

CANADA / JUDGMENT

Campbell v. Cindrich

2014 BCSC 119

COURT

Supreme Court of British Columbia

DECIDED

27 January 2014

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2014 BCSC 119 Campbell v. Cindrich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Campbell v. Cindrich,

2014 BCSC 119

Date: 20140127

Docket: S114105

Registry: Vancouver

Between:

(Campbell, Burton & McMullan) John Campbell

Lawyer

And

Joseph David Cindrich

Client

- and -

Docket: S138160

Registry: New Westminster

Between:

John J. Campbell Personal Law Corporation (Inc. No. 396102),

Steven E. Burton Law Corporation (Inc. No. 451756) and

Richard W. McMullan Law Corporation (Inc. No. 437552)

carrying on business as the partnership of

Campbell, Burton & McMullan LLP

Law Firm

And

Joseph David Cindrich

Client

Before: Master R.W. McDiarmid

Reasons for Judgment

Counsel for the Lawyer:

J. Campbell

Counsel for the Client:

C. Linde

Place and Date of Hearing:

Vancouver, B.C.

August 26-28 and December 2, 2013

Place and Date of Judgment:

Vancouver, B.C.

January 27, 2014

- [1] In these reasons, when I refer to Joseph David Cindrich, I will refer to him as the "Client". When I refer to the partnership of Campbell, Burton & McMullan, technically the "Lawyer", as set out in s. 70(3) of the Legal Profession Act, S.B.C. 1998, c. 9 [LPA], I will refer to that entity as the "Law Firm". When referring to individual lawyers, I will refer to them by name.
- [2] Evidence was taken over three days. The Law Firm called David D. Hart, the lawyer primarily responsible for the services rendered to the Client. In addition, the Law Firm called Kelly Martin, a paralegal employed by the Law Firm. As its final witness, John Campbell testified on behalf of the Law Firm.
- [3] The Client called Georgiale Lang to give opinion evidence. John Gregory Armstrong, a legal assistant formerly employed by the Client's present lawyers, testified on behalf of the Client. Finally, the Client testified. Twenty-four exhibits were entered into evidence.

- [4] The appointment taken out by the Law Firm, found at exhibit 1, tab 2, attached 13 accounts rendered by the Law Firm. The appointment taken out by the Client attached the last four accounts rendered. The Law Firm properly included all of its interim accounts as well as the final account dated April 19, 2011.
- [5] I have jurisdiction to consider all the interim accounts, even if any one of them has not been attached to the appointment for the review, and I conducted the review in that way, reviewing all of the accounts and the legal services performed for which the Client was billed in those accounts.
- [6] It was agreed that there need be no review of disbursements claimed by the Law Firm. The total of disbursements claimed is \$3,106.05, and that claim together with applicable taxes on disbursements is allowed.
- [7] The billed date and the amount billed, inclusive of fees, disbursements and taxes, is set out as follows:

March 16, 2010:

\$5,292.29

April 20, 2010:

\$4,970.60

May 18, 2010:

\$3,726.71

June 18, 2010:

\$2,422.99

July 14, 2010:

\$4,161.32

August 19, 2010:

\$3,765.37

September 16, 2010:

\$1,500.54

October 14, 2010:

\$2,234.33

November 17, 2010:

\$2,102.18

December 16, 2010:

\$8,462.29

January 18, 2011:

\$5,588.43

February 17, 2011:

\$8,352.78

April 19, 2011:

\$13,764.15

Total:

\$66,343.98

According to what is set out on the April 19, 2011 account, \$3,765.17 was applied to that account, leaving a claimed balance owing of \$9,998.98.

[8] Following the conclusion of the evidence, a timeline was set for providing written submissions.

[9] At the request of counsel for the Client, closing oral argument was made on December 2, 2013.

[10] At the beginning of the written argument prepared on behalf of the Client, Mr. Linde referred to c. 5, s. 5.2-1 of the Law Society of British Columbia, Code of Professional Conduct (formerly c. 8, s. 9 of the Professional Conduct Handbook).

[11] Section 5-2-1 reads as follows:

5.2 The Lawyer as witness

SUBMISSION OF EVIDENCE

5-2-1 A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless

- (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;
- (b) the matter is purely formal or uncontroverted; or
- (c) it is necessary in the interests of justice for the lawyer to give evidence.

[12] Mr. Campbell acted for the Law Firm during this review. In addition, he testified as to the legal services he provided on behalf of the Client. Of the total fee billings rendered by the Law Firm to the Client, which according to exhibit 1, tab 4, amounted to \$56,251.50, \$13,602.50 in fees was billed by Mr. Campbell. \$25,560.00 in fees was billed by Mr. Hart, who

was the lawyer primarily responsible for the family law aspects of the retainer. Mr. Campbell was responsible for what I am going to refer to as the corporate law aspects of the retainer, although he also participated in some of the family law aspects. \$12,540.00 in fees was billed by Kelly Martin, the paralegal. \$4,301.00 in fees was billed by a junior lawyer, Ian Whitaker.

- [13] At no time prior to receiving Mr. Linde's written submissions was the issue of Mr. Campbell acting as both an advocate and a witness raised. Although Mr. Linde in his written submissions states he objected to Mr. Campbell testifying, I have no recollection of such an objection being made. The proceedings were recorded and I have listened to the relevant portions of the recordings. I heard no such objection.
- [14] There was a pre-hearing conference on February 26, 2013 before Registrar Cameron. At that time, Mr. Campbell appeared for the Law Firm and an agent appeared on behalf of Mr. Linde. The next pre-hearing conference was on March 15, 2013, also before Registrar Cameron. At that time, Mr. Campbell advised that the Law Firm would be calling Mr. Hart, Ms. Martin, and a former junior associate, Mr. Whitaker. Mr. Campbell advised that he would be giving evidence and would also be counsel for the Law Firm on the assessment. The issue was not raised on that day.
- [15] The hearing of evidence occupied three days, August 26, 27 and 28, 2013. Mr. Campbell led Mr. Hart through his evidence on August 26, and was present through cross-examination of Mr. Hart on August 26 and 27, 2013. Mr. Campbell then led the paralegal, Ms. Martin, through her examination-in-chief, and was present during her cross-examination on August 27, 2013.
- [16] In the afternoon of August 27, Mr. Campbell took the witness stand and gave evidence-in-chief. Cross-examination commenced and continued the following day, August 28. Following cross-examination of him, he closed the case on behalf of the Law Firm, and Mr. Linde commenced the case on behalf of the Client, firstly by calling one of Mr. Linde's legal assistants, and then calling the Client. The evidence concluded with the Client being cross-examined by Mr. Campbell.
- [17] At no time was there any issue raised about Mr. Campbell being both the advocate for the Law Firm and a witness.
- [18] In his submission, at paragraph 4, Mr. Linde, on behalf of the Client, submits as follows:
4. The failure of Mr. Hart and the firm to abide [by] the spirit and letter of the Professional Conduct Handbook should be sanctioned by the Registrar by putting little if any weight on the evidence of either Mr. Hart or Mr. Campbell where such evidence is contradicted by the client.
- [19] It is common practice for a lawyer who is having his account reviewed to testify about the legal services he or she performed and also to advocate for the account the law firm renders. The fact that it is common practice does not necessarily make it good practice. Absent permission being given for a finding that it is necessary in the interests of justice for the

lawyer to give evidence, such a practice contravenes s. 5.2-1 of the Code of Professional Conduct. One reason for that rule has to do with the ability for the presider hearing an advocate's evidence to properly weigh and assess that evidence, and to separate evidence from submissions.

- [20] Although generally not stated in reasons given following a review, registrars are intuitively alive to the potential problems which occur where a witness also advocates for one of the parties. Registrars routinely hear both evidence and submissions from lawyers on reviews of their bills and from self-represented clients where the same issue arises, although obviously self-represented clients are not regulated by the Law Society.
- [21] The practicalities involved in dealing with LPA reviews must be taken into account. From a practical perspective it often makes sense for the lawyer who has personal knowledge of the file to both testify and conduct the review as an advocate. Economics and proportionality also justify this practice.
- [22] Keeping all of that in mind, had I been asked to permit Mr. Campbell to testify in addition to appearing, I would have done so. I find that in this case, it is, from a practical perspective, necessary in the interests of justice for Mr. Campbell to give evidence. I am aware of the potential issues which arise where there is a discrepancy between what the lawyer testifies to and what the client testifies to. In scrutinizing Mr. Campbell's evidence, I must keep in mind the fact that he is also appearing as the Law Firm's advocate and I have done so.
- [23] In some cases, it might be appropriate to draw an adverse inference from all conflicts in the evidence between a witness - advocate and a client. In this case, I do not draw an adverse inference in assessing the evidence of Mr. Campbell or Mr. Hart. On those points where counsel for the Client has pointed out discrepancies between the Client's evidence and that of Mr. Campbell or Mr. Hart, I have scrutinized the relevant evidence carefully.
- [24] This is a review of legal services provided by the Law Firm in relation to a family law proceeding started by Mr. Hart, then counsel for the Client, in New Westminster File No. E034808, wherein the Client was the plaintiff and Kim Laura Marie Flurry Cindrich was the defendant.
- [25] The family law writ of summons was issued March 3, 2010. In it the Client claimed guardianship and custody with respect to the two children of the marriage, support for the children, a division of family assets, a declaratory judgment pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], an order for re-distribution under s. 65 of the FRA, an order for a determination and division of family assets in accordance with the provisions of Part 5 of the FRA, an order that the matrimonial home be sold, an order for a custody and access report to be prepared pursuant to s. 15 of the FRA, together with a certificate of pending litigation, and costs.

- [26] The statement of claim pleaded a marriage on October 10, 1988; that the parties ceased to cohabit on February 14, 2010 and that there were two children, a son born February 15, 2001 and a daughter born November 23, 2004. In paragraph 26 of the statement of claim, the plaintiff sought custody of the children with the plaintiff and defendant sharing joint guardianship, and in the alternative joint custody and joint guardianship with the primary residence of the children to the plaintiff.
- [27] In the statement of claim, the plaintiff sought a reapportionment of the family assets on the basis that the plaintiff provided for a substantial amount of pre-owned assets for which he should be compensated. He claimed an interest in the property at 12598 Ocean Cliff Drive in Surrey, British Columbia.
- [28] In the statement of defence, the defendant opposed sole custody to the Client, opposed paying maintenance or support for the children, opposed reapportionment in favour of the Client, opposed the order that the matrimonial home be sold, and opposed the order for costs.
- [29] The defendant proposed that the parties share joint custody and joint guardianship of the children, and that the children primarily reside with the defendant with generous and liberal access to the plaintiff. She counterclaimed. The counterclaim confirmed the commencement of cohabitation on the date of marriage and confirmed the date when the parties ceased to cohabit, approximately eleven years and four months later. In her counterclaim, the defendant sought a larger portion of the family assets in order to become and remain economically self-sufficient. She sought spousal support or maintenance.
- [30] In the financial statements filed by the parties as part of the trial record, filed as exhibit 3 in this proceeding, the defendant deposed to assets having a value in excess of \$1 million. She also claimed as an asset a business interest in 0762954 B.C. Ltd., with an unknown value. Debts were deposed to at approximately \$440,000.00. She deposed to having no income and approximately \$74,000.00 in annual expenses.
- [31] The Client as plaintiff deposed to assets having a value in excess of \$1 million with the same "unknown" description with respect to an interest in 0762954 B.C. Ltd. The Client deposed to significantly greater secured debts in an amount of approximately \$939,600.00, including a promissory note to the Client's parents in an amount of \$120,000.00. The Client deposed to income of just under \$112,000.00 annually and to annual expenses of approximately \$144,500.00.
- [32] The Client initially met with Mr. Hart. Mr. Hart had joined the Law Firm in 1998. He was admitted as a solicitor in the United Kingdom in 1959, and was called to the British Columbia Bar in 1962. In 1973, he was appointed as a Provincial Court Family Judge, serving on the Provincial Court Bench until 1977, following which he has practised in the area of family law.

- [33] Mr. Hart testified about the initial meetings that he had with the Client. He referred in his evidence to exhibit 2, tab 2, a document which set out that the parties owned 0762954 B.C. Ltd., with the Client as president and his spouse as secretary. The document made reference to real estate property and set out some history, including a very brief description of some of the likely financial issues. It set out some relevant dates. It set out that there were two children, Benjamin, age 9, and Mayalise, age 5.
- [34] On March 2, 2010, the Law Firm sent to the Client what Mr. Hart described as a "cautionary" letter setting out the difficulties in giving cost estimates in family law matters, certain things the Law Firm could not do, and pointing out that "98% of family matters settled well before trial, if for no other reason than that the cost that both parties experience begins to outweigh the benefit".
- [35] The letter also outlined the procedure to be followed in family law cases. It sets out the necessity for preparation of a financial disclosure statement. It sets out that a judicial case conference will be scheduled. It describes in a cursory way examinations for discovery.
- [36] Prior to filing and serving the writ of summons, the Client received a letter dated March 3, 2010 from Shahnaz B. Jamal, a lawyer retained by the Client's spouse. In a "without prejudice" letter, Ms. Jamal set out a proposal for resolution of custody, guardianship, residence, access, child and spousal support, and division of assets.
- [37] In his testimony, Mr. Hart testified that he had some experience in dealing with Ms. Jamal and that in his view she was "committed to the belief in her client's cause prepared to do battle " He formed the view, communicated to the Client, that because of the differences in the views of the appropriate behaviour of the other party, access and parenting would be ongoing problems.
- [38] He testified that "the only real resolution was to obtain a s. 15 report." In furtherance of that, he recommended the retention of Dr. Elterman and requested a \$7,000.00 retainer from the Client for the purpose of retaining Dr. Elterman for a s. 15 report. The Client promptly paid that retainer, depositing it to the Law Firm's trust account on March 3, 2010.
- [39] In a letter dated March 5, 2010, he wrote in reply to Mr. Jamal's letter of March 3, 2010:
- My present instructions are to make immediate application for a Section 15 custody and access report. You will see that my client is claiming joint guardianship, sole custody and in the alternative, joint custody with primary residence. My client is extremely concerned with what he has observed of your client's conduct towards the children and what he has heard from the children on the limited occasions when he has had the opportunity to spend time with them.
- [40] In the same letter, he writes that he has taken the precaution of contacting Dr. Elterman, confirms that the Client has placed funds to cover Dr. Elterman's retainer, seeks confirmation that Ms. Jamal's client is prepared to consent to Dr. Elterman, and then writes:

If I do not hear [from] you with regard to consent for the Section 15 report, my instructions are to take short leave application during the coming week to obtain an Order for such a report.

[41] On March 10, 2010, he writes to the Client and to Ms. Jamal, and in both cases discusses the s. 15 report. On March 22, 2010, he writes, "At this time, I am still instructed to proceed with the application for a Section 15 Order".

[42] On March 26, 2010, Ms. Jamal writes back to say that she does not agree to Dr. Elterman conducting a s. 15 report. She advises:

We are in the process of determining the availability of another counselor along with the timeline and costs. My client does not have access to any funds and therefore is not in a position to share in this cost, now or in the future.

[43] On March 30, 2010, Erin Easingwood, a lawyer at a Fort Langley law firm writes to both Mr. Hart and Ms. Jamal confirming that her firm are the corporate solicitors for 0762954 B.C. Ltd., and setting out:

We have several ongoing files involving corporate matters, for which we seek your assistance in developing a plan for moving forward. We understand that Kim [Ms. Cindrich] has frozen the corporate bank accounts, therefore, seek your mutual input on how to move forward with respect to same.

[44] Ms. Easingwood then gives details of four ongoing files.

[45] On March 31, 2010, Mr. Hart again writes to Ms. Jamal with respect to the s. 15 report. In that letter, he writes:

I should be pleased to hear from you by return as my current instructions are to proceed with an application without delay.

[46] There were other exchanges between the Client and the Law Firm, and between the Law Firm and Ms. Jamal over the next several months. On November 25, 2010, Mr. Hart writes to Ms. Jamal confirming that his client is prepared to embark on mediation on several terms, including, "That the Application for the Section 15 Report proceed " This is followed by a letter the following day, November 26, 2010, wherein Mr. Hart writes "With respect to urgency, my client wishes to have the Section 15 proceed immediately."

[47] Mr. Hart was both examined and cross-examined on why he did not proceed to obtain a s. 15 report.

[48] In his written submissions, Mr. Campbell, on behalf of the Law Firm, summarizes Mr. Hart's testimony as follows:

15. In respect of the Section 15 report, it is evidence that the Client did want that report to be obtained promptly. Mr. Hart took a different approach and that he felt a basis had to be laid before the report was commissioned. Mr. Hart felt that the Client should spend increased access time with his children before the report commenced.
- [49] While that is a distillation of Mr. Hart's testimony, it does not reflect the manner in which Mr. Hart testified, nor how he dealt with the Client's file.
- [50] Mr. Hart seemed to have difficulty with providing concise answers. Questions that should have been answered succinctly seemed in his mind to require significant qualification. At times his answers were unresponsive.
- [51] I do not wish this to be interpreted as suggesting a lack of candor. Mr. Hart was a truthful witness, but he was not a good witness. To use a colloquial term, when giving his answers he was often "dithering". I have no doubt that he was trying to be careful and truthful, but the impression given was that of a person who had trouble being decisive when decisiveness was required.
- [52] As can be seen from the letters he wrote, that same inability to act decisively characterized his representation of the Client.
- [53] Near the outset of the retainer, he told the Client that the way to deal with Ms. Jamal and Ms. Cindrich was to move decisively and to bring a s. 15 application. He commenced threatening the s. 15 application with his first letter of March 5, 2010, and repeated his present instructions to make immediate application for a s. 15, custody and access report, in five other letters to Ms. Jamal prior to the end of the year. He did not file the application until November 24, 2010. The application was set to be heard December 7, 2010, was adjourned, and never was spoken to.
- [54] On April 12, 2011, six days prior to the Law Firm being advised by Mr. Linde that Mr. Cindrich was now retaining Mr. Linde, Mr. Hart wrote to the Client. In the second paragraph of his letter, he writes:

Mr. Campbell advises me that the two particular matters that require to be addressed immediately are:

1. Increased access; or
2. Obtaining an Order for a Section 15 report.

- [55] As can be seen, over one year and one month had elapsed since the March 5, 2010 letter Mr. Hart wrote to Ms. Jamal, where he indicated his instructions were to make immediate application for a s. 15 custody and access report.
- [56] The report was ultimately obtained. It was obtained by consent and was prepared by Dr. Krywaniuk dated August 14, 2012.

[57] By the end of 2010, the parties, through their counsel, were attempting to resolve matters consensually. Mediation had been scheduled for January 24, 2011. On November 26, 2010, Mr. Hart wrote to Ms. Jamal expressing his hope that the mediation could proceed expeditiously. He recommended to the Client that Mr. Campbell represent the Client at the mediation.

[58] Following that, the Client emailed Mr. Hart as follows:

I've finally had an opportunity to review the attached documents, and I have a few concerns.

I am concerned as I hired you to represent me; how can someone else who has not been involved from the beginning be expected to represent me properly?

I believe that having Mr. Campbell step in [in] your absence will require him to review the files in depth to come up to speed, and I am at a point that I cannot afford a bill associated with another member of your firm stepping in to cover your absence. I realize that he is a very competent counselor, but the costs I fear that will be generated are beyond my ability to cover.

Are there alternatives that we can use that will keep these costs down. The exchange of letters created by Ms. Cindrich's counsel's apparent inability to maintain agreed upon schedules alone must be in the multiple of thousands.

Regards

Joe

[59] Mr. Hart responded in a letter dated December 9, 2010, wherein he wrote to the Client the following:

I have your letter in which I have taken as being firm instructions that you do not wish the mediation to proceed and I have advised Mr. Campbell and Ms. Jamal accordingly.

[60] One wonders how Mr. Hart could possibly have interpreted the Client's inquiry in such a manner.

[61] The Client quite properly replied as follows in an email dated December 10, 2010:

David

I do not understand what has happened. There seems to be some confusion surrounding my letter of December 8, 2010 that I sent to you asking if there were alternate ways to proceed while keeping the costs down.

I did not ask for, and it was not my intention to have the mediation canceled. I was surprised to see Mr. [Campbell's] name in the proposal as I had not been previously informed that this would be the case.

I wish to proceed with the mediation, but I want you, the counsel I hired, representing me.

The e-mail to you was not an instruction, it was a question to see if there were alternate avenues to try and keep me legal costs down.

How do we proceed from here?

Regards

Joe

[62] The mediation did not proceed.

[63] Mr. Hart's testimony was consensually interrupted to enable testimony to be elicited from Georgiale Lang, who was called by the Client as an expert witness. Ms. Lang is an experienced family law lawyer, who at the time of writing her opinion letter (January 12, 2012) had practised family law exclusively for 23 years, litigated more than 100 family law cases in the superior courts, offered numerous family law articles that had been published in many legal journals, and was a former law professor at the University of British Columbia, having taught family law for six years.

[64] Ms. Lang's qualifications were admitted. The purpose in her testimony was to provide an opinion as to the appropriateness of the fees being billed by the Law Firm to the Client. Ms. Lang's opinion, by its very nature, can be viewed as offending the prohibition against giving opinion evidence about the ultimate issue which is, of course, up to the registrar to decide, utilizing the parameters set out in the LPA.

[65] Her opinion was affected by the material she reviewed, which as she puts in her report, was based mainly on the pre-bills. As she states, "access to the entire file would have been optimum."

[66] The Law Firm was prepared to release the entire file provided that the balance of their account was secured. Based on my review of the economic issues at stake here, the Client had the ability to secure the account and chose not to do so.

[67] In giving her opinion, Ms. Lang reviewed and relied heavily on pre-bills. In giving her opinion, she comments on the factors set out in s. 71. I found her evidence to be given fairly, for example, in commenting on the character and reputation of Mr. Hart, she writes:

Mr. Hart is a well known family law lawyer who has extensive experience. He recognized by his peers as skilled and accomplished counsel.

[68] It is apparent that her opinion was hampered by her lack of complete access to the work performed by the Law Firm. Her opinion concludes with the following:

If the application materials drafted and finalized by the firm were of assistance to Mr. Cindrich's new counsel, then a fair fee would be in the range of \$22,000.00 to \$25,000.00. If the materials prepared by the firm were of little or no use to Mr. Cindrich's counsel, and keeping in mind the extraordinary delay, the length of time it took to prepare basic litigation documents such as Notices of Application and Affidavits, the presence of two lawyers or a lawyer and a paralegal for court matters, and the fact that no orders were ever obtained, then a fair fee would \$15,000.00.

- [69] This last comment highlights the fact that access to the entire file, which could have been done with relative ease, hampered the accuracy of Ms. Lang's opinion. For example, she was unaware of a consent order obtained at the judicial case conference in front of Mr. Justice Masuhara. That order granted joint guardianship to the parties, dealt with the plaintiff having summer holiday access in the second half of August 2010, settled some child and spousal support issues, dealt with some of the corporate issues, and dealt with one step in obtaining production of police records with respect to incidents that incurred involving the Client and his former spouse.
- [70] As well, there was an order (incorrectly termed "a consent order," because with the agreement of counsel I reviewed the proceedings and it was obviously an order made after a contested application) before Mr. Justice Truscott on February 18, 2011 dealing with issues surrounding 0762954 B.C. Ltd., a company owned by the parties, from which the Client had withdrawn \$220,000.00 to pay a debt the company owed to his father.
- [71] Thus, while Ms. Lang's opinion was of assistance in giving an opinion of value for work she assumed was performed, she was not fully apprised of all of the relevant facts. Her opinion was based on the facts she knew; the actual facts were different. This case was more complex than was revealed by the documents she reviewed and the information she obtained.
- [72] Kelly Martin testified. She is a paralegal with the Law Firm. She gave some evidence about work she performed. She indicated she dealt mostly with parenting issues. She commented on the Client's demeanour in dealing with parenting issues, namely that he was often crying when she had meetings with him. I find her evidence confirmatory of the Client's primary focus that the litigation was to secure as much parenting time as could possibly be obtained.
- [73] Mr. Campbell testified on behalf of the Law Firm. He testified as to what he did, which was recorded in the time records which were exhibited as tab 5 of exhibit 1 to these proceedings.
- [74] Mr. Campbell testified that he was called in 1976, initially practiced as a generalist with a focus on civil litigation, but since 1986 practiced more in the area of family law. He qualified as a family law mediator in 1986 and is certified as a family law arbitrator.
- [75] He was cross-examined extensively on his involvement in dealing with the monies owed to the Client's father by the company, 0762954 B.C. Ltd. In cross-examination, he gave full and fair answers, the cumulative effect of which was to justify to me that the time he spent on this file was reasonably necessary and proper to conduct the business to which they related

and, moreover, was authorized by the Client. Furthermore, I have no difficulty in finding that the services he performed were reasonably intended to advance the interests of the Client at the time they were provided.

- [76] The Client called Shawn Armstrong. Mr. Armstrong was, for 12 years, a legal assistant working with present counsel for the Client. He testified as to drafting a notice of application and supporting materials. He gave evidence as to the time he typically would spend on those tasks. He also testified that, as Mr. Linde set out in his submissions, "There was very little of value that the new firm gained from work done by the old firm."
- [77] The evidence confirms that following the change of counsel, the Client eventually did obtain a s. 15 report, by consent, although not until well over a year after the change of lawyers.
- [78] The Client testified. He was not a particularly good witness. He was not untruthful, but because of the obvious frustration he had with the slow pace of the litigation, despite his urging to move matters along, he tended to minimize the work that did assist him.
- [79] In particular, the Client endeavoured to minimize the legal work done to protect his interest in the matrimonial action when his spouse was raising issues relating to the family corporation. He also tended to minimize the extent to which the Law Firm's actions were necessary with respect to the claim by his father for \$220,000.00 which was repaid from the company to the Client's father following a demand made by the Client's father in January of 2010.
- [80] Exhibit 4 is an affidavit of the Client's father detailing the interplay between indebtedness owed by 691130 B.C. Ltd. to the Client's father, and how that affected the value of the company as a family asset. It makes it clear that the economic issues in the litigation were not simple, and substantial monies were involved.
- [81] From reviewing the materials filed (exhibit 20 principally) and the order I was referred to made by Mr. Justice Truscott February 28, 2011, I conclude that the Client's spouse sought return of the \$220,000.00. Her application in that regard was dismissed. In addition, she had applied to restrict the manner in which the Client could operate 0762954 B.C. Ltd. Her application to restrain the Client in that regard was also dismissed.
- [82] The Client's justifiable frustration with the lack of action by Mr. Hart undoubtedly has been the cause of much of his frustration. Similar to my comments with respect to the testimony of Mr. Hart, while the Client was not a particularly good witness, this was because his evidence was coloured by the frustration he felt.
- [83] I find that the Client was properly advised about what would take place at a judicial case conference and properly advised about and prepared for an examination for discovery.
- [84] I find that the Client's interest in maximizing his parenting of his children was for him the most important aspect of the litigation.

- [85] I also find that the financial matters which were involved in this litigation were significant, and the Client understood that and gave instructions to deal with what the Client viewed as a significant issue.
- [86] During one of the questions asked of Ms. Martin, Mr. Linde confirmed that the matrimonial litigation remained ongoing as at the late summer of 2013, confirming what both Mr. Hart and Mr. Campbell testified to, that resolution of this litigation was not a simple matter.
- [87] In reviewing the work done, I have considered the matters set out in s. 71 of the LPA.
- [88] I must allow fees, charges and disbursements for services reasonably necessary and proper to conduct the proceeding or business to which they relate. I must allow fees, charges and disbursements for services authorized by the Client, or subsequently approved by the Client, whether or not they were reasonably necessary and proper to conduct the proceeding or business to which they relate.
- [89] I may allow fees, charges and disbursements even if unnecessary which were reasonably intended to advance the interests of the Client, or requested by the Client, after being informed that they were unnecessary.
- [90] There is no evidence that anything fits within this latter category - at no time was the Client advised that services were unnecessary, and at no time did the Client request such services.
- [91] In the assessment submissions of the Law Firm, the Law Firm argues as follows:
15. In respect of the Section 15 report, it is evidence that the Client did want that report to be obtained promptly. Mr. Hart took a different approach and that he felt a basis had to be laid before the report was commissioned. Mr. Hart felt that the Client should spend increased access time with his children before the report commenced. On cross-examination, the paralegal called by Mr. Linde agreed that the approach taken by Mr. Hart was essentially correct in that the report would likely be more favourable following increased access time.
 16. Moreover, the Client acknowledges that the Section 15 report itself (tab 12, Exhibit 1) only confirms that Kim is a fit and proper parent. Although the Client wanted sole custody, or an order that the children's principal residence should be with him, the conclusion of the report is that the children remain in their "current environment", i.e. with Kim. It is submitted that even if the Section 15 report was obtained earlier, during Mr. Hart's retainer, the results would have been no different, and that the Client would not have obtained his stated goal of sole custody.
- [92] The difficulty with these submissions is that it was Mr. Hart who advised the Client to move to promptly obtain a s. 15 report. The Client agreed and gave Mr. Hart those instructions and paid \$7,000.00 into trust to retain Dr. Elterman. Mr. Hart then did not carry out the instructions based on his own advice. Instead, he "dithered".

[93] Mr. Linde, in his submissions on behalf of the Client, submits in paragraph 2 of his brief as follows:

- a) Mr. Hart did not perform as expected or as he should have.
- b) When Mr. Hart did perform he did not perform satisfactorily.
- c) The law firm of Carey Linde had to do work Mr. Hart should have or hadn't done before satisfactorily.
- d) The client should not have to pay both firms.

[94] The comments in a) and d) are apt.

[95] The comment in b) is not wholly correct; Mr. Hart obtained significant results at the judicial case conference. However, his actions in failing to obtain a s. 15 report and his actions in the perplexing mis-reading of a proper inquiry by the Client, resulting in cancellation of the mediation, represent serious problems with the legal services provided by Mr. Hart.

[96] With respect to c), that falls within the specific consideration of all of the circumstances set out in s. 71(4) of the LPA, and in particular s. 71(4)(h) - the result obtained.

[97] Paragraphs 13 and 14 of the Client's submissions are as follows:

13. In the *Davies v. Hunter* (1995) 40 C.P.C. (3rd) 273 (B.C.S.C.) Madam Justice Baker in Chambers dismissed an appeal from a Registrar. At the bottom of page 282 in paragraph 22:

"The Registrar is required to take into account the time reasonably expended and result obtained for the client. If the Registrar concludes that the work performed was of no value to the client, because the lawyer acted without instructions, or failed to carry out his instructions competently and adequately, or took unnecessary or counterproductive step, the Registrar may properly disallow some or all of the claimed fees and disbursements."

14. In *Conkie & Company v. Free Quincy Productions Ltd. and Purple Echo Ltd.*, 2012 BCSC 33, Mr. Justice Blok, sitting as Registrar, in Reasons for Decision dated January 13, 2012, having reviewed all of the work done by Conkie & Company stated that " , but nonetheless I observe that the magnitude of the effort spent by Ms. Conkie and her associates on these activities seems disproportionate in light of their limited importance." That comment is applicable to much of what was done by the firm and will be discussed below.

[98] I find those submissions compelling with respect to the work done by Mr. Hart.

[99] Exhibit 1, tab 4 provides a summary of the fees billed in the 13 accounts rendered. The fees total \$56,251.50. Of those fees, \$25,560.00 was billed by David Hart and \$12,540.00 was billed by Kelly Martin. That totals \$38,100.00. I allow \$20,000.00 for the work done by Mr. Hart and his paralegal, Ms. Martin. Part of the \$18,100.00 reduction is for duplication between the work done by Mr. Hart and the work done by Mr. Campbell. Mr. Whitaker did not testify, although his time records were placed in evidence. His work assisted Mr. Campbell with

respect to some of the corporate issues. He billed \$4,301.00. There is some duplication between the work he did and the work done by others. There was a dispute about the necessity of that work and, in particular, the necessity of the pleading relating to an application for an appointment of a receiver/manager of the company. I find that they were reasonably necessary and proper to conduct the proceeding or business to which they relate, but overlapped somewhat with the fees for Mr. Campbell which I have allowed in full, so I reduce those fees claimed by \$1,001.00. I allow his fees at \$3,300.00.

- [100] I am satisfied that the work performed by Mr. Campbell should be allowed in full at \$13,602.50.
- [101] There was a minor amount billed by his secretary; secretarial work is overhead. Her claimed fees of \$198.00 are not allowed. It also appears that \$50.00 was billed for some work done by Douglas B. Simpson. No explanation for that work was provided. It is not allowed.
- [102] In the result, fees are reduced by \$18,100.00, plus \$1,001.00, plus \$198.00, plus \$50.00 for a total reduction of \$19,349.00. Twelve percent tax on that amount is \$2,321.88 for a total reduction of \$21,670.88. \$9,998.98 is offset as being the balance unpaid on the April 19, 2011 account. \$11,671.90 must be returned by the Law Firm to the Client.
- [103] Pursuant to s. 73(4) of the LPA, I am prepared to give a certificate for \$66,343.98 - \$21,670.88 = \$44,673.10. That certificate will require that the Law Firm refund money to the Client in the amount of \$11,671.90.
- [104] Pursuant to s. 72 of the LPA, substantially more than one-sixth of the total amount of the bill has been subtracted from it. One-sixth is 16.66 percent. I have subtracted almost twice that percentage, or just under one-third of the bill. Accordingly, the Client is entitled to the costs of this review.
- [105] I am to summarily determine the amount of the costs of the review. There was a pre-hearing conference before Registrar Cameron on February 26, 2013. There was a further pre-hearing conference on March 15, 2013; both lasted for approximately 30 minutes.
- [106] The hearing occupied three days. There was also an appearance following submission of written argument. If a bill of costs were prepared utilizing Schedule B, it would likely include claims under items 1, 2, 6, 17, 18, 24, 25, 32 and 36. Some of the claims would be for multiple days, some for brief attendances.
- [107] Keeping in mind proportionality and the amounts in issue here, I summarily assess costs at \$4,500.00, inclusive of taxes, but exclusive of disbursements and exclusive of taxes on disbursements.
- [108] If the parties cannot reach agreement on the disbursements, they have liberty to either make further brief written submissions or schedule a further hearing in front of me.

- [109] Section 73(4) of the LPA requires me to add to an amount to be refunded an amount of interest calculated on the amount the Law Firm is required to refund, \$11,671.90, from the date the money to be refunded was paid to the Law Firm to the date on which the certificate is given.
- [110] The Client generally paid accounts as they were rendered, or by provision of, and topping up of, a retainer. The first account was rendered March 16, 2010. The last account was rendered April 19, 2011. An approximate mid-point would be October 1, 2010. Interest should be added on the amount to be refunded calculated at the same rate as allowed under the Court Order Interest Act, R.S.B.C. 1996, c. 79 on an order obtained by default, from October 1, 2010 to the date of these reasons.
- [111] Counsel for the Client should prepare a certificate reflecting what I have ordered and present it to me.

"Master R.W. McDiarmid"

MASTER McDIARMID

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