

CANADA / JUDGMENT

G.K. Thomas Law Corp. v. McLean

2020 BCSC 1170

COURT

Supreme Court of British Columbia

DECIDED

2 July 2020

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2020 BCSC 1170 G.K. Thomas Law Corp. v. McLean IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: G.K. Thomas Law Corp. v. McLean, 2020 BCSC 1170 Date: 20200702 Docket: S190474 Registry: New Westminster Between: G.K. Thomas Law Corp. Solicitor And Catherine Elizabeth McLean Client Before: Registrar Nielsen Oral Reasons for Decision Counsel for Solicitor: G.K. Thomas Client appearing on her own behalf: C.E. McLean Place and Date of Hearing: New Westminster, B.C. March 10, June 30 and July 2, 2020 Place and Date of Judgment: New Westminster, B.C. July 2, 2020

Introduction

- [1] This is a client-initiated review of the law firm's bills pursuant to the Legal Profession Act, [SBC 1998] Chapter 9 (the LPA). The client retained the law firm in March 2015. The retainer agreement was signed April 22, 2015 and involved a family law proceeding. Both the lawyer having principle conduct of the file and the client gave oral evidence on this review.
- [2] There is a single bill, dated May 24, 2017, seeking a balance of \$59,153.97 in fees, taxes, and disbursements. The bill covers work performed between January 20, 2015 and May 8, 2017, approximately two years and four months. The fees portion is \$55,817.50. The client had previously paid \$5,340.33 in fees on the account. The lawyer had done work for the client previously, between 2012 and 2015. Those bills are not in issue on this review. The client dismissed the law firm and retained different counsel, who settled the matter in November of 2018.

Background

- [3] The file involved a matrimonial matter, in which both spousal support and the division of property was at issue. The client was not working at the time of separation and had no source of income other than what her ex-spouse chose to pay her by an informal agreement. The client's ex-spouse paid her 1,000 per month, tax-free. The law firm was not involved in obtaining this voluntary payment agreement.

- [4] The client's former spouse was the beneficiary of three family trusts arising in Washington State, U.S.A. The client's former spouse earned roughly 200,000 per year, combined, from the family trusts. There was also a piece of property and a vintage Ferrari at issue.
- [5] The law firm prepared an application and accompanying affidavit to seek orders for support, the appointment of a joint expert to value the trusts, and obtained a whole array of documents in an attempt to evaluate the ex-spouse's financial situation. The application did not proceed before the lawyer's dismissal. The client spent approximately \$54,000 in additional fees and disbursements following the law firm's dismissal, to subsequent law firms, to see the case through to conclusion.

Analysis

- [6] Section 71(2)(a) and (b) of the Legal Profession Act provides that:
- (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.
- [7] At a review, the registrar is to consider all the circumstances, including those in s. 71(4) of the LPA, which provides:
- (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. Application of the Factors
- (a) The complexity, difficulty or novelty of the issues involved:

- [8] At issue was spousal support and the division of property. The Washington State trust gave the matter a degree of complexity. However, the law firm advised the client that, if the trusts themselves were challenged, the client would need to retain a Washington State lawyer to represent her.
- (b) The skill, specialized knowledge and responsibility required of the lawyer:
- [9] The lawyer having principle conduct of the file prides himself on his ability to analyze financial statements and evidence. A significant amount of time was billed in relation to ascertaining the value and the income from the trust.
- (c) The lawyer's character and standing in the profession:
- [10] As with most reviews, I do not consider this to be a relevant factor on this review.
- (d) The amount involved:
- [11] The value of the case, with the benefit of hindsight, was approximately \$300,000 and a Jeep Liberty. The actual value of the trusts remains unknown, although the trust's ability to generate approximately 200,000 in income annually was known to the law firm relatively early on.
- (e) The time reasonably spent:
- [12] An enormous amount of time was spent on research regarding discretionary trusts, double dipping of an asset, privilege, as well as reviewing documents, drafting affidavits, obtaining and analyzing cases, and drafting memos. The memos were primarily authored by an articulated student within the firm, who was billed out at \$250 an hour. The time billed for the articulated student's time would amount to roughly 14,500 before applicable taxes. The work product of the articulated student was introduced into evidence during the course of this review, but it was not previously disclosed to either the client or the subsequent law firm. The law firm had a lien over its work product and chose not to disclose it without prior payment of its bill. However, the law firm also had the remedy of obtaining a certificate for fees, pursuant to the provisions of the LPA, which is deemed a judgment of the Supreme Court, pursuant to s. 76, and can be enforced as such. The result of nondisclosure of the work product was to, essentially, render the research, the notice of application, and the accompanying affidavit of limited or no use to the client, as it was not provided to her or her counsel and, therefore, did not advance her case. Further, failing to provide the research and other work product to the client's subsequent counsel necessitated ploughing the same ground twice. There was an enormous amount of time billed by lead counsel for reviewing documents, notes, research and review of cases obtained by others, as well as the preparation of the client's affidavit and notice of application.
- (f) If there [was] an agreement that sets [the] fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable:

- [13] The parties entered into a formal retainer agreement which provided for an hourly rate of \$400 for lead counsel. He was called to the bar in 1987 and has considerable experience in family law. The hourly rate is not unreasonable. I do pause to note a lawyer's specialty, experience, and knowledge is built into the hourly rate charged. It is not the client's responsibility to cover the cost of bringing the lawyer up to speed in general matters of family law, which is at the heart of the lawyer's expertise and the basis of his hourly rate. This is not to say that billing for research beyond general matters is inappropriate.
- (g) The importance of the matter to the client whose bill is being reviewed:
- [14] The matter was of the utmost importance to the client. She was indirectly dependent on the income from the trusts. Her financial future was at stake. She was receiving the voluntary payment from her ex-spouse and borrowing money from her children and parents.
- (h) The result obtained:
- [15] In terms of the result obtained, the law firm was dismissed before the matter was resolved. The law firm alleges the subsequent firm's success was built on the work of lead counsel herein. However, there is very little evidence in this regard beyond the subsequent law firm's mediation agreement, which does canvass much of the same information. However, given the issues and the factual matrix of the case, this is not surprising. It was inevitable that subsequent counsel would canvass the same evidence and matters relevant to the case, as the issues had not changed.
- [16] The client's subsequent lawyer attests she did not use the law firm's prior work, only those specific documents provided. In an affidavit filed August 23, 2019, marked as Exhibit 1 herein, at Tab 5, she states, at paras 2 through 8:
2. On July 9, 2018, Ms. Cattermole sent a letter to the Solicitor's Office to the attention of Mr. Thomas, requesting electronic copies of all documents listed on the Client, [Ms.] McLean's List of Documents in the Family Law Action. Attached hereto and marked as Exhibit "A" is a copy of the letter dated July 9, 2018.
 3. On July 10, 2018, Mr. Thomas agreed to provide electronic copies of the documents, but at a cost of \$0.35 per page. Attached hereto and marked as Exhibit "B" is a copy of Mr. Thomas' letter dated July 10, 2018.
 4. At that time, our office did not proceed with obtaining documents from Mr. Thomas, as the Client, [Ms.] McLean, provided the majority of her personal documents directly to our office.
 5. On October 15, 2018 Ms. Cattermole wrote to Mr. Thomas seeking electronic copies of the following specified documents in the Family Law Action:
 - a) 1.2(b) and (c) - Tax returns and Notices of Assessment;
 - b) 1.3(b)(ii)-(vi) - emails with Dirk Nansen . . . about [the] Oregon property;

- c) 1.5 - Title search re: Oregon property;
 - d) 1.13(a) - Transworld Dividend statement;
 - e) 1.14 - TWT Holdings;
 - f) 1.15 - Industrial Alliance Policy;
 - g) 1.16 - Industrial Alliance Policy;
 - h) 1.17 - Documents relating to Jackson National Perspective L Series;
 - i) 1.18 - Documents relating to Cyrus McLean Family Limited Partnership;
 - j) 1.25 - Dirk Nansen docs; and
 - k) 1.26 (b) and (c) - Estate Documents. Attached and marked as Exhibit "C" is a copy of Ms. Cattermole's letter dated October 15, 2019.
6. On October 26, 2018, our office received electronic copies of the Specified Documents and Mr. Thomas' invoice for same. Attached hereto and marked as Exhibit "D" is a copy of Mr. Thomas' letter dated October 26, 2018.
7. In November 2018, Clark Wilson LLP settled the Family Law Action.
8. I reviewed the correspondence between Ms. McLean's former counsel, Mr. Thomas, and opposing counsel in the Family Law Action. However, other than the Specified Documents, our office did not receive or review further documents from Mr. Thomas in connection with the Family Law Action.
- [17] The research, notice of application, accompanying affidavit prepared by the law firm herein was not seen or utilized and, therefore, arguably, had little value to the client. It would appear that the work done by the law firm ultimately did very little to advance the client's case, if at all, at the end of the day. The time spent cannot be justified when measured against the results obtained and the overall value to the client.
- [18] The registrar is to consider all the circumstances in addition to those specifically enumerated in 71(4) of the LPA.
- [19] I am somewhat concerned by paragraph 3 of the subsequent lawyer's affidavit, where she talks about the charge of 35 cents per page for copies of the electronic file. Charging 35 cents per page for an electronic copy is, in my view, excessive and potentially punitive. It puts the client at risk, if they are without funds, by causing them to forego the obtaining of some documents.

- [20] At para 4 of the subsequent lawyer's affidavit, she explains that she did not obtain the documents from the law firm, rather they relied on those provided by the client. The law firm is unable to say whether they put the file in electronic format in order to provide it to the client, or if they had been previously put into electronic format as part of the firm's office procedure. If the latter, the client ought not to have been told that she would be charged 35 cents a page, as the amount is excessive.

Disposition

- [21] In my view, the client's case was not significantly advanced by the law firm's efforts. I have evidence of the work performed, which includes the memos, the bills, the notice of application and accompanying affidavit, as well as lead counsel's testimony concerning what he did and why and what the others who worked on the file did. However, a significant amount of the work performed was not provided to the subsequent law firm, necessitating the repeating of tasks previously performed.
- [22] I accept the lawyer's testimony regarding the work performed. However, that is not the end of the matter. In my view, the amount billed does not ultimately result in a fair fee when all the factors and circumstances are considered.
- [23] In my view, a fair fee, in all the circumstances, is \$30,000. From this amount, the prior payment of the client in the amount of \$5,340.33 must be subtracted. The client owes the balance, in the amount of \$24,659.67 plus applicable taxes and interest, to the law firm. In addition, the law firm will have its disbursements claimed in the bill, which were not disputed. Interest on the balance owed, excluding taxes, shall be paid at the 18 percent per annum, as provided in the retainer agreement from May 24, 2017 to July 2, 2020.
- [24] The law firm carried on working for the client knowing it would not be paid in the near term, as the client was without funds. The interest rate is high, but the law firm is small and not in a position to carry the fees owed by the client at bank interest rates. As stated in *Sokolowski v. Lorne N. MacLean Law*, 2016 BCSC 1035, at paras 48 and 49:
- [48] Law firms are not banks, and for the most part, do not want to be treated like a bank. The smaller the firm, the more difficult it is to carry a client's unpaid fees, particularly if the firm is faced with a number of clients who are not paying their bills in a timely fashion. This can put a strain on the firm's line of credit.
- [49] An interest rate on unpaid accounts in excess of the rate provided by a bank is meant, in part, to encourage the client to borrow from a financial institution to cover the cost of fees, rather than relying on the law firm to carry the unpaid account. A financial institution is in a better position to underwrite debt, assess and assume financial risk, or absorb a loss occasioned by a bankruptcy.

- [25] The bill has been reduced by more than one-sixth and I am of the view that there are no special circumstances arising. Therefore, pursuant to s. 72(1) of the LPA, the client will have her costs, which are summarily assessed, pursuant to s. 73(2)(b), at \$1500 all inclusive. However, I am reducing the award of costs to \$1200 all-inclusive, as the law firm took on the task of preparing the common books of documents for this review.
- [26] The \$1200 in costs shall be deducted from the amount owed by the client to the law firm. If required, a certificate endorsed by both parties may be submitted through the registry for signature, together with the interest calculation.
- [27] We are adjourned. "Registrar Nielsen"

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