

CANADA / JUDGMENT

Boskovic v. Yeager Employment Law

2023 BCSC 291

COURT

Supreme Court of British Columbia

DECIDED

1 March 2023

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2023 BCSC 291 Boskovic v. Yeager Employment Law

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boskovic v. Yeager Employment Law,

2023 BCSC 291

Date: 20230301

Docket: S223659

Registry: Vancouver

Between:

ZORAN BOSKOVIC, KARINA BORDUA, CATERINA BOVA and CLINTON CHEVRIER

Clients

And

YEAGER EMPLOYMENT LAW

Solicitor

Before: Master Hughes

(as Registrar)

Reasons for Decision

Clients' representative, appearing in person:

Z. Boskovic

Counsel for Solicitor:

J. Yeager

Place and Dates of Hearing:

Vancouver, B.C.

July 19, August 22 and

November 2, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 1, 2023

Introduction

- [1] This is a review of lawyer's bills dated December 7, 2021, January 5, 2022 and February 10, 2022, pursuant to the provisions of the Legal Profession Act, R.S.B.C. 1998, c. 9. Although the Appointment only referenced the last of the three bills, the parties proceeded on the basis that all of the bills were in issue. The review was brought by four clients, Zoran Boskovic, Karina Bordua, Caterina Bova and Clinton Chevrier (the "Clients"), who allege that Yeager & Company Law Corporation, also known as Yeager Employment Law (the "Law Firm") did work beyond that which was authorized by them, and that the amount billed was not fair and reasonable. The Clients were represented at this hearing by Zoran Boskovic, although Karina Bordua also attended throughout.

Background

- [2] On October 5, 2021, the BC Public Service Agency (the "Employer") announced that the BC Public Service would require its employees to provide proof of vaccination against COVID-19 as of November 22, 2021.
- [3] On November 1, 2021, the Minister of Finance issued Human Resources Policy 25 - COVID-19 Vaccination (the "Policy") under s. 5(4) of the Public Service Act, RSBC 1996, c. 385 (the "PSA"), requiring all BC Public Service employees (with some exceptions) to be vaccinated against COVID-19 as a condition of their ongoing employment. Pursuant to the Policy, non-exempt employees who failed to provide proof of vaccination by November 22, 2021 could be placed on unpaid leave. The Clients are several of a group of non-unionized BC Public Service employees who retained the Law Firm in relation to their intended challenge to the implementation of the Policy.
- [4] Robert Yeager ("Mr. Yeager" or the "Lawyer") was called to the BC Bar in 1992, and for most of his practice has focussed on employment law and wrongful dismissal. Mr. Yeager is employed by the Law Firm, and is the senior lawyer supervising a number of more junior lawyers.

- [5] The Clients first met with the Lawyer by Zoom on November 12, 2021, along with a number of other interested individuals. During that first Zoom meeting, it was determined that seven individual employees would represent the larger group. The Lawyer had another meeting with the smaller group of employees on November 17, 2021, and then prepared a joint retainer agreement (the "JRA") dated November 18, 2021, which was subsequently signed by the Clients.
- [6] The Lawyer's advice was that the Employer could not place an employee on unpaid leave unilaterally without the contractual right to do so, and that doing so would constitute a wrongful dismissal. The agreed-upon strategy was that the Lawyer would first attempt to negotiate by way of a letter to the Employer. If that step was unsuccessful, the Lawyer would commence a civil action seeking an injunction and/or damages for wrongful dismissal, and retain another senior lawyer more experienced in injunctions to apply for an interlocutory injunction against the Policy.
- [7] It was agreed that Ms. Bordua would be the contact person for the Clients, and the JRA includes the following paragraph:

You instruct and authorize that Karine Bordua is your representative to be the conduit of your instructions to us and conduit of our communications to you. We may also clarify instructions to you directly so long as clarification is not inconsistent with the instructions we receive from your representative.

- [8] The following portion of the JRA sets out the scope of services to be performed pursuant to the retainer:

The services which could be required are as follows:

- a) Negotiate the retraction or withdrawal of application of the employer's Vaccination Policy against you, including interviewing you, researching and drafting and sending a retraction letter to the employer, and the necessary aftermath in attempts to settle this issue;
- b) Approximately subsequently to our performing (a), and when appropriate to do so, commence proceedings against your employer by drafting and filing a Notice of Civil Claim for injunction or alternatively and depending on the circumstances for wrongful dismissal and injunction or alternatively and depending on the circumstances for only wrongful dismissal, and hire injunction legal counsel to make application or applications as necessary for an interlocutory injunction;
- c) Make or defend interim applications to court as necessary;
- d) Obtain and provide document disclosure;
- e) Prepare for, attend and conduct examinations for discovery;
- f) Prepare for and attend any mediation;

- g) Prepare for and attend at any trial of your claim;
- h) Obtain judgment, settle the order, and enforce the order;
- i) Generally, attend to all matters related to your claim including the settlement and any litigation of your claim.

All of these services may not be required, and the total cost of the services will vary according to several factors, such as the degree of urgency, the number and complexity of issues in your claim, need for valuations of pensions, the need to make or defend interim applications to court, any mediation, the cooperation of the other side in disclosing information and producing documents, and the degree of acrimony between you and the other party, the degree to which the other party takes procedural steps in any claim.

- [9] The Lawyer requested an initial retainer of \$4,000 for the services set out in paragraph (a) of the JRA, and \$20,000 for the services set out in paragraph (b) (collectively the "First Steps"). With respect to the retainer amount, the JRA further sets out:

These initial retainers cover the estimated first steps, described in (a) and (b) on page 1 above, in your claims. We keep any retainer in our general trust account for your benefit until we sent (sic) you a bill. At that time, we transfer money from your retainer to help pay that bill. When the retainer has been used up, if we continue to pursue your instructions, we will ask you to pay us another retainer. Alternatively, we reserve the right to ask for further retainers if we deem it necessary to secure us with respect to any major cycle of work to be undertaken.

- [10] In response to a detailed email from Ms. Bordua the morning of November 18, 2021, the Lawyer sent a reply that evening which was intended to provide some clarification as to the terms of the Lawyer's engagement, and which includes the following:

But the \$4,000 retainer will only go as far as \$4,000 takes us in the circumstances, and if litigation is in the works we will end up well beyond that initial retainer. I gage the initial retainer based on how many hours it will take me to perform the cycle of work in front of me that could lead to settlement. That cycle involves interviewing, reviewing, drafting, finalizing and sending the initial letter to the employer that we have discussed. The initial retainer of \$4,000 is not a guarantee of fee limitation, it is only a rough estimate. The point here is that retainers are not guarantees but estimates. In this case, the initial estimate won't cover "dealing with follow up" as that is part of the next step and it is difficult to estimate until I hear from the employer in response to my letter. (emphasis added)

- [11] In response to the Lawyer's November 18, 2021 email, Ms. Bordua replied in part " as for the fee, we completely understand that it is an estimate."

- [12] The Clients paid the retainer, which they raised through crowdfunding, in installments of \$16,000 paid on November 19, 2021 and \$8,000 paid on November 22, 2021.

- [13] The Lawyer immediately commenced work, including reviewing documents provided by the Clients, and drafting a letter to the Employer as contemplated in paragraph (a) of the JRA. The Lawyer was unable to find a senior injunction lawyer who was willing to take the case, so he commenced in-house legal research regarding the intended application for an injunction against the Policy.
- [14] Late in the day on Friday, November 19, 2021, Ms. Bordua notified the Lawyer of Order in Council No. 627 (the "OIC") made that day, which enacted the Public Service COVID-19 Vaccination Regulation to the Public Service Act, R.S.B.C. 1996, c. 385, s. 25 (the "Regulation"). The Regulation provides that the Policy is a term and condition of employment, and that if an employee is terminated under the Policy, the employee is deemed to have been dismissed for just cause.
- [15] The Lawyer immediately advised the Clients that the issuance of the OIC completely changed the landscape of the case and required a different strategy, as the wrongful dismissal argument was negated by the Regulation. The Lawyer sought and obtained instructions from the Clients to switch the target of the injunction application to the Regulation.
- [16] Over the next several weeks, members of the Law Firm embarked on considerable research in order to determine the best course of action to challenge the Regulation, including arguments based on employment law, the Canadian Charter of Rights and Freedoms, and the Lieutenant-Governor's duty of procedural fairness. The Lawyer described the research process as being one in which a member of the Law Firm would research each issue to a conclusion, whether helpful or not. Much of the work was done by members of the Law Firm, although the Lawyer also consulted with an external constitutional lawyer who worked pro bono.
- [17] The Lawyer orally testified that, between November 22 and late December 2021, the Law Firm prepared a total of 10 drafts of a Petition (rather than the originally-contemplated Notice of Civil Claim), which was constantly being edited based on the results of the ongoing research. That evidence is somewhat inconsistent with the Lawyer's affidavit of justification, in which he refers to the 9th draft of the Petition being 95% ready by January 14, 2022. Regardless, there were many drafts prepared, and nothing turns on the discrepancy.
- [18] The Lawyer had a telephone call with Ms. Bordua on November 22, 2021, in which they discussed a number of matters. The Lawyer's brief note of that telephone call includes a reference to a discussion of the amount of the retainer for the injunction application, which "may be 20,000 + up to 30's. She will arrange that." In her evidence, Ms. Bordua said that she did not recall discussing an increased retainer with Mr. Yeager, and would not have agreed to do so without discussing it with the larger group, as she did not have independent authority in this regard.

- [19] The Law Firm's practice is to bill clients at the beginning of each month for work done in the prior month.
- [20] The first invoice from the Law Firm, for services rendered between November 12-30, 2021, was issued on December 7, 2021 for a total of \$17,876.35 inclusive of fees, disbursements and taxes (the "First Invoice"). The full amount of the First Invoice was paid from the retainer funds, leaving a balance of \$6,123.65 remaining in trust. The First Invoice was sent to Ms. Bordua by Ivy Atwal, an administrative assistant at the Law Firm, on December 10, 2021. Ms. Bordua replied the same day, saying "I am distraught by this invoice. \$20,000 was for an injunction and I do not see any injunction mentioned in the document. Additionally, I see costs associated with the meetings and discussion we had with Bob and Herb before we retained them." In a subsequent email sent to Ms. Atwal later on December 10, 2021, Ms. Bordua asked "Would it be possible to let us know how much more your office will need in order to move forward with the injunction?". Ms. Atwal replied on December 20, 2021, telling Ms. Bordua that Mr. Yeager says "\$10,000-15,000 will be needed for the injunction to move forward in the future". This brief email does not appear to be a request for a further retainer, but rather an estimate in response to Ms. Bordua's inquiry. There was no evidence of any response from the Clients regarding the need for additional funds, or any explicit direction or approval of additional work.
- [21] The second invoice, for services rendered between December 1-31, 2021, was issued on January 5, 2022, for a total of \$19,247.20 (the "Second Invoice"). The balance of the retainer was applied in partial satisfaction of this account, leaving a balance owing of \$13,123.55. Ms. Atwal forwarded this invoice to Ms. Bordua by email on January 6, 2022. In her email, Ms. Atwal said "It is a requirement of our retainer agreement that the retainer be kept current, so we also ask you to forward \$15,000.00 in replenishment of the retainer in anticipation of continued legal services required in your matter."
- [22] After receiving the Second Invoice, the Clients requested another Zoom meeting with the Lawyer to discuss costs and next steps. The meeting was held on January 25, 2022, at which time Mr. Boskovic asked the Lawyer to pause work so that the Clients could fundraise to pay the outstanding balance and a replenishment retainer. The Lawyer was never instructed to resume work.
- [23] A third invoice was issued on February 10, 2022, for a total of \$5,695.20, including some services rendered in early December and the remainder being for services rendered between January 5-26, 2022 (the "Third Invoice"). This invoice was sent via email by Ms. Atwal on February 16, 2022. In that email, Ms. Atwal requested \$10,000.00 in replenishment of the retainer.

- [24] On February 17, 2022, Ms. Bordua notified the Lawyer that the retainer was being terminated and that the Clients were moving their case to a different law firm in order to better support legal actions for unionized members of the group and to take a more strategic approach to the overall case. On February 18, 2022, Ms. Bordua advised the Lawyer that Mr. Boskovic would be his point of contact moving forward regarding billing and invoices. As indicated, Mr. Boskovic was the spokesperson for the Clients during this hearing.
- [25] It is undisputed that the draft Petition prepared by the Lawyer was the basis for the Petition that was ultimately filed by the new law firm on behalf of the Clients. Both Mr. Yeager's draft Petition and the filed Petition were in evidence, with only a few paragraphs added to the filed version.
- [26] It was clear from the evidence given by Mr. Yeager, both in his affidavit and orally, that he was very invested in the Clients' case and was eager to argue the impact of the Policy and the Regulation on the Clients and on the fundamental principles of employment law. Much time was spent in his oral evidence explaining the legal arguments that he did not have the opportunity to make in court due to the termination of his retainer.

The Clients' position

- [27] The Clients seek to have the Lawyer's invoices reduced to the sum of \$24,000, being the amount of the initial retainer. Their position is that the JRA obliged the Lawyer to advise them before initiating any work that would substantially increase the amount they would be charged, and that the Lawyer would only proceed with such work with the Clients' express authorization. The Clients assert that they never provided the Lawyer with any instructions or authorization to continue working beyond the initial \$24,000 retainer.

- [28] In support of this position, the Clients rely on the following portions of the JRA:

It is understood that we cannot guarantee to accomplish your goals for a fixed amount, and we will keep you advised of your account as matters progress. Also, it is difficult at this point to estimate with any certainty the amount of time and expense that will be necessary to adequately represent you in this case. However, we will advise you before initiating any procedures that will substantially increase the amount of fees and will proceed only on your instructions to do so.

When the retainer has been used up, if we continue to pursue your instructions, we will ask you to pay us another retainer. Alternatively, we reserve the right to ask for further retainers if we deem it necessary to secure us with respect to any major cycle of work to be undertaken.

(emphasis added)

- [29] The Clients allege that the Lawyer never communicated with them about their mounting bill prior to incurring those costs, and that they only learned of the extra fees after the fact, when the invoices were received. The undisputed calculation of the Clients is that the \$24,000 retainer was exhausted by December 8, 2021, but they were unaware of this until they received the Second Invoice, nearly a month later.
- [30] The Clients also allege that the lawyer overbilled them for the work that he performed in that he (a) billed two separate client groups for the same research and drafting work and (b) spent far more time than a reasonably competent and experienced lawyer would have done in researching and drafting the Petition.

The Lawyer's position

- [31] The Lawyer asserts that he was at all times very clear that there was no guarantee of fees, and that the retainer amount did not equate to a "fixed fee" contract. Mr. Yeager further submits that the OIC dramatically changed the Clients' legal circumstances, that he immediately advised Ms. Bordua in the November 22nd phone call that the new instructions would require additional fees, and that she agreed on behalf of the Clients to arrange for an additional retainer.
- [32] With respect to the allegation that the Law Firm billed both these and other clients for the same work, the Lawyer's evidence is that there was initially some overlap between the two cases, and that the time billed was divided between the clients rather than duplicated.

Legal Principles

- [33] There were no submissions by either the Clients or the Lawyer in regard to any of the legal principles applicable on this review.
- [34] Section 71 of the Legal Profession Act sets out the matters to be considered on a review of a lawyer's bill under s. 70.

Matters to be considered by the registrar on a review

71 (1) This section applies to a review or examination under section 68 (7), 70, 77 (3), 78 (2) or 79 (3).

(2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:

(a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;

(b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.

(3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:

(a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;

(b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.

(4) 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.

(5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

Complexity, difficulty or novelty of the issues involved

[35] It appears to be common ground that challenging the Policy and Regulation raised some novel legal issues. In the fall of 2021, COVID-19 vaccine mandates were being introduced by a number of employers, with limited jurisprudence directly on point to assist those contemplating a legal challenge. This difficulty was compounded by the need for swift action as the Clients were faced with the imminent prospect of being placed on unpaid leave, and the further prospect of having their employment terminated.

[36] The Clients were opposed to the Policy for a variety of principled reasons, including medical, political and religious grounds, security of the person, and conscientious objections. Principle is the most difficult and costly of all matters in litigation to represent and to pursue on behalf of a client, and it definitely adds to the complexity of any case (*Ansley Law Corporation v. Chiu*, 2012 BCSC 631 at para. 38).

[37] Although the basis for the wrongful dismissal claim and injunction had some novel features, the application did not. The test for an interlocutory injunction is well known. Mr. Yeager was aware of the test and identified from the outset that the Clients would have difficulty in meeting the "irreparable harm" part of the test. As discussed below, he was also aware of the need for additional expertise in this area.

Skill, specialized knowledge, and responsibility required of the lawyer

- [38] Mr. Yeager was retained because of his specialized skill and knowledge as an employment lawyer. His prior experience in injunctions was limited to defending applications by an employer against a current or former employee.
- [39] Drafting the pleadings would have been less challenging and time-consuming for a lawyer more experienced in such work. Mr. Yeager's initial assessment was that an experienced injunction lawyer would be needed. The importance of this fact is highlighted by its inclusion in the JRA.
- [40] In my view, Mr. Yeager's evidence underscored the fact that significant additional time was spent on researching and drafting due to the Law Firm's lack of specialized knowledge in the area of injunctions.

Lawyer's character and standing in the profession

- [41] Mr. Yeager is senior counsel experienced in employment law matters, and there was no challenge to his character or standing in the profession. This is a neutral factor in my analysis.

Amount involved

- [42] The amount in dispute is \$18,818.75, being the amount billed by the Law Firm over and above the \$24,000 retainer, plus contractual interest at the rate of 12% per year as set out in the JRA. Although modest by some standards, it is a significant sum to the Lawyer, who expected to be paid for his work, and to the Clients, who are in a precarious financial position having been on unpaid leave for an extended period of time and, in some cases, subsequently terminated from their employment.

Time reasonably spent

- [43] The Lawyer submits that all the time charged was reasonable and necessary given the complexity and urgency of the Clients' case. In addition to the time charged, a considerable number of hours worked by another lawyer at the Law Firm were written off and never billed, as was the time of the external constitutional lawyer.

- [44] The Clients took issue with the time spent, particularly in the early stages of the Law Firm's engagement when some of the time billed appeared to overlap with work done for other clients of the Law Firm who were dealing with a similar issue under a separate retainer. As indicated previously, the Lawyer's unchallenged evidence is that he divided such time between the different files.
- [45] As discussed above, it is my view that excessive time was spent researching and drafting due to the Law Firm's lack of expertise in this area of law. The Lawyer's affidavit evidence includes the following:

From November 22 forward for a number of weeks, myself and my associate researched, drafted and re drafted the Petition honing it into a potentially winning pleading, we put other work aside and threw ourselves into this process of research and drafting every day for a few weeks. We spent hours working on the argument, first drafting an outline, then critiquing it, then researching, then strengthening the argument until we had it fashioned into an effective argument. We did the same with the research and the Petition.

We researched bringing an injunction application against the Crown; we researched the Crown Proceeding Act and cases decided under it; we researched Orders in Council; we researched all aspects of declaratory relief; we researched the discretionary powers of the Lieutenant Governor; we researched the ultra vires argument which was based on the Charter and we researched Charter cases for sections 15 equality rights, section 2(a) freedom of conscience, and section 7 rights to life, liberty and security of the person for the ultra vires argument; we researched procedural fairness for the unlawful argument; we researched unconscionability for an alternate argument; we researched all sorts of fine tuning points along the way.

- [46] While the Lawyer's efforts and commitment to the Clients' case are not to be faulted, a certain level of expertise is built into a lawyer's hourly rate, which is a factor to be weighed against the time spent researching and drafting (*Mackoff & Company v. Grewal*, 2015 BCSC 1726 at para. 48).
- [47] The Law Firm took a 'no stone left unturned' approach to the research; however, there was no evidence that the Clients gave the Law Firm such carte blanche instructions.

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

- [48] In the JRA, Mr. Yeager reduced his hourly rate to \$350 from his usual \$450. His evidence was that this reduction was in consideration of the JRA Clients' strained financial circumstances. Other lawyers were to be billed out at \$250 or \$260, articled student at \$180, paralegal at \$120 and secretarial at \$60 or \$90 per hour. There was no suggestion that any of these rates were unreasonable.

Importance of the matter to the client whose bill is being reviewed

- [49] It is agreed that the matter was of the utmost importance to the Clients, as they were subject to imminent placement on unpaid leave and subsequent termination of their employment. Furthermore, the Clients were representing a larger group of BC Public Service employees who shared a common interest in the outcome of the case, and who contributed to the cost through the Clients' crowdfunding efforts.

Result obtained

- [50] The Lawyer sent a letter to the Employer as contemplated as step (a) in the JRA, although he received no response. A draft Petition and supporting affidavits, as contemplated in step (b), were completed. The Law Firm also produced a number of legal memoranda and draft arguments, although none of those were put in evidence. Due to the termination of the retainer by the Clients, the pleadings were never finalized or filed by the Law Firm. No injunction legal counsel was hired, nor was an injunction application prepared.
- [51] Mr. Yeager took umbrage at the fact that his draft Petition, which he had provided to the Clients for review, was ultimately filed by their new counsel with minimal changes, which he submits is a testament to the value of his work. However, no date is currently scheduled for the hearing of that Petition, and the application for an interlocutory injunction was dismissed on April 1, 2022.

Fee estimate

- [52] There is a significant disagreement between the Lawyer and Clients as to whether the sum of \$24,000 was intended as a fee cap, an estimate, or simply an initial retainer with the understanding that the fees were likely to exceed that amount and further retainer(s) would be required.
- [53] The JRA is very clear that the Lawyer did not promise a fee cap. There is nothing ambiguous about terms such as "it is understood that we cannot guarantee to accomplish your goals for a fixed amount" or "it is difficult at this point to estimate with any certainty the amount of time and expense that will be necessary to adequately represent you in this case".
- [54] However, language in the same paragraph of the JRA as that just quoted, such as "we will keep you advised of your account as matters progress" and "we will advise you before initiating any procedures that will substantially increase the amount of fees and will proceed only on your instructions to do so" is equally unambiguous.

- [55] The Clients' evidence is that they explained to the Lawyer at the initial meeting that they had limited funds available from their crowdfunding efforts, had no additional funds of their own, and would need time to undertake additional fundraising efforts if the costs were going to increase beyond the initial retainer amount. The Clients' strained financial circumstances were clearly recognized by the Lawyer, as evidenced by his willingness to reduce his hourly rate by \$100 from the outset.
- [56] The Lawyer's evidence and closing submissions acknowledged that he provided an estimate of fees for the purpose of getting an initial retainer from the Clients that would fund the First Steps. This is also clearly acknowledged in the JRA itself, as it says "These initial retainers cover the estimated first steps, described in (a) and (b) on page 1 above, in your claims." I am satisfied that \$24,000 was the Lawyer's ballpark estimate for the First Steps.
- [57] The work actually performed diverged from that estimate in two important respects. First, the OIC was issued after the JRA was prepared but before it had been signed and returned by the Clients. The Lawyer immediately sought instructions from the Clients, by an email to Ms. Bordua dated November 20, 2021, to change the target of the injunction application to the Regulation. However, nothing in that email indicates any impact on the overall cost estimate. The Lawyer had a telephone discussion with Ms. Bordua on November 22, 2021, in which he says increased costs were discussed. Ms. Bordua's evidence was that she did not recall discussing any increase in fees with Mr. Yeager in that conversation. On balance, I am satisfied that the Lawyer's evidence is to be preferred in that the possibility of an increased retainer was discussed, although his notes do not indicate a definite amount and there was no written confirmation or follow-up communication with the Clients. Second, as indicated under the heading Results Obtained above, the First Steps were not fully completed by the Lawyer due in part to the Clients' termination of the retainer.
- [58] Master Muir has recently reviewed some of the decisions regarding the impact of fee estimates in *Guild Yule LLP v. Heck*, 2022 BCSC 1848, as follows:
- [89] Numerous decisions have concluded that an estimate, even a ballpark estimate, is relevant to the analysis of a fair fee.
- [90] Counsel have an obligation to provide proper and considered advice to their clients. As was noted by Master McDiarmid in *0751548 B.C. Ltd. v. Burke*, 2015 BCSC 665:
- [91] In determining the effect of the fee estimate given in writing by Mr. Burke on June 7, 2013, and the oral estimate given on November 13, 2013, I have reviewed the Annotated Legal Profession Act by Gordon Turriff, Q.C. pages 8-77 to 8-78. A summary of relevant annotations is as follows:

[]

- Lawyers are bound to use reasonable care and skill when estimating the cost of particular pieces of work.

· Lawyers should give clients clear, specific and unambiguous information about the cost of legal services

[91] A similar conclusion is expressed by Master Tokarek in *Koffman Kalef LLP v. Identity Rehab Corporation*, 2010 BCSC 27:

[32] When a client retains a solicitor, a duty arises on the part of that solicitor because of the relationship of trust and confidence, and consequently there is a requirement on the lawyer to be candid and transparent in his dealings with the client. Here the lawyers had every imaginable opportunity to inform the client of the magnitude of increase in the estimated fees. There is nothing in the evidence before me to suggest any rational basis for an experienced lawyer to make an estimate of \$100,000 for an IPO and end up charging three times that amount without any indication to the client. Granted the estimating of fees is certainly not an easy task in many instances, but once a lawyer embarks upon that course of action, he is obliged to not only be as reasonably accurate as possible but to advise the client of any unusually high increase beyond the estimate.

[92] Mr. Doyle breached his obligation to the clients in three ways:

- 1) he did not give due consideration to the estimates he was providing the clients;
- 2) he did not review the work in progress ("WIP") monthly, as he acknowledged he was supposed to do and as is set out in the retainer email to the clients; and
- 3) he failed to advise the clients when he knew that the estimates he had given them were grossly inadequate.

[93] Estimates, even ballpark estimates, are important to clients. As was noted in *Best Industries et al v. Fulton and Lawson Lundell LLP*, 2006 BCSC 611 by then Registrar Blok:

[28] The other factor is the estimate itself. Although I have found that it is not a fixed fee quote nor even a true estimate, as the authorities define that term, but merely a preliminary or ballpark estimate, I conclude that this must still be taken into account in moderating the amount of fees that are properly charged in this matter. Even ballpark estimates give rise to expectations on the part of clients, expectations which can lead to most unpleasant surprises if the ultimate bill exceeds the estimate given by a material amount. The solution, of course, is for the solicitors to disabuse the client of those expectations as soon as it is reasonably known that the estimate is no longer accurate, even on a ballpark basis. Thus I have concluded that the fee estimate of \$30,000 must be taken into account in moderating the fee assessment in this case.

[59] Mr. Yeager was fully aware of the Clients' financial challenges. He did not clearly advise the Clients of the impact that the OIC and consequent change in injunction target would have on the fee estimate he had given. Further, he did not follow up with the Clients when he became aware that his initial estimate would be exceeded by a significant amount, nor did he respond to the Clients' cost concerns as communicated by Ms. Bordua following receipt

of the First Invoice. The Lawyer's explanation that he was unaware of the concern because Ms. Bordua did not copy him on her email to Ms. Atwal is somewhat disingenuous. Ms. Bordua communicated her immediate concern to Ms. Atwal, a representative of the Law Firm. A lawyer is responsible for work delegated to their staff members (LSBC Code of Professional Conduct for British Columbia, s. 6.1-1)

[60] The Law Firm continued working on the case despite:

- a) having exceeded the initial estimate,
- b) not advising the Clients that the retainer had been exceeded until nearly a month later when significant additional billable hours had been incurred,
- c) Ms. Bordua expressing to the Law Firm that she was "appalled" by the First Invoice, and
- d) the Clients not replenishing the retainer.

All of these factors should have indicated to the Lawyer that there was an issue that needed to be addressed and resolved prior to further work being done.

Conclusions

[61] I have concluded that Mr. Yeager gave a ballpark estimate of \$24,000 for the First Steps. Soon thereafter, being unable to retain outside counsel for the injunction and learning of the OIC, he determined that the initial estimate was insufficient. He could and should have formally updated the Clients when he knew that his initial estimate was significantly inadequate.

[62] However, the Lawyer did not clearly communicate a revised estimate and increased retainer request to the Clients until after the initial estimate and retainer had been exceeded. There is insufficient evidence of the content of the November 22, 2021 telephone discussion between Mr. Yeager and Ms. Bordua for me to conclude that it formed the basis of a revised estimate or a request for an increased retainer at that time. The first written estimate of potential additional costs was the December 20, 2021 email from Ms. Atwal in response to Ms. Bordua's question. The first request for a replenishment of the retainer was when the Second Invoice was delivered. Had Mr. Yeager provided an updated estimate and retainer request in writing at an earlier date, the Clients would have had an opportunity to decide whether or not to proceed.

[63] As a result, I cannot conclude that the work done after the initial estimate was exceeded was either reasonable or necessary. However, there was some value to the Clients in the work subsequently performed, as the Lawyer produced a draft Petition that was largely adopted by the Clients' new counsel.

[64] A precise calculation of a fair fee is not possible. Considering all of the circumstances, I have concluded that \$25,000 plus taxes is a reasonable fee for this retainer.

[65] The disbursements billed are modest and unchallenged. Aside from the amount for "file opening recovery", which is not claimable, the disbursements are allowed as claimed. Accordingly, the Law Firm is entitled to taxable disbursements in the amount of \$28.90 plus taxes.

Interest

[66] The Law Firm is entitled to contractual interest at the rate of 12% per annum as set out in the JRA. If required, a certificate can be submitted to the Registry for signature. The certificate must be accompanied by a summary of the interest calculation. For clarity, the retainer of \$24,000 is to be deducted from the amount owing.

Costs

- [67] Absent a finding of special circumstances, I am obliged to award costs of the review to the Lawyer if the bill is reduced by less than one-sixth, and to the client if the bill is reduced by more than one-sixth (Legal Profession Act, s. 72(1)). As the bill has been reduced by more than one-sixth, the Clients would ordinarily be entitled to costs of this assessment.
- [68] However, this review was unduly lengthened by the approach taken by both the Clients and the Lawyer. The review was originally set for one day, but ended up taking 2 ½ days. Although both parties were ordered by Master Robertson to provide affidavit evidence in advance of the review, the Clients provided a new affidavit on the second day of hearing, which then required a third day of hearing so that the deponent of the new affidavit could attend for cross-examination. Re-examination of the Lawyer was also required as a result of the new affidavit.
- [69] Under all of the circumstances, I am satisfied that special circumstances exist, as contemplated by s. 72(2) of the Legal Profession Act, such that each party should bear their own costs of this review.

"Master Hughes"

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