AND THE APPEAL

- [9] The trial of the action commenced on February 5, 2001 and concluded on June 21, 2001 after 67 hearing days. The Reasons for Judgment on January 16, 2002 found in favour of Inmet on liability, deciding that specific performance should not be granted but that equitable damages in the amount of \$88,200,000.00 should be available to Inmet in lieu of specific performance. The damages were based on the difference between the purchase price and the value of the mine at the date of the Trial. Prejudgment interest was not ordered. The

Counterclaim of Homestake was dismissed.

- [10] An application was brought on behalf of Inmet to re-open the Trial to permit argument on the issue of whether pre-judgment interest should have been awarded. In April, 2002, Satanove J. held that the question of pre-judgment interest should be decided by the Court of Appeal as Homestake had filed a Notice of Appeal.
- [11] The appeal was scheduled for seven days commencing June 3, 2003. In its November 14, 2003 Reasons for Judgment, the Court of Appeal accepted the proposition that Satanove J. had applied the wrong test for materiality but concluded that the same results would have been obtained applying the proper interpretation of the facts. On the cross-appeal of Inmet, the Court held that it would be unjust not to award pre-judgment interest under the Court Order Interest Act.
- [12] Following the judgment of the Court of Appeal, NST negotiated a settlement by which Inmet discounted the total it was entitled to receive in exchange for Homestake foregoing a potential leave application to the Supreme Court of Canada. \$112,940,589.88 was paid by Homestake to Inmet on November 28, 2003 pursuant to the settlement arranged.

ACCOUNTS RENDERED BY NST

- [13] From the beginning of November, 2000 to the end of June, 2001, NST had to devote three of its senior counsel to the file virtually full-time. During that period, Mr. Nathanson docketed 1,194.8 hours, Mr. Schachter docketed 1,435.9 hours, and Mr. Clemens docketed 1,512.7 hours. On a monthly basis, NST sent 52 statements of account to Inmet. The fees billed through December 2003 totalled \$4,375,472.50. Each of the statements of account were sent under a cover letter with the text: "I enclose our Interim Statement of Account for services rendered with respect to the above matter ." The accounts themselves were headed: "To our Interim Account for Professional Services rendered in connection with the following matter ." Each account contained a description of services undertaken during the preceding month but no time detail, total hours or hourly rates were shown in the accounts. Under the description of activities was a line headed "TOTAL FEES" against which an amount was shown. With one exception, the "TOTAL FEES" shown were round numbers (generally rounded to hundreds or thousands of dollars).
- [14] After the Trial result was known there were discussions between NST and Inmet about an additional fee. NST advised that it considered a further fee of \$5,000,000.00 would be reasonable in the circumstances. Inmet advised NST that it considered this request premature in light of the filing of the Notice of Appeal and that it would be prepared to consider the request when the matter was concluded.

- [15] In September, 2002, the general counsel for Inmet requested an estimate of fees for the Appeal and NST replied indicating a "rough estimate of interim fees" of \$550,000.00 but that this estimate did not take into account the final fee of NST which would be determined after the result was known and after NST had consulted with Inmet.
- [16] After the Reasons for Judgment of the Court of Appeal were released, there were further discussions between NST and Inmet about fees. Mr. Nathanson agreed to provide the Board of Directors of Inmet with a note outlining the contributions of NST but not requesting a specific amount. The Board of Directors of Inmet resolved to pay an additional fee of up to \$2,000,000.00 to NST with the actual amount to be paid being left to the discretion of the Chair of the Board. A further \$1,000,000.00 was forwarded to NST. Mr. Nathanson responded by expressing the disappointment of the firm. A further interim account was issued for \$1,000,000.00 which, net of tax, resulted in further interim fees of \$873,362.44 being received.
- [17] NST then issued a bill for \$10,000,000.00 for fees to and including February 2, 2004. It is not in dispute that no services were rendered to Inmet by NST after the \$873,362.44 was paid. The difference between what had been billed and paid and the \$10,000,000.00 was not paid by Inmet. NST then arranged for an appointment to assess the \$10,000,000.00 bill.

POSITION OF THE PARTIES BEFORE THE REGISTRAR

- [18] Registrar Blok described the submissions on behalf of Inmet as follows:

Inmet emphasized that NST built substantial premiums into its monthly or periodic bills. From January 1998 until the conclusion of the litigation NST billed and was paid a total of \$4.375 million, whereas the time value of the work at NST's hourly rates was \$3.366 million. Inmet did not know that NST's periodic bills contained a cumulative premium of \$1 million over the time value of their services, either when the bills were rendered or at the time of the Board meeting to approve a bonus for NST.

The payment of the additional sum of \$1 million as a bonus brought the billings up to about \$5.25 million, which comprised a total premium of \$1.88 million over the value of the time at straight hourly rates.

Inmet submitted that the dispute in this case stems from two causes: the failure of the law firm to disclose at the outset of the retainer the basis on which it proposed to charge for its services, and the pattern adopted by the law firm of rendering monthly accounts during the course of the retainer, accounts which described fully the services provided during the month and showing the fees billed as "Total Fees". Inmet maintained that the law firm now seeks to take advantage of its failure to disclose its intended billing methodology by relying on the "fair fee" provisions of the LPA.

Inmet argued that these circumstances raise squarely the nature of the fiduciary obligation owed by lawyers to their clients. In particular, it was urged that this case ought to be governed by *R. v. Neil*, [2002] 3 S.C.R. 631, 218 D.L.R. (4th) 671, [2003] 2 W.W.R. 591, 168 C.C.C. (3d) 321, where the

Supreme Court of Canada said (at para. 19) that the duty of loyalty owed by every lawyer to his client included "a duty of candour with the client on matters relevant to the retainer". The requirement of disclosure was also said to be reflected in s. 7 of the Law Society's Professional Conduct Handbook, which reads as follows:

7. A lawyer must fully disclose, to the client or to any other person who is paying all or part of the lawyer's fee, any fee that is being charged or accepted.

The client submitted that this duty of disclosure required that NST inform Inmet at the outset if NST intended to render additional accounts for services that had already been billed on a monthly basis.

The client acknowledged that the Court of Appeal in [Nathanson, Schachter & Thompson v. Albion Securities Co. (2004), 32 B.C.L.R. (4th) 10 (B.C.C.A.)] came to a different conclusion about the disclosure requirement, but it argued that this conclusion was inconsistent with *R. v. Neil*, that the result in *Albion Securities* fostered mischief in lawyer-client dealings, and that, in any event, an estoppel arose on the facts of this case.

The mischief said to have been caused by *Albion Securities* is that lawyers who used to disclose to their clients the basis on which their fees were to be charged no longer do so, leaving clients in the position of not knowing how they are being billed (or worse, being actively misled by monthly billings) because their lawyers have made the deliberate and self-interested decision not to tell them.

On the matter of estoppel, the client maintained that a reasonable person in the position of Inmet would conclude that NST represented by words and conduct that fees would be charged on the basis of hours worked and as the services were performed.

The evidence relied upon as establishing this estoppel is as follows:

- (a) the failure to disclose the intended billing method, which is, in and of itself, a representation that the solicitors would not attempt to bill on a basis that was not transparent; and
- (b) the monthly bills, which state that the fees billed are the "TOTAL FEES" (with capital letters used in the original bills), which constituted a representation that the total fees for the work described in each account are the fees set out in that account.

Additionally, it was emphasized that a client in the position of Inmet, an Ontario company, would conclude that it was paying in full for the services as they were rendered because the practice in Ontario (and, indeed, its experience with counsel elsewhere in the world) is generally to charge for commercial litigation on an hourly basis.

Finally, the client argued that the fees paid, which represent a premium of 56% over normal hourly rates, constitute a fair fee for the services rendered. (at paras. 96-106)

[19] Registrar Blok described the submissions made on behalf of NST as follows:

The solicitors argued that the claimed fee was fair and reasonable having regard to the various criteria set out in s. 71(4) of the LPA, and particularly in view of the complexity of the matter, the skill and ability displayed and the "hugely successful result".

The solicitors emphasized that both Mr. Giles and Mr. Kirkham, two highly respected senior counsel in commercial litigation matters, opined that the claimed fee of \$10 million was fair and reasonable in the circumstances of the case, and that no opinion evidence was offered to the contrary. They argued as follows:

In the absence of any evidence that would challenge the opinions of these experts it is really unnecessary to finely weigh the issue or endeavour to determine a lesser fair fee.

On the estoppel issue, the solicitors submitted that if any conclusion was formed by Inmet as to the finality of the interim accounts it was not as a result of anything said or done by NST. NST made no representations, either by words or conduct, which reasonably could have led to such a conclusion, and thus no estoppel can arise: *NST, Schachter & Thompson v. Albion Securities Co.*, supra, and *NST, Schachter & Thompson v. Sarcee Indian Band* (1994), 90 B.C.L.R. (2d) 1, [1994] 6 W.W.R. 213, 24 C.P.C. (3d) 349 (C.A.).

Thus, according to the solicitors, Inmet's experience with legal bills in Ontario or elsewhere and Inmet's argument as to the alleged absence of "fair fee" billing in commercial litigation matters in Ontario are both irrelevant because Inmet's expectation was still based on a subjective misapprehension about billing practices in British Columbia and not on anything conveyed to Inmet by NST.

As to the duty of disclosure alleged by Inmet, the solicitors submitted that the decisions of the Court of Appeal in *Albion Securities* and *Sarcee* established conclusively that there is no duty on the part of solicitors to inform clients in advance that they intend to bill a "fair fee", i.e., a fee set by reference to the factors set out in the LPA. (at paras. 107-111)

APPLICABLE SECTION OF THE ACT

[20] Section 71(4) of the Act states:

At a review of a lawyer's bill, the registrar must consider all of the circumstances, including:

- (a) the complexity, difficulty or novelty of the issues involved;
- (b) the skill, specialized knowledge and responsibility required of the lawyer,
- (c) the lawyer's character and standing in the profession.
- (d) the amount involved,
- (e) the time reasonably spent,
- (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,

- (g) the importance of the matter to the client whose bill is being reviewed, and
- (h) the result obtained.

DECISION OF DISTRICT REGISTRAR BLOK

[21] There was no question raised by Inmet or their counsel at the assessment before Registrar Blok, by Registrar Blok at the assessment, or by Inmet or their counsel on this application that NST had not put enormous effort into the development of the case of Inmet or that the result produced was not extraordinary. In these regards, Registrar Blok stated:

Preparation of the case was complex and difficult. Experts were engaged in a number of fields, including geology, geostatistics and mine modelling, geochemistry (assaying), mine engineering, mineral sampling, mine valuation and materiality of information. In all, twelve experts were consulted. Mr. Schachter, in particular, developed a working knowledge and command of various complex technical fields. NST took care to master these subjects before experts were asked to formalize their opinions or witnesses were formally interviewed. Witnesses were interviewed at the mine site in Québec and at Inmet's offices in Toronto, and further interviews were conducted in Vancouver. There was at least one substantial pre-trial motion that took a number of days to complete.

Production and disclosure of documents was an enormous task. Inmet produced lists of documents containing 3,200 individual documents and comprising over 75,000 pages of material, much of which was of a highly technical nature. Many of the documents were in French.

Examinations for discovery were extensive. Although the number of days spent on examinations for discovery was not expressly referred to by the witnesses, it appears from the accounts themselves that they were conducted over 22 days. Inmet's representative was left with 450 requests for information and documentation. Homestake also delivered extensive interrogatories. NST delivered an extensive notice to admit, comprising some 88 pages including schedules.

NST performed extensive legal research on various procedural, evidentiary and legal issues. In all, there were 70 legal memoranda prepared, which took up three large binders.

(at paras. 18-21)

Superlatives abound when considering the s. 71(4) factors in this matter. The case was highly complex and difficult; the NST lawyers displayed superb skill in dealing with difficult issues and a vast body of evidence, much of it highly technical in nature; the responsibility imposed on the lawyers was considerable; the principal NST lawyers involved were all Queen's Counsel and would be regarded as leaders in the profession; the amount recovered made the case one of the largest ever litigated in the province (but, contrary to Mr. Nathanson's letter of December 1, 2003, not the largest ever as there are at least two others which exceed it); a prodigious amount of time was spent on the matter, so much so that, during the trial, the three senior counsel involved worked every day for about six months; the hourly rates of the lawyers involved, though at the

high end of the range, reflected their experience and standing; the matter was of critical importance to the client; the result was highly successful, perhaps even a "company maker", and it vindicated the integrity of Inmet and its representatives through the dismissal of Homestake's claims of fraudulent misrepresentation. (at para. 129)

- [22] On the question of whether the fees claimed were fair or reasonable, Registrar Blok stated that s. 71(4) of the Act requires a Registrar to consider all of the circumstances of the matter including the eight particularized factors which are derived generally from *Yule v. City of Saskatoon* (1955), 16 W.W.R. 305 (Sask.Q.B.), aff'd 17 W.W.R. 296 (Sask.C.A.).
- [23] After noting in para. 129 that "Superlatives abound" regarding the result obtained by NST for Inmet, Registrar Blok concluded that: "These matters make it plain that a substantial premium is warranted. Indeed, the contest in this matter is not whether a premium was warranted but how much it should be." (at para. 130).
- [24] Inmet presented no opinion evidence regarding the appropriate quantum of a fair fee. Jack Giles, Q.C. and Barry Kirkham, Q.C. presented opinion evidence on behalf of NST. Registrar Blok described Messrs. Giles and Kirkham as "counsel of great experience and standing and their opinions are to be accorded appropriate respect and considerations." (at para. 131). However, Registrar Blok quite correctly concluded: "But their opinions are not determinative and, ultimately, the responsibility is mine alone to arrive at a conclusion based on a consideration of all of the evidence." (at para. 131).
- [25] Registrar Blok arrived at a different opinion than the opinions of Messrs. Giles and Kirkham. Rather than coming to the conclusion that a fair and reasonable fee would be somewhere between two to three times the regular billing rates of the lawyers who had provided services, Registrar Blok came to the conclusion that the accumulated fees already paid of \$5,248,834.94 represented a fair and reasonable fee. The reasons for concluding that \$5,248,834.94 was a fair and reasonable fee were set out in paras. 145-56 of the Reasons of Registrar Blok:

Both Mr. Giles and Mr. Kirkham placed considerable reliance on *Birnie, Sturrock & Co. v. Farrell Estate Ltd.*, [(1993), 85 B.C.L.R. (2d) 59 (B.C.C.A.)] where a fee was allowed that was three times the value of the recorded time. However, I think it would be incorrect to conclude that *Birnie, Sturrock* established a general benchmark in these types of cases. Although trite to say, it is important to remember that fee review cases turn on their individual facts. In *Birnie, Sturrock* the solicitor's ingenuity brought about a highly successful result with a relatively modest expenditure of his time, and only one bill was rendered. A significant feature of the case, perhaps the most salient feature of all, was that the solicitor's highly efficient efforts brought about the very successful result while sparing the client the significant expense, uncertainty and trouble of a major legal battle with the taxation authorities. This must be contrasted with the facts in the present case, where an enormously successful result was obtained but only after the client had gone through a lengthy trial and a lengthy appeal and had paid millions of dollars in fees by way of 52 bills rendered over a six year period. For this reason I consider that the quantum experts

placed undue reliance on Birnie, Sturrock in concluding that a premium of similar relative magnitude was warranted in this case.

Owen, Bird v. De Cotiis, [[199] B.C.J. (Q.L.) No. 2417 (S.C.-Rev.)] though less authoritative because it was a decision of a registrar, was closer to the mark factually because it involved a case where an excellent result was obtained through extraordinary skill in difficult litigation, the solicitors having rendered a series of accounts throughout the matter. In that case the premium allowed was 72% of the straight-time billings.

A prominent feature of Mr. Kirkham's opinion was his astonishment at the result of the litigation in view of the difficulties of the case. In his testimony he said "I'm incredulous at the result" in the face of the difficulties. In his report he described those difficulties as being "overwhelming odds". He went so far as to say that it would not have been unreasonable for a competent lawyer to recommend that Inmet not proceed with litigation at all. This, however, must be contrasted with NST's own opinion on the matter, an opinion it conveyed to Inmet, which put the prospects for success at 50-50, and I therefore conclude that the proper view of the result achieved in light of the difficulties faced must be moderated somewhat from Mr. Kirkham's view.

As for Mr. Giles, I do not consider it to be a correct approach to test the reasonableness of a fee in a very large case by "dropping a few zeros" (in this case, three zeros), as he suggested. Reasonable fees are not necessarily linear in that way. A small case, for example, may warrant fees that represent a higher proportion of the amount recovered than a case where a lot of money is in issue. I thus do not consider it particularly helpful to test the reasonableness of the fees claimed in this case by extrapolating or interpolating in linear fashion over many degrees of magnitude.

I also found Mr. Giles's reference to the commission structure prescribed by Order 65, R. 29 of the pre-1976 Rules of Court to be of no assistance in this case. Even if such a historical provision could usefully be looked to for guidance in modern fee review cases, a matter on which I entertain considerable doubt, that provision was essentially a contingency fee for collections matters (which formed an important part of law practices prior to the advent of collection agencies): see *Harper Gilmour Grey & Co. v. Vancouver (District Registrar)* (1967), 60 W.W.R. 658 at 662 (B.C.S.C.), *aff'd* (1968), 63 W.W.R. 705 (B.C.C.A.). As such, this provision offers little in the way of guidance for a non-contingency case.

In the closing observations in his report, Mr. Giles said:

I have no doubt that your client, in offering \$1 million in addition to the sum of the series of interim accounts rendered from time to time, was actuated by an admirable spirit of gratitude and generosity. Nevertheless, it failed, in my respectful view, to have adequate regard to the true value to it and the true cost to you of what was required to obtain the result you achieved on its behalf.

The cost to you and your firm is a matter to which I can speak with the benefit of some experience. In the 44 years I have practised at the Bar, I have been involved in many mega cases. They are properly called practice killers. Other briefs have to be refused, as was the case with you, and for months at a time the senior members of your firm are simply unavailable to meet the requirements of your regular clientele. When the case is over it takes time to recover.

[emphasis added]

The evidence in this case did not support some of the latter comments. While Mr. Nathanson said that he was obliged to turn away three substantial matters during the course of the Inmet file (but since the firm was already fully engaged this should not have resulted in any loss of fees), there was no evidence that NST left any regular clientele wanting for its services, nor was there any evidence that time was needed for the firm to recover its practice after the case was over.

Importantly, in giving his opinion Mr. Giles assumed that the cumulative total of the interim fees billed represented the value of the time spent on the matter at the firm's usual hourly rates. He therefore proceeded on the assumption that the total straight-time value of the services was \$4.38 million, but because the interim accounts contained premiums the true straight-time value was \$3.37 million.

The general approach of Mr. Giles was to consider what a fair overall fee would be having regard to the various factors set out in s. 71(4) of the LPA. He did not discuss the effect that the interim billings might have on an overall fee, and he did not discuss (and was evidently unaware of) the premiums that had been billed by way of the interim accounts. Mr. Kirkham did deal with interim billings expressly; in discussing the Endean case he concluded that interim accounts would have the effect of moderating an overall fee, although he did not address the effect of the premium billings in the interim accounts.

(at paras. 133-141)

The interim accounts, which contain a cumulative total of premiums of \$1,009,054.25, are very significant factors in this case. For the reasons outlined above I conclude that the quantum experts did not give sufficient weight to these interim accounts. (at paras. 142-3).

Taking an overall view of the underlying litigation, it was Inmet's asset that was at issue and not that of the solicitors, the damages for which compensation was ultimately ordered had been incurred by Inmet, and it was Inmet that bore the enormous cost and risks of the litigation, including the risk, in the event of a loss, of having to pay costs in the millions of dollars. By contrast, while the solicitors brought admirable skill and industry to bear in framing the issues, mustering the evidence and presenting the client's case, they were paid throughout this matter, usually every month, and not only were they paid but they were paid premiums over their hourly rates. They were never at risk for non-payment of fees, although it is not clear if, or to what extent, the fees would have been moderated in the event the litigation had been lost (Mr. Nathanson simply said "there would have been a very different conversation" with Inmet). In any event, the risk borne by the solicitors pales in comparison to the risks borne by the client. Taking

those matters into account, together with all of the other circumstances of the case, I am of the view that the work of the solicitors, extraordinary as it was, does not warrant the significant participation in the outcome for which the solicitors contend.

Having given careful consideration to all of the circumstances, I conclude that the superb efforts of the solicitors, which brought about an extraordinarily successful result in a most difficult and challenging case, warrant a substantial overall fee reflective of the unusual features of the matter, a fee which should include a substantial, even generous, premium over the straight-time value of their services. Given the ample manner in which the solicitors were remunerated throughout the course of the case I conclude that the cumulative fees already paid of \$5,248,834.94, which includes a total premium of \$1,882,232.94, properly rewards the solicitors for their services.

THE STANDARD OF REVIEW

[26] The standard of review applicable to an appeal from the assessment by a Registrar of the fees of a solicitor is analogous to the standard applicable to an appeal to the Court of Appeal from a trial judgment or an appeal from an interlocutory ruling of a Master: *Shafer v. Berge & Co.* (1991), 7 C.P.C. (3d) 43 (B.C.S.C.). In *Shafer*, supra, Paris J. concluded:

The jurisprudence under those provisions held that before the "discretion" of the registrar could be interfered with by a judge it had to be found that he had acted upon an error in principle or that his decision was "clearly wrong" (*Moss v. Blaine* (1984), 56 B.C.L.R. 266 (B.C.C.A.)). The courts felt that it was prudent to rely on the particular knowledge and experience of registrars in the area of taxing bills.

The terminology now in place of "review" of a bill by the registrar and an "appeal" to the court combined with a power in the court to "make any order it thinks just" would, on the face of it, appear to bring the power of the Court closer to that of a court of appeal on an appeal from a trial. Certainly it seems that s. 72 at least contemplates something in the nature of a re-hearing similar to that of an appeal from a final order of a master under Rule 53(6) (see *Abermin Corporation v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188).

Of course, in the exercise of its powers a court of appeal is careful not to lightly change findings of fact or interfere with the discretion (which in this context I apprehend to mean the right of the court to exercise its judgment according to legal principles) of the trial court unless it acts on wrong principle or is clearly wrong. A court sitting on appeal under s. 72 would similarly be slow to change a registrar's findings of fact and would give due deference to the registrar's extensive experience in the area of taxation of solicitors' bills. In the last analysis perhaps that process is little different than applying the tests under the previous legislation of "error in principle" and "clearly wrong". (at p. 46)

- [27] In *Pamela S. Boles Law Corp. v. Mathison*, [1998] B.C.J. (Q.L.) No. 976, Baker J. made this statement regarding the general principle regarding the standard of review: "An appeal from the decision of the registrar on the review of a bill under the Legal Professional Act is not a new trial or a re-hearing. It is a true appeal, in the sense that the court may not interfere with the registrar's decision in the absence of an error in principle." (at para. 4).
- [28] Accordingly, to interfere with the findings of Registrar Blok it will be necessary to find that he committed an error on a matter of principle or that his findings were clearly wrong.

ERRORS IN PRINCIPLE ALLEGED BY NST

- [29] NST submits that the first error in principle made by Registrar Blok was in deciding that he should take into account that NST did not bear a risk of non-payment and that this was a factor to be taken into account when determining a fair or reasonable fee. NST submits that the consideration of risk of non-payment was either an error in law in that the consideration of that matter was inapplicable or, alternatively, was an error in principle in that the Registrar gave it undue weight. The following passage which is said by NST to be "most telling" is para. 142 of the Decision where Registrar Blok stated:

It is my view that the sending of interim accounts is a factor that ought to be taken into account when considering the amount of a reasonable overall fee. Risk and reward are related concepts: the greater the risk taken on or the sacrifice incurred by the solicitor, the greater the potential fee ought to be. Thus in a matter where a solicitor is at risk of non-payment of some or all of his or her fees, or where significant disbursements have been carried by the solicitor with attendant risk or cost, or where a matter has been concluded after being carried by the solicitor over a long period of time without any interim payment, the resulting fee may be greater than in a case where those features are not present. Just as the element of carrying a matter is a factor weighing in favour of a premium or greater fee where all factors warrant one, so must interim billings be taken into account to moderate any final fee or premium component to that fee, and certainly if the interim accounts themselves have included a substantial premium component.

- [30] NST submits that the risk of non-payment of fees is only a factor to be considered in reviews of the reasonableness of contingency fee agreements and that, because risk is not an enumerated consideration under s. 71(4) of the Act, it is not a factor which should have been considered by Registrar Blok in this assessment. As well, it is submitted that the very few cases in which assessing officers or the courts have considered the risk to a solicitor of going unpaid have only resulted in risk being a factor militating in favour of increasing a fee. Counsel for NST submits that: "In no other case has the concept of risk been applied to decrease an otherwise fair fee."
- [31] I cannot accede to this submission on behalf of NST. I cannot conclude that Registrar Blok made an error in principle or was clearly wrong in reaching the conclusion that the risk to the solicitor should be taken into account in determining a fair and reasonable fee. Section 71(4) of the Act is clear. On an assessment, a Registrar must consider "all of the

circumstances" including but not limited to the eight factors which are then specifically enumerated in that section. The phrase "all of the circumstances" has been interpreted in this context to include "all factors essential to justice and fair play": *Diligenti v. McAlpine* (1979), 9 B.C.L.R. 153 (B.C.C.A.) at para. 8; *Murphy v. Mutual of Omaha Insurance Co.*, [2000] B.C.J. (Q.L.) No. 2046 (B.C.S.C.) at para. 7; *Yule v. City of Saskatoon*, supra, at p. 313; and *Davis & Co. v. Jiwan*, [2006] B.C.J. (Q.L.) No. 1009 (B.C.S.C.) at para. 177.

- [32] The risk borne by the lawyer and the ability of the client to pay accounts are among the factors that have been held to fall within the residual discretion of the Registrar when considering "all factors essential to justice and fair play": *Re Goode* (1987), 11 B.C.L.R. (2d) 112 (B.C.C.A.) at p. 116; *Davis & Co.*, supra, at paras. 265, 281-2; *Diligenti*, supra, at para. 8; and *Re Norton, Stewart, Norton & Scarlett* (1989), 40 B.C.L.R. (2d) 168 (B.C.C.A.) at para. 21.
- [33] While the risk borne by the solicitor may be of greater significance in a contingency fee case, the authorities noted above establish that the risk to the solicitor is also a relevant factor for consideration in non-contingency cases. Considerations of risk both to the client and to the solicitor have consistently been recognized as relevant factors when determining a fair and reasonable fee.
- [34] In this regard, consideration of risk was considered by both Mr. Giles and Mr. Kirkham in their expert opinions provided to support the position taken by NST at the assessment. It should also be noted that Mr. Nathanson in giving an opinion in support of a fee charged by Mr. Kirkham stated that, when determining a "fair fee", he would look at the result and "the amount of risk involved": *Owen Bird v. De Cotiis*, [1999] B.C.J. (Q.L.) No. 2147 (B.C.S.C. - Registrar) at para. 91.
- [35] NST was never at risk for non-payment of its fees. The 52 accounts rendered by NST were all paid in a timely fashion and Inmet posed no risk of not being in a position to pay the accounts as rendered. Registrar Blok did not err in law or principle in considering the lack of risk borne by NST over the course of its retainer as a relevant factor in determining a fair and reasonable fee. To have ignored risk to NST would have led to a finding that he did not consider "all of the circumstances" contrary to the statutory mandate provided to a Registrar under s. 71(4) of the Act. In considering this factor, I cannot conclude that Registrar Blok gave this question too much weight. From his Reasons, it is clear that Registrar Blok considered it as only one of the circumstances which he was required to consider.
- [36] NST submits that the second error in principle made by Registrar Blok was his conclusion that the issuance and payment of interim accounts was a legally relevant factor for consideration in a review under s. 71(4) of the Act and was made a significant factor in the determination of Registrar Blok. What are referred to as the "relevant passages" in this regard are paras. 142-3 of the Reasons noted above. NST submits the consideration of the payment of interim accounts was an error in law and, in this regard, submits that s. 71(4) of the Act does not enumerate payment of interim accounts as a factor to be considered in determining the value of the services rendered. NST also submits that the approach taken by

Registrar Blok is inconsistent with the established law relating to the "entire contract" doctrine applying to the retainers of solicitors as set out in what NST refers to as "the leading authority" on the subject in this jurisdiction, the decision in *Ladner Downs v. Crowley* (1987), 14 B.C.L.R. (2d) 357 (B.C.S.C.). In *Crowley*, supra, Southin J., as she then was, stated:

In three judgments of the Court of Appeal, *Ray, Wolfe, Connell, Lightbody & Reynolds v. Henry Elec. Ltd.*, (1982) 37 B.C.L.R. 203, decided the 2nd June, 19 82, by Bull and Craig, JJ.A., Anderson, J.A. dissenting, *Architectural Institute of British Columbia v. McAlpine, Roberts & Company* [1982] 5 W.W.R. 470, decided 6th July, 1982, by Seaton, Lambert and Hutcheon JJ.A., and *Ace Asphalt & Maintenance Ltd. v. Goodfellow MacKenzie*, [1984] B.C.J. No. 1780 (1984), 56 B.C.L.R. 169 decided by Seaton and Craig, JJ.A., Lambert J.A. dissenting, the Court has been concerned with the right of a client who has paid accounts sent during the course of a retainer to tax those accounts. To what extent, if at all, those cases have changed the law as it existed at the end of the 19th century, I shall advert later in these reasons. (at p.362)

- [37] NST submits that the billing practice that was followed is consistent with the "entire contract" doctrine as interim accounts seeking payment for amounts which Inmet was legally obliged to pay but to which NST would not become legally entitled until the retainer was concluded were sent and paid by Inmet. The effect of the "entire contract" doctrine is that payment of money on account of fees on an interim basis leaves unaffected the right of Inmet to pursue an assessment under the Act at the conclusion of the retainer. NST submits this ability would be lost to Inmet if what was rendered on an interim basis was not part of an "entire contract" as Inmet would not have the right to seek assessment of each interim account within the limitation period set out under s. 70(1) of the Act which requires an appointment to have a bill reviewed within 12 months after the bill was delivered or three months after the bill was paid (whichever occurs first).
- [38] NST submits that it would be "illogical and unfair if the right of the solicitor to pursue an assessment under the Act at the conclusion of the retainer to establish the value of the work done were affected by payment of money on account when the client's rights are unaffected" and submits that the presence or absence of payment of monies on account of the final fee are not relevant factors in determining the value of the services rendered. NST submits that the value is for the "entire contract", that what is fair and reasonable can only be determined at the end of the retainer and that payments on account are deposits against a sum which will only later be determined.
- [39] I cannot accede to that submission. First, Registrar Blok was required to consider "all of the circumstances" whether or not a matter such as the issuance of interim accounts is one of the enumerated factors set out in s. 71(4) of the Act. Second, while Registrar Blok did state that the sending of interim accounts is a factor that ought to be taken into account when considering the amount of a reasonable overall fee (at para. 142), it is clear that this statement and the subsequent discussion was in the context of a determination of risk. There is nothing in that discussion which would allow me to conclude that Registrar Blok did not understand that he was to make an assessment of the fairness and reasonableness of

the total fee to be charged taking into account "all of the circumstances". One of those circumstances is whether interim accounts were issued and whether those interim accounts were paid. I cannot conclude that Registrar Blok was "clearly wrong" or that he made an "error in principle" in this regard.

[40] The issue of interim accounts allows a solicitor to be paid "down payments" against what will eventually will be found to be a fair and reasonable fee between solicitor and client or, if necessary, after assessment. The decision in *Crowley*, supra, sanctions the rendering of interim accounts while, at the same time, retaining the right of both the client and the solicitor to have an assessment of the overall account and, if necessary, of each account without the argument being raised that the right to have an account assessed has been lost as a result of s. 70(1) of the Act. The maintaining of the right of assessment when interim accounts are rendered is a further factor which can be considered by a Registrar when an account is being assessed. Registrar Blok was not clearly wrong and did not make an error in principle when he considered this question on this assessment.

[41] NST submits that the third error in principle made by Registrar Blok was his repeated reference in paras. 42-4, 57, 59, and 141-6 to the word "premium". It is submitted that the alleged emphasis of premium as the "single most important factor in his review" reveals both an error in law and error in principle. NST submits that the error in law arises from the fact that there can be no "premium" in a quantum meruit consideration because there is no agreement that there will be payment for time on the basis of regular hourly rates and that, without a fee agreement in place based on hourly rates and time, there can be no "regular price" and, therefore, no "premium". NST submits that the repeated references to and the reliance on a concept of premiums demonstrates an error in principle as it demonstrates an overemphasis on the factors of time spent and the hourly rate as set out in s. 71(4)(f) of the Act and that this section is entirely inapplicable in the absence of an agreement with the client. In these regards, NST relies on the following authorities: *Yule v. Saskatoon*, supra; *Doig v. Davidson Muir* (1998), 158 B.C.L.R. (4th) 1 (B.C.C.A.); and *Audet v. Bates* (1998), 18 C.P.C. (4th) 357 (B.C.S.C.).

[42] In *Yule v. Saskatoon*, Tomson J. stated:

I find myself in full agreement with the principle enunciated by Riddell, J., in *Lynch-Staunton v. Somerville* (1918) 44 O.L.R. 575, at 581, when he said:

"Common sense, I venture to think, indicates that the amount of remuneration a lawyer should receive depends to some extent on the magnitude of the interests concerned, and more upon the skill which he manifests in his client's behalf than upon the number of interviews he may have or the time spent. When negotiating for a settlement in a matter of importance, it is often impossible to attach a particular value to a particular interview and less or more to another; nor should either the client or the Taxing Officer require it. It is infinitely better to state in reasonable detail what the lawyer has done and what he has accomplished, and from the whole course of the transaction determine the fee to be allowed."

In the last-mentioned case Kelly, J. also expressed an opinion which, I think, is peculiarly applicable in this case when, at pp. 582-3, he said [quoting Middleton, J. in *Re Solicitors* (1911) 2 O.W.N. 596, 18 O.W.R. 366]:

"When a solicitor is employed to adjust a matter of difficulty, nothing more injurious to the client could be suggested than that the solicitor's remuneration must depend upon the length of time taken and the number of interviews had. One may grasp a situation with great rapidity, and his skill and experience may lead to its satisfactory solution in a way that after the event appears easy. Another, lacking the necessary skill and experience, may plod away at great length and in the end fail to reach as satisfactory a result, but an itemized bill would give him greater remuneration.'

"It can readily be conceived that in many instances the solicitor is sought out and retained because of his experience and his skill in attaining the desired result without unnecessary expenditure of time." (at p. 312)

[43] In Davidson Muir, *supra*, Southin J.A. stated:

Until the 1950's, solicitors' fees were generally fixed by paying some regard to the tariff in the Supreme Court Rules. In that decade, someone invented the idea, rapidly adopted, that solicitors, like tradesmen, should charge by the hour. Thus, the invention of time sheets, now I suppose replaced by computer recording.

What was not then invented and, so far as I know, has never been invented, is the solicitor's equivalent of the automobile mechanic's, I believe it is called, "Blue Book", which sets forth how long this or that job of repair should take. Concerning charging by time, these comments made in 1971 are as apposite now as they were then:

... the fee ... charged by the solicitors suggests that one of the dangers of keeping detailed dockets is that one might become mesmerized by the ticking of the clock and come to value the expenditure of time to the exclusion of all other factors that should bear on the assessment of a reasonable fee for solicitors' services. It is not true that a solicitor has only time to sell and whoever was the author of that inanity has little to be proud of. Of course, he may have been referring to that hopefully small minority of solicitors who, indeed, have little to offer a client but their time. But a solicitor, a competent solicitor, has knowledge, advice, expertise and experience with which to embellish the passage of raw time. It is these factors that weigh more heavily when fees are being considered, rather than how much time was lavished on the client's affairs. Another important factor is the value of the services of the solicitor, not to himself, but to his client. What did he accomplish for his client -- if anything? [*Re Solicitors*, [1971] 3 O.R. 470 at 472, per Mr. McBride, the Taxing Officer.]

One danger to clients in charging by time alone is that contained in the aphorism of C. Northcote Parkinson, "work expands so as to fill the time available for its completion". If a solicitor is charging by the hour, what incentive is there to hurry up?

Another danger is quite simply exaggerating the time productively spent; hence the solicitor who arrives at work at 9:00 a.m. and leaves at 5:00 p.m. with a time sheet showing eight hours.

In commenting on these dangers, I am not speaking of the facts of this case nor am I suggesting that the legal profession in British Columbia is generally guilty of either practice, but only the naive would believe that no solicitor has ever done such a thing. (at pp. 5-6)

[44] In paragraph 144 of his Reasons, Registrar Blok referred to "premiums" as follows:

Had there been no interim billings and no interim premiums paid, I might have agreed with Mr. Giles's conclusion that an account that was twice one confined to the value of time alone would meet the test of reasonableness (though I might not have agreed that it would have been met "easily", as Mr. Giles put it). Here, doubling the hourly-rate value of the time spent (that is, applying a 100% premium) would result in a fee of \$6.74 million, as compared to the \$5.25 million that has been paid (a premium of 56%). But of course there were interim billings, accounts which contained significant premiums, and when one takes these into account as a general factor to be considered the apparent disparity between the two figures all but disappears, or at least narrows considerably.

[45] NST submits that the amounts charged in excess of the usual rates charged by it are not, in fact, "premiums". Rather, NST submits that the "premiums" are the product of the efficient use of time by the professional staff providing services and of internal and arbitrary rates used by NST developed for less complicated matters and, therefore, inappropriate for this litigation. The fact that the interim accounts already included an incremental increase over the value of the time spent at the regular hourly rates is not irrelevant in determining what is a fair and reasonable fee on an assessment. However, Mr. Nathanson admitted that "premiums" were included in the interim accounts for reasons that, at least on some occasions, included enumerated factors such as success and complexity. In this regard, Mr. Nathanson under cross-examination stated:

"I looked at what we had done, the quality of the work we had done and the quality of the work we'd done on the appeal and I added an amount that as I mentioned, that indicated that I thought that the appeal had gone very well and we would succeed I can't attribute a number to say well, I put in a success factor of X. I took it all into account and I fixed the amount that I did for the reasons I gave, recognizing it was an interim account."

[46] On the other hand, Inmet submits that this submission of NST is "misconceived for a number of reasons":

First, it misconstrues the exercise that the Registrar was engaged in when he refers to "premium". Second, it is uncontested that the interim accounts rendered by NST contained amounts greater than the fees based solely on time and the firm's ordinary hourly rates. Finally, NST ignores the fact that the "premium" that was built into the interim accounts delivered by NST was intended to account for some of the "fair fee" considerations under s. 71(4).

- [47] Inmet submits that the "most readily available benchmark" against which a Registrar can measure the fees sought by solicitors is what the fees would have been at the ordinary hourly rates of the solicitors who provided services. In this regard, Inmet points out that Mr. Kirkham said that an appropriate fee would reflect "a premium of 150% and 200% of the value of the time spent." Similarly, Mr. Giles also considered the relationship between the time spent and final bill rendered. Inmet submits that the Registrar committed no error in law or in principle in referring to the "premiums" in the NST accounts and that the evidence before Registrar Blok clearly established that each of the accounts included a premium over the value of the work at the usual hourly rates of the lawyers who had provided services.
- [48] I cannot conclude that Registrar Blok erred when he considered the question of whether "premiums" had been added to the regular hourly rates charged by those who were providing legal services to Inmet when interim accounts were rendered. First, I agree that the "ordinary" hourly rates charged are a readily available benchmark against which a Registrar may measure what is a reasonable fee. Second, if what is being charged on an interim basis is less than or more than the ordinary hourly rates of those providing services, this is a factor which can be taken into account by a Registrar. If what is charged is less than the ordinary hourly rates, then it would be possible for the Registrar to conclude that it was the view of the billing solicitor that the services provided were of lesser complexity and importance than what would be reflected in the usual rates charged. If what was charged was in excess of the usual hourly rates, then it would be possible for the Registrar to conclude that it was the view of the billing solicitor that the services provided were of greater complexity and importance than what would be reflected in the usual rates charged. The ongoing assessment by the billing solicitor of the factors enumerated in s. 71(4) of the Act and as reflected in the relationship between the usual hourly rates and what was being charged is a factor which a Registrar could take into account. Third, a Registrar could take into account whether and to what extent the factors enumerated in s. 71(4) of the Act had already been taken into account in interim accounts rendered. In determining what is a fair and reasonable fee, it is appropriate for a solicitor to assess not only what is a fair and reasonable fee at a particular stage but also what is a fair and reasonable fee overall. Similarly, a Registrar can take into account the assessment made by the billing solicitor on an ongoing basis. Fourth, the interests of "justice and fair play" require the Registrar to consider these questions as part of the consideration by the Registrar of "all of the circumstances" when assessing a fair and reasonable fee. Even if there is no agreement setting a fee rate as is contemplated under s. 71(4)(f) of the Act, a Registrar must still look at the reasonableness of the base rate in the context of the overall fee, what is received on an interim basis, and what is a fair and reasonable fee based on what was accomplished and the various other matters set out in s. 71(4) of the Act.
- [49] Prior to the introduction of time sheets and computer recording of time, the assessment of whether a fee was fair and reasonable could more easily concentrate on what had been done, what had been accomplished, and all of the other factors set out in decisions such as *Yule v. Saskatoon*, *supra*, now encapsulated under s. 71(4) of the Act. The introduction of

computerized records has resulted in a slavish and unfortunate adherence to a mathematical exercise and, after that exercise is undertaken, an assessment by practitioners such as Messrs. Giles and Kirkham of an appropriate multiplier or premium over and above the value of the time spent.

- [50] In this regard, I adopt the sentiment expressed by the Taxing Officer in *Re Solicitors* as quoted by Southin J.A. in *Davidson Muir*, *supra*. While Registrar Blok paid much attention to the question of the "premiums" that were built into the interim accounts rendered by NST and to what extent a premium should be applied against the usual billing rates of the lawyers of NST who had provided services to Inmet, I cannot conclude that undue emphasis was placed on these questions or that the emphasis on "premiums" became the single most important factor in the review undertaken by Registrar Blok. While a more principled rendering of both interim accounts and final bills would best be accomplished without the solicitor referring to how much time had been spent and only considering what would be a fair and reasonable fee in all of the circumstances whether or not set out in s. 71(4) of the Act, that type of exercise is now a mere footnote in the history of how solicitors render accounts and bills. In any event, it has always been the case that a District Registrar must take into account whether "premiums" were built into interim accounts and whether the proposed fee should represent either an increase or a decrease in the usual billing rates of lawyers providing services to a client.
- [51] I cannot conclude that Registrar Blok made any errors in principle or was clearly wrong in any of the conclusions he reached in assessing what was a fair fee for the services rendered by the lawyers of NST. In the circumstances, I cannot conclude that Registrar Blok did not take into account "all of the circumstances" in reaching the conclusion that a fair and reasonable fee was \$5,248,834.94.

FURTHER SUBMISSIONS OF INMET

- [52] It was the submission of Inmet that NST was not entitled to a fair and reasonable fee at all because the billing pattern of NST established that it was billing for its services as they were rendered based on hourly charges. Extensive evidence was presented regarding the understanding of Inmet officers and their counsel as well as the understanding of corporate counsel across Canada relating to the question of whether a "success fee" was contemplated when so-called "final" accounts were received throughout.
- [53] On the issue of "estoppel", Registrar Blok found that the matter was indistinguishable from the findings of the Court of Appeal in *Albion*, *supra*. In this regard, Registrar Blok concluded:

I accept that Inmet's representatives believed that the monthly bills sent by NST were final bills for the work in question. However, on the evidence I am satisfied that this belief was based on the previous experience of the representatives in question and not on any information or representations provided by NST. The mere fact of sending monthly accounts in variable

amounts, with the term "Total Fees" used on the fee line, is an insufficient basis on which to conclude that NST represented to Inmet that these bills represented the complete charges for the work in question. (at para. 113)

The upshot is that Ontario practice in this area was not shown to be much different from the practice in British Columbia, and therefore no conclusion can be drawn that Inmet would necessarily have had differing expectations as a result of its Ontario origins.

The test for estoppel is an objective one. As the Court of Appeal said in *Albion Securities* (at para. 23):

Silence alone is not enough and there must be a representation either by words or conduct. The test for a representation sufficient to found an estoppel is an objective standard. In any particular case, it is a factual inference whether a reasonable person in the position of the client would conclude that the solicitors represented by words or conduct that fees would be charged on an hourly rate basis only.

I conclude that the belief of the Inmet representatives that the monthly bills represented the complete charges for the periods in question stemmed from assumptions based on their own experiences. This is no different from the situation in *Albion Securities*, where the clients' representative operated under an assumption that was based on his prior experience with legal accounts through his employment at a financial institution. Inmet's assumption about the bills was thus a subjective misapprehension.

Finally on the estoppel issue, I conclude that NST's request for extra fees following the successful trial result, with its position on fees being confirmed by Mr. Schachter in his response to Inmet's request for a fee estimate for the appeal, put Inmet on notice that a further fee was being sought. If an estoppel arose at all it cannot survive these events. (at paras. 116-9)

[54] In submitting that Registrar Blok was correct in his conclusion as to what was fair and reasonable but that he erred in arriving at the conclusion that NST was not estopped from claiming a success fee, I cannot conclude that an error in principle was made or that Registrar Blok was clearly wrong. When receiving the 52 accounts rendered, Inmet and its counsel must be taken to be aware of the authority provided by the decision of the Court of Appeal in *Albion Securities*, supra, and that the practice followed by NST was in accordance with the obligations imposed by that Court in that decision. They must also be taken to be aware that there were good policy reasons why it is necessary for interim and not final accounts to be rendered so that it could maintain the ability to seek assessment of each account within the limitation period set out under s. 70(1) of the Act.

[55] Relying on the decision in *R. v. Neil*, supra, Inmet submits that Registrar Blok erred in coming to the conclusion that he was bound by the billing practices approved by the Court of Appeal in *Albion*, supra. On the question of whether there was a duty to reveal the intended billing method and that NST had not fulfilled the duty of loyalty owed by every solicitor to his client including a duty of candour with a client on matters relevant to the billing that would be undertaken, Registrar Blok concluded:

As to Inmet's argument that there was a duty to reveal the intended billing method, I conclude that, on the authority of *Albion Securities*, no such duty arose. As NST put it, solicitors are not required to inform clients that they intend to bill as the law allows. If *R. v. Neil* alters that result then it is for more authoritative voices than mine to say so. (at para. 120)

[56] It is clear from his Reasons, that Registrar Blok was not comfortable with the billing practices approved by the Court of Appeal in *Albion*, supra. In this regard, he stated:

This is not the first time that a client has maintained that a practice of regular or periodic billing has led to the belief that the matter was being fully billed as it proceeded. The fact that this issue has been raised on a number of LPA [Legal Professions Act] reviews (and not all involving the same law firm) shows that there are clients who, due to their past experience (or inexperience) with lawyers and legal bills, are unaware of the concepts of interim and final accounts, who are most unpleasantly surprised to receive a further account upon the successful conclusion of a matter and who feel let down by their counsel as a result.

It reflects ill on the profession that clients might feel (albeit through misunderstandings) that their lawyers, whom they have trusted with their most confidential and important matters, have been less than candid with them about their billing arrangements.

It is disquieting, too, that the current state of the law would tend to discourage lawyers from being completely open with their clients over billing arrangements. If a lawyer fails to mention the possibility that there will be a further account in addition to, say, monthly accounts, it may be open to him or her to render such an account upon a successful result because the law will allow it. However, for a lawyer to discuss such a possibility at the outset of a retainer creates the risk that a client will reject it or that the client might inquire about a substantial fee reduction in the event of failure. It is therefore to the lawyer's advantage to remain silent.

While the solicitors in this case argued that the use of the word "interim" in their accounts ought to have alerted Inmet that the monthly accounts being rendered were, in effect, requests for money to be applied against a final bill that would be ultimately rendered in the matter, it is artificial to assume that the vast majority of clients would be aware of this. The meaning of the word "interim", which is really a term of art in this area, is not necessarily one that would be known even to a sophisticated client. Indeed, it is a term that is not properly understood by many lawyers [for an example of this, see *Holmes Greenslade v. Starcom International Optics Corp.* (1997), 86 B.C.A.C. 66, [1997] B.C.J. No. 257 (C.A.)].

There is force in the argument that, where applicable, clients ought to be made fully aware of the possibility that there will be a further billing at the end. I think there is much to be said for the imposition of a requirement that accounts intended by lawyers to be interim state on their face that the fees shown may not represent the complete fees for the services in question and that a further bill may be rendered.

I recognize that the issue cuts both ways and that interim accounts can be an advantage to a client where, for example, the result of a matter has been unfavourable. In such a case the client is able to challenge the total of the fees billed throughout the matter because the all accounts save the last are interim and not final in nature. For this reason any change in billing requirements would have to preserve existing client rights in this respect. (at paras. 122-7)

[57] While I agree with the concerns raised by Registrar Blok and while I adopt the sentiments that he expresses in paras. 122-7 of his Reasons, it is not for me to state that Registrar Blok was wrong in failing to disapprove of the billing practices approved by the Court of Appeal in Albion, supra. The Court of Appeal may well revisit the question of the billing practices that they approved in Albion, supra when they hear the appeal from this decision. Additionally, the Law Society of British Columbia may wish to make recommendations to the Legislature and the Legislature in dealing with possible amendments to the Act may well wish to address this question. Until then, I cannot conclude that Registrar Blok made an error in principle or was clearly wrong in his assessment of the billing practices of NST in coming to the conclusion that NST was not estopped from rendering a final account or that NST had not failed in their obligation owed to Inmet when they issued a series of interim accounts which included what was referred to as "TOTAL FEES" for the interim accounts forwarded.

[58] The appeal of Nathanson Schachter & Thompson LLP is dismissed. Inmet Mining Corporation will be entitled to its costs on a Scale "B" basis.

The Honourable Mr. Justice Burnyeat

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