
CANADA / JUDGMENT

Cullen v. Henderson Heinrichs

2017 BCSC 612

COURT

Supreme Court of British Columbia

DECIDED

13 April 2017

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2017 BCSC 612 Cullen v. Henderson Heinrichs

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cullen v. Henderson Heinrichs,

2017 BCSC 612

Date: 20170413

Docket: S1610293

Registry: Vancouver

Between:

Steve Cullen

Client

And

Henderson Heinrichs

Law firm

Before: District Registrar Nielsen

Reasons for Decision

Appearing on his own behalf:

S. Cullen

Appearing for the law firm:

K. Heinrichs

Place and Date of Hearing:

Vancouver, B.C.

January 9, 2017 & March 27, 2017

Place and Date of Decision:

Vancouver, B.C.

April 13, 2017

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Introduction

[1] This is a client initiated review of the lawyer's fees pursuant to the provisions of the Legal Profession Act, SBC 1998, c. 9 (LPA). The retainer covered the time period between March 31, 2016 and July 18, 2016. The total fees billed were \$8,550, and with applicable taxes, totalled \$9,576. The lawyer also had \$50 in disbursements but he has waived this amount.

- [2] The client is of the view that he received no value from the lawyer's services; that the lawyer charged more per hour than he had represented; that the lawyer was only retained for the purposes of representing the client at trial; that what pretrial work there was to be done ought to have been done by a legal assistant; and finally, the lawyer billed for email correspondence when it was agreed he would not.
- [3] The lawyer is of the view that the client received good value, and the bill for services is entirely reasonable. The lawyer testified that he accurately represented his hourly rate and did not agree to waive fees related to emails.

Background

- [4] The client first contacted the lawyer on January 18, 2016. The client had been contacted by his 17-year-old son who had just become aware that the client was his biological father. The client's son was previously led to believe that his mother's husband was his biological father.
- [5] Seventeen years prior, in 1991, shortly after the client's son had been born, there was an altercation between the client and the child's mother. Violence was involved and a prison sentence was imposed. The client entered into a consent order in 1999 whereby the client was restrained from contact with the child's mother and the child.
- [6] The client wrote a letter to the child's mother during his probation, offering maintenance and wanting to initiate contact with his child, but he received no response. There was no further contact until the client's son contacted him 17 years later.
- [7] The client's son wanted to leave his mother's home and move in with the client. As a result, it was necessary to have the restraining order set aside. When the client attended provincial Court for this purpose, he was advised by the child's mother that she would be seeking retroactive child support.
- [8] The lawyer identified the issues arising in the retainer as those of guardianship, residency, and retroactive child support.
- [9] After the initial meeting of January 18, 2016, the lawyer did not hear from the client again until March 31, 2016. The lawyer testified he advised the client of his billing practices and hourly rates at both the January 18 and March 31, 2016 meetings. The firm's practice is to bill for all work performed.
- [10] The client's son had completed high school and wanted to enrol in college. The client also managed to secure a job for his son at his place of employment. In order to complete both his son's enrolment in college and his employment, identification documents were necessary. The client's son is transgendered and required prescription medication, and his passport in order to attend Gender Odyssey, an annual international conference focused on the needs and interests of transgendered and gender nonconforming people. The client's son had attended the conference the previous year and wanted to attend again in 2016.

- [11] The client also needed to be his son's guardian in order to secure medical and dental insurance coverage for him.
- [12] The lawyer assisted the client with these legal issues between March 31, 2016, and July 18, 2016. The client had provided the lawyer with a \$5,000 retainer. However, when he received further billings this triggered the deterioration of the solicitor client relationship requiring the lawyer to withdraw.
- [13] It had been the client's belief that the \$5,000 retainer was to be used strictly for the cost of the lawyer attending the upcoming trial.
- [14] The entire retainer lasted approximately 3 1/2 months.

The Retainer

- [15] The lawyer was unable to produce a retainer agreement signed by the client. He did produce an unsigned retainer agreement dated April 5, 2016 on the firm's letterhead.
- [16] The client produced a retainer agreement on the firm's letterhead dated April 7, 2016, which has each page initialed by him, and the final page endorsed by him. Both versions of the retainer agreement are identical except for the date on the firm's letterhead, the client's initials and signature, and the client's added terms which appear above his signature. The client's added terms state:

[Client's] NOTE's as per reception and [the lawyer] I am not charged for little back and forth emails only actual work done, majority to be done by assistant.

I only need [the lawyer] for my actual trial nothing else, I am of limited funds. My wife a paralegal will be able to file most paper work and assist on anything pre trial that is needed. As per my initial meeting with [the lawyer].

Please divide the retainer between two credit cards,

Please put 3000.00 on Visa [redacted].

Please put the remaining 2000.00 on Visa [redacted]

- [17] The nature of the retainer agreement is general and does not specify the work to be performed by the lawyer. The only specific reference to the client's case is the terms added by the client.
- [18] The lawyer testified he was not aware that the retainer agreement had been modified, nor did he agree to the modifications.
- [19] The firm's retainer agreement was sent to the client by the firm's receptionist under cover of an email dated April 5, 2016. The email states in part:

"This Agreement sets out the terms under which we shall be providing our legal services to you and specifically sets out, among other things, how our firm shall be paid and under which circumstances our firm may cease to act for you. In order for us to represent you, it is necessary that you fully review the terms of the Agreement and that you sign the last page of the document indicating your consent to those terms. We ask that you return, either by mail or at your next office visit, the signed Agreement to our offices where it shall form part of your file. If you do not return the Agreement to our offices, we reserve the right to withdraw as your Solicitor.

If, upon reading the Agreement you have questions or concerns, we urge you to contact the writer to discuss the same. It is important that you return the signed Agreement to our offices at your earliest convenience so that we may continue with your file's progress.

We confirm that we have received a retainer deposit in the amount of \$5,000.00 to which we have provided you a receipt."

(Underlining Added)

[20] The receptionist's April 5, 2016 email invited the client to contact her with questions and concerns. The client did so the very next day in an email dated April 6, 2016 which states:

"Okay i will drop off tomorrow morning around 10am. Remember that is just an auth that is my wife's credit card i have written my card numbers on the retainer. I need you to split 2500.00 per card please.

[The lawyer] also said in our initial meeting that he does not charge for every little thing or for sent out emails. He sends me emails for stuff i dont need him for so i hope those are not charges it does not say on the retainer so I wrote that in, just want to make sure i dont get charged for every two second useless email.

thanks"

[21] The receptionist responded April 6, 2016 stating in part:

"If [the lawyer] has informed that he does not charge for emails then I don't see a problem with writing that in. I will look over your document when you drop it off tomorrow."

[22] The client testified that he did drop off the retainer agreement the next day as suggested, being April 7, 2016, the date on the retainer agreement signed and initialed by him.

[23] I accept the client's evidence in this regard. It is consistent with documentary evidence consisting of the email exchange of April 5 and 6, 2016, and the signed retainer agreement dated April 7, 2016, on the firm's letterhead.

[24] The receptionist did not testify at this review. The lawyer testified that the receptionist is no longer with the law firm, and this fact is not connected to the events surrounding the client.

[25] The client testified he had limited funds and was concerned regarding costs. The client's concerns in this regard are reflected in the terms added to the signed April 7, 2016 retainer agreement. These terms were brought to the attention of the law firm and its contact person as specified in the email of April 5, 2016. Terms under which the client had the honest belief he was operating.

[26] It is well-settled that the onus of proving the terms of a lawyer's retainer rests upon the shoulders of the lawyer. In *Coates v. Buchholz* the court states:

The law with respect to the determination of the retainer is well settled. The onus is always on the solicitor to prove his retainer: -*MacGrill & Grant v. Chin Yow You*, (1914) 19 B.C.R. 541; In *Re Dickie*, (1916) 23 B.C.R. 538; *Griffiths v. Evans*, (1953) 2 A11 E.R. 1364, per Lord Denning at p. 1369. Where there is a dispute as between the solicitor and his client on the terms of a retainer, the word of the client is to be accepted, or at least given more weight, unless there is some evidence to corroborate the word of the solicitor, or which tends to support the solicitor's evidence: *Griffiths v. Evans* (supra)' *Bourne Lyall Davenport & Herbert v. Varabioff et al*, Penticton Registry number 396B74, unreported, 1974, per Ruttan, J., citing with approval *Macdonald v. Bellhouse*, (1920) 1 W.W.R. 597.

[27] The client cited the case of *Ross Barrett & Scott v. Simanic* 1998 CanLii 4458 (NSCA) where the court states:

"The controlling law on this issue is the basic law of contract and a special rule. Lawyers have a duty to establish their retainers with clarity and to reduce the contract to writing. A rule has developed because of that duty: where there is no written retainer, and there is a conflict in the evidence of the lawyer and the client as to a term of the retention, weight must be given to the version advanced by the client rather than that of the lawyer. Our Appeal Court has said that this is an accurate summary of the authorities on disputes arising from retainer contracts for legal services."

[28] This legal principle has been referred to as the rule in *Re Dickie*. The rule in *Re Dickie* [1916] 23 BCR 538 (BCCA) is:

"There runs through all the cases, that which seems right and proper in the administration of justice, that if a solicitor will make an agreement with a client, then he must be able to shew what that agreement is, and if it is not in writing, then it seems to be that the client's statement must be accepted. If he makes an agreement, then let him make it in writing as a prudent solicitor with a client, disclosing all the facts and circumstances."

[29] Where each party to the dispute stands upon an equal ground of credibility, the rule in *Re Dickie* applies. Put simply, where there is no basis for finding any difference between the credibility of the lawyer and the client, the client's version must be preferred. While I accept the client's version of the events leading to signing of the retainer agreement, I also accept the lawyer's testimony that he did not agree to the changes to the retainer agreement, nor was he aware of the changes. The difficulty in this regard is the fact that the law firm

instructed the client to bring any questions and concerns to the attention of the receptionist, which the client did, and a retainer agreement was signed accordingly.

- [30] I accept that the client then subsequently acted in the honest belief that the added terms were part of the retainer agreement. Any misunderstanding in this regard lies at the feet of the law firm.
- [31] This fact alone is not the end of the matter. The lawyer did a substantial amount of legal work that was communicated by email. The fact that the mode of communication between solicitor and client was email does not detract from the fact that he is entitled to a fair fee for his work which was necessary and proper to the conduct of the proceeding.

Legal Principles

- [32] The matters which must be considered by the registrar on a review are enumerated in section 71 of the LPA. Section 71 provides:

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.
- [33] The registrar must consider all the circumstances arising, including those factors enumerated in section 71 (4).

Application of the Factors

A. The complexity, difficulty, or novelty of the issues involved

- [34] The lawyer conceded during his evidence that the issues arising were not overly complex or difficult. The fact that the client's son is transgendered is novel, but did not impact the work involved surrounding issues of guardianship, residency or retroactive child support.
- [35] The lawyer testified he thought the child's age would make it difficult for the child's mother to challenge the issue of residency, and the fact that the client had been cut out of the child's life completely in the years preceding would make an award of retroactive child support, of any significance, unlikely.
- [36] The guardianship issue presented the immediate problems. The client's son wanted to join a gym on his doctor's advice, obtain prescription medication, enroll in college, travel to the transgender conference event in the US, and begin part-time employment, all of which required identification and a passport. The client also wanted to have his son covered by his employer's health care provider. The key to resolving these issues necessitated the client becoming his son's guardian. The lawyer commenced working to resolve these issues immediately on March 31, 2016.

B. The skill, specialized knowledge, and responsibility required of the lawyer

- [37] While the issues were not complex or difficult, the lawyers experience and specialized knowledge in relation to family law was essential.

C. The lawyers character and standing in the profession

- [38] As with most reviews under the LPA, I do not consider this factor to be relevant in the circumstances of this case.

D. The amount involved

- [39] No evidence was led regarding the amount involved. The lawyer testified he expected that any claim for retroactive child support could have been negotiated away against any future child support claimed by the client. The issues of guardianship and residency were both important to the client. The issue of guardianship presented the immediate difficulties for the client which needed to be addressed.

E. The time reasonably spent

- [40] The lawyer billed \$8550 over the course of the retainer, consisting of 3 1/2 months between March 31, 2016 and July 18, 2016. During this time, the lawyer was required to familiarize himself with the pleadings and the litigation background as well as the immediate issues facing the client. Numerous phone calls and emails were exchanged between the lawyer and the client during this time period. The lawyer also corresponded with opposing counsel and attended a family case conference on April 25, 2016. The lawyer testified that he wrote off 1.5 hours of his time, and did not bill for 23 emails exchanged between him and the client, nor did he bill for the initial consultation in January 2016. The firm's practice is to provide an initial consultation free of charge.

F. If there has been an agreement that sets a fee rate that is based upon an amount per unit of time spent by the lawyer, whether the rate was reasonable

- [41] The lawyer was called the bar in 1993 and has practiced family law exclusively since. The lawyer is called to the BC, Alberta and Ontario bars. The lawyer charges an hourly rate of \$475. This rate is clearly stated in the retainer agreement endorsed by the client.
- [42] The client testified that he was advised by the lawyer that his hourly rate was \$375. This is inconsistent with both the lawyer's evidence and the signed retainer agreement. I find that a lawyer advised the client of his hourly rate of \$475, and the client agreed, as evidenced by the by the retainer agreement signed by him. The lawyer's rate is reasonable in the circumstances given his experience and degree of specialization.

G. The importance of the matter to the client whose bill is being reviewed

- [43] The matter was of importance to the client. The client had reconnected with his son who had moved in with him. In order for the client to assume a full parental role and facilitate his son's needs, he had to become a guardian. This issue presented immediate difficulties which needed to be addressed.
- [44] The client also faced a claim for retroactive child support which was an issue of concern.

H. The result obtained

- [45] The lawyer was unable to finally resolve any of the issues as he withdrew as counsel when the client refused to pay the balance of fees owed.
- [46] The client testified he proceeded to trial, self-represented, and succeeded on all issues. The client did not provide an entered order, or reasons for judgment to substantiate this assertion. The lawyer was likewise unable to provide any evidence or authority in this regard
- [47] The evidence confirms the lawyer devoted himself to the file during his 3 1/2 month retainer. He responded to each inquiry by the client in a timely fashion and asserted the client's position with respect to each issue as it arose.
- [48] The lawyer was conscious of the cost to the client and addressed this issue, in writing, and proposed alternate strategies to court applications in order to keep legal costs under control.
- [49] Despite the lawyer's diligence in attending to the issues, they were left unresolved at the time of his withdrawal as counsel.

I. Other circumstances

- [50] The lawyer described his inability to locate a signed retainer agreement at the law firm as "a fly in the ointment".
- [51] The retainer agreement produced by the client, signed by him and the lawyer, on the firm's letterhead dated April 7, 2016, confirms the client's evidence concerning the limitations he says were agreed upon. Also, the emails between the law firm's receptionist and the client provide a further documentary foundation to the client's oral evidence.
- [52] There was clearly a breakdown in communication between the firm's designated contact person with respect to the retainer, the receptionist, and the lawyer. There is no evidence the receptionist passed along the information regarding the terms added to the retainer agreement by the client for the lawyer's review or approval. As a consequence, both the lawyer and the client carried on with their opposite belief concerning its terms.
- [53] The client did indicate he had limited funds and wanted to keep legal costs within his means. This was clearly stated in the April 7, 2016 retainer agreement.

Disposition

- [54] Applying the rule in *Re Dickie* to the present circumstances still begs the question of what constitutes a fair fee. The bulk of the work done by the lawyer required his active participation and could not have been properly performed by a legal assistant. Further, the email exchanges on the file were exclusively between the client and the lawyer, and therefore, the client was aware throughout the retainer that the lawyer had sole conduct of the matter.

- [55] The client was in regular contact with the lawyer and demanded his assistance with legal difficulties as they arose. The lawyer was diligent and responded to each inquiry immediately. The lawyer provided advice, strategy, and communicated with counsel for the client's ex-spouse by phone and correspondence.
- [56] The strategy was to attempt to resolve all the issues without a trial. The efforts of the lawyer were directed to that end, and in my view, to use the client's terminology added to the retainer agreement, was "actual work done".
- [57] Work was performed and billed which is properly characterized as back-and-forth emails, and other work was performed and billed which was not substantive in nature. In this regard, I do take note of the fact that the lawyer did not bill for 23 emails or charge for all the time he invested in the file. However, I am of the view that a further reduction is warranted in order to take into account the terms added to the retainer agreement.
- [58] In my view, an appropriate reduction in all the circumstances is three hours of billed time, or a total of \$1,425 given the lawyer's hourly rate of \$475.
- [59] This results in the lawyer's bill being reduced by 1/6. Pursuant to section 72(1) (a) of the LPA, the client would be entitled to costs of the review unless there are "special circumstances" pursuant to section 72(2). I do not find special circumstances exist in the context of this case. The client is therefore entitled to the cost of the review, which I assess in the amount of \$1,000 all-inclusive, pursuant to section 73(2) of the LPA.
- [60] Pursuant to section 73(4)(a) and (c) of the LPA the client is entitled to interest on the \$1,425 to be refunded at the rates set by the Court Order Interest Act.
- [61] The client claimed interest at the rate set by his credit card provider; however, the LPA is specific in this regard. The client is entitled to \$10.63 in interest as calculated by the rate set by the Court Order Interest Act.
- [62] The total amount to be refunded to the client is \$2,435.63. If a certificate is required, one may be submitted through the registry for signature.

"District Registrar Nielsen"

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