

Society of Notaries Public of British Columbia

Taxation Committee

Reasons for Decision

Note to readers:

The Rules of the Society provide for a 30 day right to appeal.
The 30-day period expires on April 19, 2021 after which
this decision will be in effect

Date: March 8, 2021

Committee members: Jessie Vaid - President; David Watts - Chair, Finance Committee; Hassan el Masri - Chair, Discipline Committee

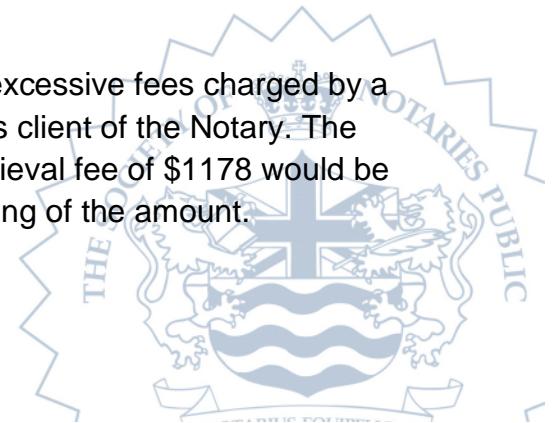
John Mayr - Executive Director, SNPBC

The Taxation Committee is a committee of the Society of Notaries Public of BC bylaws. Section 8.17 establishes the composition of the committee and provides for the committee to investigate complaints of excessive fees charged by members.

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{Complainant – Redacted }
{Notary Public – Redacted }
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Complaint received

The Office received a complaint regarding an allegation of excessive fees charged by a Notary. The complainant is a lawyer representing a previous client of the Notary. The complainant requested a file and was advised that a file retrieval fee of \$1178 would be charged. The matter was accepted as a request for the taxing of the amount.



Analysis

The first step in any consideration of a taxation request starts with an understanding of the terms. The bylaws and mandate of the committee say that the committee shall investigate the charging of “excessive” notarial fees.

Black’s Law Dictionary defines “excessive” as:

Greater than what is usual or proper; over much; a general term for what goes beyond just measure or amount.

The Principles for Ethical & Professional Conduct Guidelines also include specific information about fees and, in part, say the following:

8. Fees and Disbursements

8-P2 A Member should not ask for, negotiate, charge, or accept any fee that is not fully disclosed, fair, and reasonable including any justifiable disbursements.

Commentary

8.1 A Member is entitled to reasonable compensation for services. The Member should, however, avoid charges which either over-estimate or under-value services rendered.

The client's ability to pay cannot justify a charge in excess of the value of the service, though circumstances may suggest that a lesser charge or even none at all is warranted.

8.2 A Member should avoid controversies with client regarding compensation. Fees should always be readily justifiable as fair and reasonable for services rendered. A Member should take care to ensure that no client suffers any financial loss or is put to any trouble or inconvenience as a result of careless or incompetent work on the part of the Member.

8.3 A fair and reasonable fee will depend upon and reflect such factors as:

- a. the time and effort required and spent;
- b. the difficulty and importance of the matter;
- c. whether special skill or service has been required and provided.
- d. the customary charges of other Members of equal standing in the locality in like matters and circumstance;
- e. the amount involved or the value of the subject matter;
- f. other special circumstances such as loss of other employment and urgency;
- g. any relevant agreement between the Member and the client.

The Principles are guidelines to practice and as such have limited use in regulatory administrative proceedings. The limitation in the guidelines originates in the use of the term “should”. The commentary adds substance to expand on what “should” means in a particular context.

The Principle 8-P2 establishes three contextual aspects to the consideration of a fee regardless of whether it is negotiated, charged, or accepted. The contextual aspects are:

- fully disclosed,
- fair, and
- reasonable.

With the test for the committee being that the fee must meet all three by virtue of the “and” provision.

The questions for the Committee to consider are:

1. Did the Notary subject to taxation charge an excessive fee for file retrieval?

Competitions Act

As a statutory regulator, the Society of Notaries Public can not and must not be seen to be enforcing or establishing a fee for any particular service. It has been long held that

price fixing violates the federal laws on competition and that such practices are detrimental to the market. The Society accepts the principles of competition and must therefore consider the matter from a broad perspective.

The framework of the Principles for Ethical and Professional Conduct originates from a time at which the Society of Notaries Public acted as both the professional advocacy organization and disciplinary body. The *Notaries Act* also contains provisions which, in current times, are considered ill-advised for a regulatory body. With the creation of the BC Notaries Association, an advocacy organization, the Society can and must focus on those provisions of the *Notaries Act* that represent sound administrative law practices.

Position of the Parties

Complainant

On February 9, 2018, [the notary] notarized the registration of a mortgage that was placed on my client's home.

I requested a copy of my client's file from [the notary] on January 22, 2021. [The notary] advised that the cost to disclose my client's file would be \$1178.24.

When questioned why the fee for disclosing my client's own file was so high, [the notary] advised that this was the cost of 4 hours of his hourly rate of \$250.00 as well as photocopying fees and the cost of preparing the file for disclosure.

This amount is astronomically high and I do not believe that it is a reasonable fee for production of this file.

The Notary

The Rationale behind charging the fee is simple, I have had 1 previous file request in the past for which I charged a nominal fee of \$200 plus disbursements. At the end of the process I assessed what I charged against the actual time I spent, and at that time it was approx. 5 hours. I realized that what I charged was not enough for the time spent and therefore I decided to formalize my file request process in the event that it happened again.

I base the rate on my hourly rate of \$250, and its (sic) based on an estimated time of approx. 4 hours for files of this age. My hardcopy files are stored in [city] in greater

Vancouver], at the 18 month mark following the file completion and closure I move the entire physical file to the off site storage.

I have a staged charge schedule with fee charges ranging from \$25 - \$1000. I charge a nominal fee of \$25 plus costs and disbursements for files completed in the last 6 months, and costs go up based on age from there, as outlined by the file retrieval request form attached. Following the move to storage the price jumps up based on the actual time it takes for me to drive to [the location] to retrieve the file bring it back to my office prepare it for the requestor and then subsequently return the file back to storage thereafter.

[...]

In recent times we have moved to a digital file storage which alleviates the need for the large amount of storage of files off site so over time we will be phasing out the Langley storage as well which will result in these costs for file retrieval again decreasing significantly.

[...]

As notaries our time is our product, I hold the time I spend on any file as billable, as do most legal professionals.

I have enclosed herewith a copy of the file retrieval document that was presented to [the complainant] at the outset of the request, along with my time sheet for the retrieval thus far. I have only noted for the time spent in communication with [the complainant] and for the actual retrieval of the file for which I am already committed to over 3 hours on this request.

As for additional comments, I do not feel that the fees charged are outrageous by any means, and I do not feel that the Society has the right or authority to regulate our fees.

The Notary provided an undated copy of the “File Retrieval Request Fee Schedule”:

*Files completed in the period 6 months prior to the date of the request
(All file types)
Retrieval fee \$25.00*

*Files completed in the period 6 months to 18 months prior to the date of the request
(All file Types)
Retrieval Fee \$ 200.00*

*Files completed in the period of 18 months to 5 years prior to the date of the file request
 (All File Types)
 Retrieval Fee \$ 1,000.00*

*Files completed prior to 5 years
 (All File Types)
 Retrieval Fee \$ 2,000.00*

Please note that we only provide copies of files in paper (hard copy) format the cost of copying and preparing a file will be charged in addition to the above noted retrieval charge.

We require an undertaking to pay the retrieval fees prior to advancing the request.

In lieu of an undertaking we will also accept a retainer in the amount of the retrieval fee as noted above. If choosing to order via retainer, following receipt of the retainer the file will be pulled and copies will be made and full payment must be received prior to release of the file documents.

All file requests must be made by the client named in the file or an attorney acting on their behalf the request should be accompanied by a signed consent/authorization to release information signed by the client named in the file. We enclose our file retrieval order form for your convenience, please complete the attached and return to our office to begin the process.

The notary also provided the time sheet:

<i>[Client's name] file request time sheet and record</i>	<i>time in Mins</i>
18-Jan <i>received file request</i>	
19-Jan <i>request sent to file requests</i>	
19-Jan <i>retrieved file from Langley</i>	120
21-Jan <i>legal confirmed receipt of file request</i>	
22-Jan <i>Spoke to [complainant] on the phone</i>	10
22-Jan <i>[redacted]</i>	
22-Jan <i>emailed out file request forms</i>	10
26-Jan <i>received and responded to email</i>	10
27-Jan <i>received and responded to email</i>	10
28-Jan <i>received and responded to email</i>	10
29-Jan <i>received and responded to email</i>	10

02-Feb	<i>copied and prepared file for delivery</i>	40
03-Feb	<i>emailed [complainant] file request ready</i>	10
05-Feb	<i>emailed [complainant] reminding her request is ready</i>	
19-Feb	<i>Complaint form received from the Society</i>	

Discussion

File creation, maintenance, and storage are required by various statutes and the Rules of the Society. The contents of a file may be categorized as client information and practitioner information. Clients generally receive a set of documents at the close of a transaction with the legal professional. Those documents do not include the legal practitioner's notes.

The Office of the Information and Privacy Commissioner has a number of decisions and a guidance document that are relied upon in assessing this matter. The guidance document¹ includes the following:

Your organization may charge individuals a minimal fee for access to their personal information,

The guide further says:

Charging fees for access

Your organization may charge an applicant a minimal fee for responding to a request for access to the applicant's personal information (section 32(2)). Minimal means that what you charge must cover only the actual costs you incurred in producing the record. Typically, a minimal charge would include costs associated with locating, retrieving and producing a document, preparing it for disclosure, shipping it, and providing a copy of the document. Charging for services not required to create documents, such as the creation of an index for the documents, is not a minimal charge (Order P10-03). If the applicant's request only involves a few pages of documents that are easy to locate, this fee should be small. If the request involves a large number of documents and it takes a long time to locate and produce them, the fee could be larger, but you are still limited to charging a minimal fee for access to personal information. Your fee must never generate any profit (Orders P08-02, P08-03 and P10-03).

¹ <https://www.oipc.bc.ca/guidance-documents/1438>

In the OIPC decision P08-02 a professional services corporation issued an estimate for a file production and retrieval for \$535.44. That amount was deemed to be in excess of a “minimal fee” by an OIPC adjudicator and reduced to \$51.38.

In OIPC P08-03 a professional services corporation issued an estimate for reproducing a client’s records of \$115.00 (\$105 plus \$1.00 per page). This amount was deemed to be in excess of a “minimal fee”.

In OIPC P10-03, the adjudicator considered hourly rates charged by an organization to retrieve and reproduce personal information. The decision sets out that a fee of \$30 per hour was charged to retrieve and prepare records for disclosure. Further, a temporary employer was billed at a rate of \$21.72 per hour to retrieve and review electronic records. In determining whether the fee was minimal, the adjudicator relied on supra P08-02:

‘Adjudicator Boies Parker found that for a fee to qualify as “minimal” it must cover only actual costs incurred in producing the records and not be for the purpose of generating revenue. She also found that charging for services not actually required to produce the record was inconsistent with the fee being minimal.’

The nature of a notary’s file (similar to those considered by the OIPC in P08-02 and P08-03) is that they contain both personal information of a client as well as notes made by the notary.

The notary’s notes, upon a request for the file having been received, may be sent to counsel for consideration. Counsel generally provides guidance to the notary with respect to disclosure. Notes made for the client’s benefit and paid for by the client are made as a result of the client engagement and obtaining client personal information. Subject to counsel’s direction, these notes are generally considered to be a part of the client’s file and may be produced.

However, notes made for the benefit of the notary, to aid in recollection or other do not form part of the client’s file. These notes are not the subject of this decision.

Findings

After considering all the information in the file, whether it is specifically referenced in these reasons or not, the committee finds that the notary subject of the taxation:

1. Proposed a fee that is deemed to be excessive and out of the ordinary for the profession for the retrieval and reproduction of a file.
2. The fee proposed by the Notary is inconsistent with PIPA and the provision for charging a “minimal fee”.
3. A legal professional is entitled to charge a fee for retrieval and reproduction of a file.
4. The Committee is of the opinion that a fee of \$450.00 is a reasonable fee in this matter.

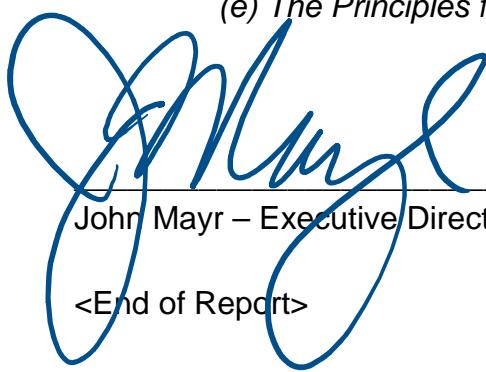
Section 8.17 of the Bylaws of the SNPBC state:

The taxation Committee shall consist of the President, and the Chairmen of the Finance Committee and Discipline Committee. The Taxation Committee shall investigate complaints of excessive notarial fees charged by members. The decisions of the Taxation Committee shall be final and binding upon all members.

Further, section 3.03 of the Bylaws state:

Every Member shall comply with the following, as amended from time to time:

- (a) *The Notaries Act;*
- (b) *Any regulations made pursuant to the Act;*
- (c) *These Bylaws;*
- (d) *The Rules of the Society; and*
- (e) *The Principles for Ethical and Professional Conduct of the Society.*



John Mayr – Executive Director
<End of Report>