

CANADA / JUDGMENT

Greig v. Seddon

2001 BCSC 1206

COURT

Supreme Court of British Columbia

DECIDED

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2001 BCSC 1206 Docket:

S065881

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA RE: THE LEGAL PROFESSION ACT

BETWEEN:

GREIG, SKAGEN & WILSON
SOLICITORS

AND:

SCOTT JAMES SEDDON
CLIENT

REASONS FOR DECISION

OF

DISTRICT REGISTRAR SAINTY

Counsel for the Solicitors D.R. Greig

Appearing in Person S.J. Seddon

Date and Place of Hearing/Trial: July 3, 2001

New Westminster, BC

- [1] This matter involves the assessment of an account rendered by the Solicitors to the Client dated May 31, 2000 in the amount of \$4,432.64 (the "Account"). The Account is made up of \$3,300.00 fees (reduced without request from \$4,840.00), \$630.80 in disbursements, GST of \$270.84 (on fees and disbursements) and \$231.00 PST on the fees only. The Client paid \$1,500.00 towards the Account and the amount of \$2,932.64 remains due and owing.

- [2] The reduction was, according to Mr. Greig, made taking into account the Client's financial circumstances and the fact that there was little achieved in the way of results by the Solicitors on behalf of the Client.
- [3] The Client initially retained the Solicitors in late 1999 in connection his matrimonial matters - specifically a change in custody as well as reduction and/or cancellation of some \$35,000.00 in maintenance arrears. Some work was done in respect of this initial retainer but was not completed. An account for the work done at that time was issued and paid by the Client from funds provided as a retainer. In fact, the Solicitors issued a refund from the initial retainer as the time expended and disbursements and taxes incurred did not exhaust the initial retainer. The Client did not take issue with the initial account.
- [4] The Client again retained the Solicitors in respect of his matters in or about February 2000. At the meeting to discuss representation of the Client by the Solicitors, Mr. Greig estimated a cost of approximately \$1,500.00 to conclude the matter on behalf of the Client. The Client provided a retainer of that amount and these were the funds used to make the payment on the Account.
- [5] The parties did not enter into a retainer agreement. Mr. Greig recorded his time to the file at an hourly rate of \$250.00 and his legal assistant (Ms. Ekman) recorded time spent by her on the file at a rate of \$75.00 per hour.
- [6] The Client has a number of complaints concerning the fees and disbursements. None of these complaints were raised with the Solicitors, however, until the date of the hearing. Prior to that time, there was no communication between the parties with respect to the outstanding balance of the Account.
- [7] The Client's main complaints concerning the fees and disbursements related to:
- (a) the "estimate" (of \$1,500.00) given by Mr. Greig at the time of the retainer,
 - (b) the fact that, according to the Client, Mr. Greig consented to a number of adjournments of the application for which Mr. Greig was retained. The Client stated that he did not consent to these adjournments and that the adjournments resulted in increased costs and further accrual of arrears;
 - (c) excessive time apparently spent on matters the Client submits were fairly straightforward; and
 - (d) Mr. Greig's failure to include an application for cancellation or reduction of arrears on the Notice of Motion he drafted on behalf of the Client.
- [8] Mr. Greig conceded, both at the hearing and in his written submissions, that "in terms of what was accomplished for the Client, the results were disappointing". Mr. Greig submitted that it was for that reason, and to assist the Client in difficult circumstances, that he reduced the fees portion of the account.

- [9] Mr. Greig was retained to deal with two matters - a change in custody and reduction or cancellation of maintenance arrears. These were to be accomplished by one application. Mr. Seddon drafted the affidavit materials in support of the application. Mr. Greig reviewed the materials, including an affidavit of a third party (Ms. Parent) drafted by Mr. Seddon and reviewed and redrafted by Mr. Greig (or his assistant).
- [10] Mr. Greig prepared the Notice of Motion. He failed to include a provision in that Notice of Motion for cancellation or reduction of arrears. Mr. Greig submitted that this could have been remedied by a simple amendment to the Notice of Motion.
- [11] The application was scheduled to proceed on at least three occasions. Mr. Greig apparently made one (or perhaps two) attendances at court. Mr. Greig testified that the "estimate" of \$1,500.00 was premised on the Client preparing the materials and one court appearance.
- [12] Mr. Greig further testified that when the Client returned with the "ready" materials, the Client presented to him a 278-page affidavit which required review. Further, according to Mr. Greig, he prepared an affidavit for Ms. Parent (the "Parent Affidavit") based on a draft affidavit prepared by the client in support of the application. The Client submitted that he should not be charged for the Parent Affidavit as Mr. Greig simply had it retyped. It was sworn elsewhere. I reviewed both the draft affidavit and the affidavit prepared by Mr. Greig. While the information in the Parent Affidavit is substantially the same as that in the draft, it was essentially rewritten to make it more readable and to be in proper paragraph format.
- [13] In determining the amount of fees properly chargeable by the Solicitors to the Client, I must conduct my review keeping in mind the factors set out in s. 71(4) of the Legal Profession Act, S.B.C. 1998, c. 9. That section provides as follows:
- 71(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.

- [14] Mr. Greig submitted that this matter was reasonably complex. He stated that the Client presented with a difficult case. He based this on the fact that there were \$35,000.00 in arrears and the fact that the Client was seeking a change in custody. The Client submitted that the case was not difficult. He noted that he has achieved some measure of success, without representation. There has been a change in custody for one child and he no longer pays maintenance. The arrears, however, remain outstanding.
- [15] Mr. Greig testified that he has been practising in the area of family law since 1987. He is an elected representative on the Canadian Bar Association and a member of a number of other trial lawyer organisations. In addition, he has lectured and written on the subject of matrimonial matters. The Client did not make specific submissions with respect to Mr. Greig's skill or knowledge but indicated a general dissatisfaction with the representation he received.
- [16] In my opinion, while not novel or particularly complex, this matter would have required some degree of skill and specialised knowledge on the part of the lawyer representing the Client. Changes to custody are always difficult and hard fought. It is my opinion that, likely, some of the work done by Mr. Greig before the retainer was terminated would have laid the groundwork for the Client's success in these matters. Further, Mr. Greig is a well-known member of the profession, particularly in the area of matrimonial matters. He has a high level of skill, specialised knowledge and expertise in dealing with matters of this nature. It is surprising, therefore, that the Notice of Motion failed to include the application to cancel or reduce arrears, a matter for which the Solicitors were specifically retained.
- [17] The Client did not take particular issue with Mr. Greig's character and standing in the profession.
- [18] With respect to the amount involved, at the time Mr. Greig was retained, the Client owed some \$35,000.00 in maintenance arrears. While not a substantial sum in the context of a commercial case, in a matrimonial proceeding, that sum is, in the circumstances, considerable. In my opinion, in reviews of lawyer's accounts, my consideration of this factor (the amount involved) should be based on the circumstances of the parties and the particulars of the case. It appears that the Client was impecunious. He could not afford the payments he had been ordered to make and arrears were continuing to build up. In addition, the custody of the children was in issue. In my opinion I must consider all of these factors as part of my review.
- [19] The Client's main complaint appears to be related to the amount of time expended by Mr. Greig in dealing with this matter and the fact that the amount billed was so much higher than the estimate given at the time of the initial retainer. Mr. Greig submitted that the time spent was reasonable in the circumstances, particularly given the history and volume of the materials provided by the Client. The Client noted that the 278-page Affidavit was some 34-pages of material to be reviewed and sworn. The balance of the materials was exhibits such as court orders, reasons, school reports, etc. Regardless of the nature of the materials, all of

it, including the attached exhibits would have to be reviewed by Mr. Greig in order to properly prepare for an application and to understand the Client's case.

- [20] Mr. Greig had difficulty recalling all of the circumstances of this matter. Mr. Greig advised that some of these difficulties stemmed from the fact that, despite his unpaid account, he provided his file to the Client so that the Client could continue with this matter on his own. The Client made much, in his submissions, of these errors in recollection on Mr. Greig's part. He claims that Mr. Greig was untruthful. I do not agree. In my opinion, Mr. Greig simply had difficulties recalling all of the specifics of a complicated file, more particularly as his recollection could not be aided by a review of his file.
- [21] I have reviewed the time records and considered the discount given by the law firm. In my view, the time expended by Mr. Greig was not unreasonable, in the circumstances. Mr. Greig testified, and I believe his testimony, that there were occasions where no time was recorded to the file for matters undertaken by Mr. Greig. Further, the fees were discounted substantially. It is clear that Mr. Greig was attempting to provide his services to the Client as reasonably as possible.
- [22] There was no agreement with respect to hourly rate. I should note, however that I consider Mr. Greig's hourly rate reasonable for someone with his level of expertise and experience.
- [23] I should note as well that there do not appear to have been discussions between the Client and the Solicitors with respect to the mounting costs and the fact that the amount eventually billed was to be so much greater than Mr. Greig's estimate.
- [24] Clearly, the matter was of a great degree of importance to the Client - both the custody of his children and his personal financial wellbeing were at issue.
- [25] The results were not good. Little was achieved before the solicitor/client relationship was terminated. It should be noted, however, that Mr. Greig was not in a position to conclude the matter on behalf of the Client (due to non-payment of the Account). I may take this factor into account on this review. Some blame, however, may attach to Mr. Greig for this lack of result as the Notice of Motion failed to include this application.
- [26] I wish to further note that the issue of the arrears is still outstanding and has yet to be resolved, although the issue of custody has been resolved to the Client's satisfaction. Mr. Greig cannot be penalised for being unable to resolve the issue of the arrears, as he has not had carriage of the file for more than one year.
- [27] In *Norton Stewart v. Mathisen*, (1998), 54 B.C.L.R. (3d) 225, Master Doolan, as Registrar, discussed how a review of a lawyer's account should properly be conducted, including the import of the results obtained for the client by the solicitor whose account is being reviewed. He stated, at paras 73 - 75, as follows:

[para73] On a review of a bill to the client, the registrar must consider not one, but all of the circumstances set out in the Act which are, for the most part, a codification of those principles referred to in *Yule v. Saskatoon* (1955) 16 W.W.R. 305 at 313, affirmed 17 W.W.R. 296, 1 D.L.R. (2d) 540 (Sask. C.A.), and later adopted in the B.C. Court of Appeal in *Diligenti v. McAlpine* (1979) 9 B.C.L.R. 153:

In fixing the remuneration of the plaintiff in this case all factors essential to justice and fair play must be taken into account: *Re Solicitor* (1920), 47 O.L.R. 363 (C.A.). The circumstances to be considered in arriving at the proper amount are the extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation in which the services were rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in his profession of the counsel; the results secured, and to some extent at least the ability of the client to pay: *Murphy v. Corry* (1906), 7 O.W.R. 363.

[para74] In the proceeding *Pierce Van Loon v. Davro Investments Ltd.*, [1997] B.C.J. No. 1774, Vancouver Registry No. J930644, Mr. Turriff, on behalf of the client, submitted that while the words "all factors essential to justice and fair play" were dropped from the codification of the Yule principles, as was "the ability of the client to pay", these were still factors to be considered on the review of a lawyer's bill. I accepted that proposition.

[para75] In *Kowarsky & Co. v. Williams*, [1998] B.C.J. No. 543, Vancouver Registry No. J970085, I had occasion to review the law firm's bill to the client based on time alone. In that case the law firm's retainer was also terminated prior to the matter going to trial. At p. 43 of that decision I comment upon law firm's bills based on time alone without consideration of the other circumstances set out in the Act:

I recently reviewed a solicitor's bill based on time in the file *Fiddes v. Norman*, J940244. My decision was filed May 8, 1996, and at pp. 35-36 I had this to say:

It is my view that lawyers must understand that his or her time is not sacrosanct, particularly when it must be evaluated against only part performance of the job at hand.

It is unreasonable for a solicitor to expect that, where only part of the job has been done, that part should be rewarded by payment of his usual hourly rate, without taking into account the additional cost to the client, both in money and in frustration. To do so would be to ignore the factors set out in s. 71.1(2) of the Act. (Now s. 79(2)) [Now s. 71(4)]

Mr. McBride, one-time taxing officer of the Supreme Court of Ontario, made reference to the practice of keeping time and charging only on that basis in the case of *Re Solicitors* [1971] 3 O.R. 470 at 472. His comments are appropriate and worthy of note:

[The fee charged] 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?

- [28] There were delays in bringing the Client's application to court. The Client advised that the delays were occasioned by Mr. Greig agreeing to adjournments of the application and to which the Client did not consent. Mr. Greig noted that the adjournments were necessary to accommodate other counsel, including counsel for one of the children and for the Family Maintenance Enforcement Program. Further, Mr. Greig noted that he did attempt to negotiate a settlement of the issues while waiting for the matter to be brought before the Court.
- [29] Delays are inevitable in court proceedings, although I note that there was some urgency to having this matter heard as arrears were mounting with the passage of time.
- [30] It should be noted that the Client did not complain about the account prior to the date of this hearing. Mr. Greig only became aware of the Client's complaints regarding the quality of service at the time of the hearing.
- [31] Taking into account all of the factors set out in s. 71(4) of the Legal Profession Act and the additional factors of the estimate given by Mr. Greig, the Client's financial circumstances, and the "courtesy discount" already given by Mr. Greig, I am of the opinion that a reasonable amount of fees for the work performed by Mr. Greig on behalf of the Client in this matter is \$2,500.00.
- [32] With respect to the disbursements, the Client complained, specifically, about the amount charged for photocopying. He stated that the amount charged was excessive as the Client made many of the photocopies, particularly of his affidavit in support of his application. He also suggested that the balance of the disbursements were exaggerated and should therefore be discounted. In fact, Mr. Greig offered to reduce the disbursements by one-half at the hearing to attempt to resolve the matter. Disbursements totalled \$600.80 (\$568.80 taxable and \$62.00 non-taxable), plus GST of \$39.84 (total \$640.64). I reviewed the disbursements and was unable to see anything that I would consider to have been unreasonable or unnecessary, other than photocopy charges which may have been excessive. I would reduce the photocopying charges by \$50.00. I would allow all of the other disbursements as set out on the Account. Taxable disbursements therefore total \$518.80, plus GST of \$36.32 and non-taxable disbursements are \$62.00.

[33] The total allowed is therefore \$2500.00 in fees (plus GST and PST of \$175.00 each - total \$350.00), plus disbursements of \$617.12 for a total allowed of \$3,467.12. The Client paid \$1,500.00 by way of retainer which was applied against the Account when rendered. The amount remaining outstanding is therefore \$1,967.12.

[34] Section 72 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) a 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.

[35] The total amount billed by the Solicitors to the Client was \$4,432.64. One-sixth of that amount is \$738.77. I have reduced the Account by \$965.52. In accordance with s. 72, I must therefore award the Client costs of this review unless "special circumstances" exist.

[36] In McLean Nichol v. Brandt, New Westminster Registry, Docket No. S064676, May 25, 2001, I had occasion to consider the meaning of "special circumstances". At paras. 76 - 79, I stated:

[76] "Special circumstances" are not defined and there has been little judicial consideration of the phrase. In Boe v. Waters, (1998), 24 C.P.C. (4th) 252 (B.C.S.C.) Master Horn (as Registrar) found that "special circumstances" existed where the solicitor made a formal offer to settle to the client pursuant to the Rules of Court. The amount in the offer was almost \$15,000.00 less than the amount awarded on the review. In that instance, Master Horn awarded the solicitor costs in accordance with Rule 37(2) of the Rules of Court.

[77] In Shafer v. Berge & Co. (1991), 7 C.P.C. (3d) 43 (B.C.S.C.), Paris, J. on an appeal under s. 72 of the Legal Profession Act awarded no costs to either party. He stated, in the last paragraph of his judgment:

I confess I was somewhat bemused to learn that after the half-day hearing before the registrar Mr. Berge submitted a bill of costs for his appearance for approximately \$1,200.00. In effect the parties represented themselves. Disbursements could not have been large. As I have said, it is best that this matter comes to an end without further taxation. I think there are "special circumstances" and that it is "just" under s. 72 that all parties bear their own costs.

[78] In Davidson Muir v. Krentz, [1998] B.C.J. No. 1953 (Q.L.) (S.C.), Master Patterson (as Registrar) reduced the solicitors' accounts by an amount close to 1/6th of the total. He held, at para. 24:

Although the amount reduced from the account is very close, less than 1/6th of the total bills has been deducted, and consequently there being no special circumstance, the law firm is entitled to costs on Scale 3 for two full days of hearings plus all necessary preparation, but no costs for the attendance on October 17, 1997 when no registrar was available to hear the review.

- [79] In this particular matter, I prefer the reasoning of Paris, J. The Solicitors, in effect, represented themselves in the hearing. Further, the amount by which the accounts were reduced is so close to 1/6th as to be considered equal to that amount. I therefore award no costs to either party in respect of the review. I am mindful in making this decision that I have not calculated the interest payable to the Solicitors but, in my opinion, that would not affect my decision with respect to costs.
- [37] In this particular matter, as I have reduced the Account by more than one-sixth, absent "special circumstances", the Client is entitled to costs. Mr. Greig, in his submissions, voluntarily offered to reduce the amount due and owing pursuant to the Account to \$2,500.00 "all in", a reduction of \$432.64. If the Client had accepted this offer, the Account would have been reduced to \$4,000.00. One-sixth of that amount is \$666.67. I have allowed the Account at \$3,467.12. If I take the \$4,000.00 offered by Mr. Greig and deduct the amount I have allowed (\$3,467.12), I am left with a balance of \$532.88. That is less than one-sixth of the amount offered by Mr. Greig. Furthermore, the Client represented himself in these proceedings. He had no out of pocket costs of which I am aware in respect of this matter.
- [38] Accordingly I find that there are "special circumstances". I would therefore award no costs to either party in respect of this review.
- [39] The law firm is therefore entitled to a certificate in the amount of \$1,967.12. No interest was claimed and none is allowed (other than post-judgment interest in accordance with the provisions of the Court Order Enforcement Act).

"K. Sainty, District Registrar"

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