

CANADA / JUDGMENT

E. John Becker Personal Law Corp. v. Tremblay

2002 BCSC 203

COURT

Supreme Court of British Columbia

DECIDED

7 February 2002

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Citation: Becker v. Tremblay Date: 20020207

2002 BCSC 203 Docket:

S070424

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: THE LEGAL PROFESSION ACT

BETWEEN: E. JOHN BECKER PERSONAL LAW CORPORATION
SOLICITOR

AND: MARK DAVID TREMBLAY
CLIENT

REASONS FOR DECISION

OF

DISTRICT REGISTRAR SAINTY

Counsel for the Solicitor E.J. Becker

Appearing in Person M.D. Tremblay

Date and Place of Hearing/Trial: January 23, 2002

New Westminster, BC

The Review

- [1] This was an application brought by the solicitor to review several accounts rendered to the client in respect of the client's matrimonial law litigation. The solicitor provided a brief at the commencement of the hearing. Tab 1 of that brief contained a "Billing & Credit Summary" which set out the accounts subject to the review and the payments made by the client. That summary provided as follows:

DATE INVOICE FEES DISBURSEMENTS GST & PST TOTAL BILL CREDIT

Deposit

750.00

June 14/00 11226 880.00 38.59 125.51 1,044.10

July 14/00 11280 760.00 101.68 113.52 975.20

Sept.07/00 11371 170.00 46.20 27.03 243.23

Oct. 19/00 11450 110.00 11.20 16.18 137.38

Jan. 18/01 11623 70.00 1.85 9.93 81.78

Apr. 01 Credit

5,000.00

Apr. 18/01 368 700.00 134.86 100.44 935.30

Apr. 25/01 379 360.00 22.64 51.98 434.62

May 16/01 424 2,900.00 408.69 420.05 3,728.74

June 01/01 445 1,040.00 40.54 148.44 1,228.98

June 07/01 462 690.00 28.80 98.62 817.42

June 13/01 479 2,750.00 71.08 389.98 3,211.06

June 20/01 494 290.00 27.40 42.52 359.92

June 27/01 504 200.00 156.19 38.93 395.12

July 13/01 516 480.00 27.55 69.13 576.68

July 19/01 535 950.00 82.75 138.79 1,171.54

July 25/01 554 320.00 14.84 45.84 380.68

Sept.26/01 670 540.00 15.94 76.72 632.66

Oct. 25/01 735 670.00 24.74 95.53 790.27

Oct. 31/01 751 150.00 8.04 21.56 179.60

Nov. 07/01 767 340.00 14.08 48.59 402.67

Total bills

14,370.00 1,277.66 2,079.29 17,726.95

Total credits

5,750.00

(Balance owing)/ Credit

(11,976.95)

The Facts

- [2] Mr. Becker testified that he was called to the Bar in 1981. Family law has comprised a significant portion of his practice since that date. He advised that his practice is to try and establish a good working relationship with his clients. In this matter, the relationship was not all that he hoped.
- [3] Mr. Tremblay engaged Mr. Becker on or about June 2, 2000 to represent him in divorce proceedings commenced by his former spouse relating to divorce, custody and guardianship of two children, child and spousal support, division of family assets and some other corollary relief. Ms. Hoover represented Mrs. Tremblay. Ms. Hoover's retainer was being funded by the Legal Services Society (Legal Aid).
- [4] During the first visit, Mr. Becker gathered information about the client's case, explained the legal fees to him and an agreement was made for Mr. Becker to represent Mr. Tremblay.
- [5] Mr. Becker forwarded a letter to Mr. Tremblay confirming the retainer on June 2, 2000. That letter provides:

Dear Mr. Tremblay:

Re: Cathy Mae Tremblay - Supreme Court Divorce Proceedings

Thank you for referring this matter to us.

We confirm that you will be billed at my regular hourly rate of \$200.00 plus our out-of-pocket disbursements and applicable P.S.T. and G.S.T. We confirm receipt of a deposit of \$750.00.

Statements will be sent to you from time to time. The statements are final accounts for the period referenced in each statement. Please review each statement carefully and telephone me immediately if you have any questions with respect to any of the line items. Unless each account is queried within a reasonable period of time you will have no right to do so at a later date.

Yours truly,

BECKER & COMPANY

per:

E. JOHN BECKER

[6] I was advised that the major issues in the matrimonial litigation were:

- (a) access by Mr. Tremblay to the children. Mrs. Tremblay alleged Mr. Tremblay had an alcohol problem and wanted access restricted;
- (b) valuation of family assets. Mr. Tremblay was previously an independent contractor for Snap-On Tools and owned a number of tools;
- (c) determination of Mr. Tremblay's income for child support purposes. Mr. Tremblay had previously done a number of mechanic's jobs out of the garage at the former matrimonial home for cash. He stopped that work when he left the home - both to allow him to spend more time with children and because he no longer had a place to do the work;
- (d) characterisation (loan or gift) of monies provided to Mr. and Mrs. Tremblay by some of Mrs. Tremblay's family, as well as determination of the amounts loaned/gifted and paid over time;
- (e) Mrs. Tremblay's claim for spousal support. Mrs. Tremblay worked at a good paying job throughout most of the marriage. She voluntarily left her field and wished to retrain, even though she had an immediate ability to return to her former trade. Mrs. Tremblay wanted spousal support and/or an unequal division of the family assets to allow her to retrain.

[7] At the time of the initial retainer, Mr. and Mrs. Tremblay were negotiating themselves and undergoing mediation with a third party in an attempt to reach a settlement. During that period, Mr. Becker provided some guidance to Mr. Tremblay and exchanged some correspondence with Ms. Hoover.

[8] In the Spring of 2001, the family home was sold. Mr. Becker and Ms. Hoover had many discussions related to division of the parties' assets, including a "pots and pans" discussion.

[9] By that time, Mr. Tremblay's legal accounts had accumulated. Some payments were made. Mr. Becker tried to get the client to agree with the amount of the accounts. The client refused. Mr. Becker agreed that he would wait to be paid out of the matrimonial home sale proceeds but he was not prepared to wait indefinitely.

[10] Ms. Hoover made a formal offer to settle on behalf of Mrs. Tremblay. Mr. Becker prepared and forwarded a response on behalf of Mr. Tremblay.

- [11] Mrs. Tremblay continued to hold firm to her position that she was entitled to some spousal maintenance. As the parties were unable to resolve the issues, cross motions were set to be heard by Master Nitikman. Mr. Becker prepared affidavit materials in respect of the motions. Master Nitikman made an order that Mr. Tremblay pay \$100.00 per month spousal maintenance. A litigation plan was completed. The litigation plan included dates for examinations for discovery, a settlement conference and trial (December 3, 2001 for 3 days).
- [12] The examinations for discovery were set for June 12, 2001. In advance of the examinations, Mr. Becker prepared a formal offer to settle which was served on Ms. Hoover. The examinations proceeded. Mr. Becker testified that, after the examinations for discovery, he was able to confirm his opinion that Mrs. Tremblay was unlikely, should the matter proceed to trial, to be successful in her spousal support claim. Nor was she likely to be successful in proving the debts allegedly owed to her family members.
- [13] After the examinations, efforts continued to settle the matter. Those efforts were again unsuccessful. Mrs. Tremblay refused to abandon her claim for spousal support and the claims in respect of the debts allegedly owed to her family members. Mr. Tremblay was unprepared to pay anything towards these claims to settle the matter, even though Mr. Becker advised him that the costs of proceeding to trial would likely be greater than the costs of paying Mrs. Tremblay something for spousal maintenance and for his portion of the alleged debts.
- [14] The legal bills continued to mount. Again Mr. Becker attempted to get Mr. Tremblay's agreement with the amount of the accounts. Mr. Tremblay refused to confirm the amounts. Mr. Becker made some proposals to Mr. Tremblay to reduce the accounts if Mr. Tremblay would "sign off on them". Mr. Tremblay refused.
- [15] A settlement conference was held July 13, 2001. At that conference Master Nitikman advised Mrs. Tremblay that she would have difficulties proving her case with respect to the debts. Mrs. Tremblay continued to refuse to budge from her position. Settlement discussions continued between counsel.
- [16] On or about July 18, 2001, it appeared that the parties had reached an agreement. Mr. Becker and Ms. Hoover exchanged correspondence confirming the settlement. The settlement included a lump sum payment by Mr. Tremblay to Mrs. Tremblay for spousal support and in respect of the debts.
- [17] On July 20, 2001, Mr. Tremblay telephoned Mr. Becker and withdrew his consent to the settlement. He wanted to change the proposal to reduce the amount he was to pay Mrs. Tremblay by approximately \$2,000.00. The actual cost to Mr. Tremblay was only \$1,000.00 as Mr. Becker had agreed to reduce his fees by \$1,000.00 to make the settlement happen. Mr. Becker reminded Mr. Tremblay that to back out of the deal would only create further costs. Mr. Tremblay refused to go through with the deal.

- [18] Mr. Becker wrote to Ms. Hoover putting Mr. Tremblay revised proposal on the table. Ms. Hoover responded by making demands for further documents from Mr. Tremblay and insisting that the matter would proceed to trial. Mr. Becker then started collecting the materials demanded and considering what additional steps Mr. Tremblay should take if the matter proceeded to trial.
- [19] Mr. Becker made a further settlement proposal on behalf of Mr. Tremblay on or about October 19, 2001. He advised Mr. Tremblay of matters that needed to be attended to to prepare for the trial. Mr. Becker continued to discuss with Mr. Tremblay the costs of a trial versus the costs of settlement of the matter. Certain pre-trial motions and demands were recommended brought to advance Mr. Tremblay's case. Mr. Tremblay remained adamant that he was not prepared to pay Mrs. Tremblay more than the amount in his last proposal (approximately \$16,000.00). He did not, however, instruct Mr. Becker to make the motions or demands recommended.
- [20] Mr. Becker continued to have discussions with Mr. Tremblay about the mounting costs of the litigation, particularly as the trial drew closer. Mr. Tremblay continued to refuse to "sign off" on Mr. Becker's accounts. Mr. Becker did not want to incur the costs of a trial without some guarantee of payment from Mr. Tremblay, particularly an agreement with respect to the amounts of the outstanding bills.
- [21] A final settlement meeting was arranged for November 19, 2001. Prior to that meeting, Mr. Becker told Mr. Tremblay he was not prepared to invest any more time and money in the file given Mr. Tremblay's refusal to come to an agreement on the outstanding accounts. Mr. Tremblay attended the settlement meeting on his own. A settlement was reached. I understand that the settlement reached was substantially the same settlement as had been reached in August 2001 from which Mr. Tremblay had resiled.
- [22] Mr. Tremblay attempted to file (and I refused to allow him) a document which purported to be a breakdown of the time expended by Ms. Hoover on matters for Mrs. Tremblay. Mr. Tremblay advised that Ms. Hoover's account for the same services was approximately \$5,000.00. While of some interest, that information is of no value in this matter. Firstly, Ms. Hoover retainer was through legal aid - a completely different manner of calculating time and billing. Secondly, there was no evidence of any arrangements made between Ms. Hoover and Mrs. Tremblay in respect of billing and retainers. Finally, Ms. Hoover was not available for cross-examination on the information set out in the document.

The Law

- [23] A review of a solicitor's account is conducted pursuant to the provisions of s. 71(4) of the Legal Profession Act, S.B.C. 1998, c.9. That section provides as follows:
- (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.

Analysis

- [24] The issues involved were relatively complex, although within the "normal" range for family law proceedings. Mrs. Tremblay's refusal to give up her claim for spousal support and in respect of the debts owed to her family made this litigation more complex than it should have been, at first glance. In addition, the allegations against Mr. Tremblay related to access (an alleged drinking problem) made settlement negotiations difficult. Further, the client himself was difficult. He did not want to pay spousal support, even when faced with the prospect of paying more in legal fees for a trial than he was being asked to pay in support. While I sympathise with Mr. Tremblay - he likely would not have had to pay support or contribute towards the alleged debts had the matter proceeded to trial - the unfortunate reality of the litigation process is that usually settlement, even for more than a claim might be worth, is less costly than the process itself.
- [25] Mr. Becker has skill and specialised knowledge in the field of family law. This case required some degree of skill and knowledge, if only to ensure that the client understood the process.
- [26] An hourly rate of \$200.00 per hour is at the higher end of the scale for lawyers practising family law in the Fraser Valley area. A lawyer charging an hourly rate less than that of Mr. Becker's would have been able to deal with this matter competently. At that rate, in my view, Mr. Becker should have been able to deal with the litigation more expeditiously than the average lawyer. This is, however, complicated by the fact that many of the difficulties in this matter arose from Mrs. Tremblay's recalcitrant position and Mr. Tremblay's unwillingness to accede to the litigation process, pay his ex-wife some money (which perhaps she did not deserve) and conclude the matter.
- [27] Each account presented in this review contained notations of the hours spent by Mr. Becker on each task. I reviewed these time notations carefully. The client cross-examined Mr. Becker in relation to a number of entries shown on the accounts as "follow up with wife's lawyer". He also referred Mr. Becker to instances where he was billed for being billed by Mr. Becker. Mr. Becker testified that the client was billed for letters sent with bills where the letters were in the nature of reporting letters. Mr. Tremblay also questioned Mr. Becker

about his practice of billing a number of items together such as: "Apr 04/01 - Telephone call from client re collapse of direct discussions & mediation, lump sum spousal support issue, pending sale of home; Review litigation file re status of Action, Litigation Plan review - 0.50 hours". This latter practice does not concern me as most lawyers' bills lump matters together and record a global amount of time for a number of matters attended to during the same day.

[28] I undertook a careful review of the time notations. Little was recorded to the file at less than 0.20 - the equivalent of 12 minutes. All of the accounts were rendered on a strict time basis. In my view, counsel should be very careful not to simply become slaves to time recording as a method for billing clients.

[29] In *Doig v. Davidson Muir*, [1998] B.C.J. No. 723 (Q.L.) (C.A.), Southin, J.A., speaking for the court said, at paras. 9-14:

[para9] Until the 1950's, solicitors' fees were generally fixed by paying some regard to the tariff in the Supreme Court Rules. In that decade, someone invented the idea, rapidly adopted, that solicitors, like tradesmen, should charge by the hour. Thus, the invention of time sheets, now I suppose replaced by computer recording.

[para10] What was not then invented and, so far as I know, has never been invented, is the solicitor's equivalent of the automobile mechanic's, I believe it is called, "Blue Book", which sets forth how long this or that job of repair should take. Concerning charging by time, these comments made in 1971 are as apposite now as they were then:

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

[Re Solicitors, [1971] 3 O.R. 470 at 472, per Mr. McBride, the Taxing Officer.]

[para11] One danger to clients in charging by time alone is that contained in the aphorism of C. Northcote Parkinson,

"work expands so as to fill the time available for its completion". If a solicitor is charging by the hour, what incentive is there to hurry up?

[para12] Another danger is quite simply exaggerating the time productively spent; hence the solicitor who arrives at work at 9:00 a.m. and leaves at 5:00 p.m. with a time sheet showing eight hours.

[para13] In commenting on these dangers, I am not speaking of the facts of this case nor am I suggesting that the legal profession in British Columbia is generally guilty of either practice, but only the naïve would believe that no solicitor has ever done such a thing.

[para14] Controversies between solicitor and client about fees are not always the fault of the solicitors. All clients are not above reproach in their attitude to their solicitors. There are those who will, if they can, attempt to do the solicitor out of his just recompense.

[30] In my view, while the amount of time actually expended multiplied by an hourly billing rate is one method of determining the value of legal services, in determining the amount to bill a client, counsel should take all of the factors set out in the Legal Profession Act into account.

[31] In this instance, the time expended was greater than should have been expected of counsel with Mr. Becker's skill and expertise. In my opinion, Mr. Becker should have been able to deal with the litigation fairly expediently. Based on the hours recorded, he did not. Further, it is clear in reviewing the accounts that all accounts were rendered on a strict time basis. No thought appears to have put to the factors enumerated in the Legal Profession Act, *supra*, and which I must apply in this review.

[32] Mr. Becker's character and standing in the profession was not in issue in this review.

[33] I have not totalled the time spent on each type of item, such as correspondence, preparing court materials, etc. That is not necessary. I reviewed each account and, in my opinion, the time spent overall was excessive in the circumstances, even considering Mr. Tremblay's nature which was demanding and recalcitrant.

[34] The amount involved was relatively small. The only assets of significance were the matrimonial home, the parties' possessions, some RRSP's and pensions and Mr. Tremblay's tools. I do wish to point out, however, that what was at stake in this litigation was everything the parties had worked to accumulate during the years of their marriage as well as their future livelihoods.

[35] There was an agreement with respect to hourly rate (although poorly expressed). As noted above, the hourly rate is within the range for a lawyer of Mr. Becker's skill and experience.

[36] The matter was of considerable import to the client. It involved his relationship with his children, as well as having an effect on his financial security after the marriage breakdown.

[37] The results achieved were not particularly good, nor were they particularly bad. The results were, for the most part, dictated by Mrs. Tremblay and her counsel. In my view, Mr. Becker made considerable efforts to bring Mr. Tremblay to the bargaining table. He cannot be held to account for Mrs. Tremblay's refusal to agree to a settlement, nor Mrs. Tremblay's insistence on maintaining a likely losing position. However, Mr. Becker might have

considered an application pursuant to Rule 18A of the Rules of Court, rather than a trial. He might also have considered a mini-trial or a further settlement conference. Costs might have been reduced had those options been pursued. No doubt a trial would have produced a better result for Mr. Tremblay than the settlement negotiated, but at a significantly higher cost in legal fees.

- [38] A skilled lawyer charging \$200.00 per hour and taking into account all of the factors set out in the Legal Profession Act should have been able to perform the work for a total fee of \$12,000.00 plus applicable taxes (GST and PST of \$840.00 each) and disbursements.
- [39] No issue was taken with respect to the disbursements. I reviewed the disbursements charged. The majority of disbursements were photocopies and facsimiles billed at \$0.35 and \$0.50 per page, respectively, as well as for agents' fees. While in my view the photocopies and faxes were numerous, they are not untoward for a file of this nature. The amounts charged for photocopies and faxes are within the range of those normally allowed by a registrar on a review of a lawyer's account.
- [40] The only disbursements that troubled me were for travel. Mr. Becker charged the client \$8.00 for travel on the June 1, 2001 invoice and \$21.50 on the July 19, 2001 invoice. Each travel expense appeared to relate to travel to court. I am not sure why the travel expense for the appearance in May was less than the travel charge for the appearance in July.
- [41] In the absence of an agreement between the lawyer and the client to charge the client for travel costs, such disbursements should not be awarded. This item is more properly an item of overhead, not a disbursement to be charged separately to a client. Accordingly, I would reduce the disbursements charged by the amount of \$29.50, plus GST of \$2.07, for a total reduction of \$31.57.
- [42] As I have allowed fees of \$12,000.00 plus GST and PST of \$1,680.00 and disbursements of \$1,313.97, the total amount allowed is \$14,993.97. The client has paid \$5,750.00 to the solicitor. The amount due for fees, disbursements and taxes is therefore \$9,243.97.
- [43] In respect of costs, ss. 72(1) and (2) of the Legal Profession Act provides as follows:
- 72 (1) Costs of a review of a lawyer's bill must be paid by the following:
- a) the lawyer whose bill is reviewed, if 1/6 or more of the total amount of the bill is subtracted from it;
 - b) the person charged, if less than 1/6 of the total amount of the bill is subtracted from it;
 - c) person who applies for a review of a bill and then withdraws the application for a review.
- (2) Despite subsection (1), the registrar has the discretion, in special circumstances, to order the payment of costs other than as provided in that subsection.

[44] The total amount billed to the client was \$17,726.95. One-sixth of that amount is \$2,954.49. The amount awarded is \$14,993.97, a reduction of \$2,732.98.

[45] In my view, even though the accounts have been reduced by slightly more than one-sixth, the amount of the reduction is so close to one-sixth of the amount of the accounts as to be indistinguishable. I therefore find that there are "special circumstances" in accordance with s. 72(2) of the Act and award no costs to either party.

"District Registrar K. Sainty"

February 14, 2002 -- Corrigendum to the Reasons for Decision issued by District Registrar K. Sainty advising that there were some typographical errors:

[1] The figure on page 19, paragraph 42 should read:

\$12,000.00, and not \$12,00.00

[2] The figure on page 20, paragraph 44 should read:

\$2,732.98 and not \$2,732.93.

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