

CANADA / JUDGMENT

Guild Yule LLP v. Heck

2022 BCSC 1848

COURT

Supreme Court of British Columbia

DECIDED

21 October 2022

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2022 BCSC 1848 Guild Yule LLP v. Heck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Guild Yule LLP v. Heck,

2022 BCSC 1848

Date: 20221021

Docket: S223200

Registry: Vancouver

Between:

Guild Yule LLP

Law Firm

And

Brian Heck and Camilla Heck

Clients

Before: Master Muir

(As Registrar)

Reasons for Decision

Counsel for the Law Firm:

G. Holeksa

The Clients, appearing in person:

B. Heck

C. Heck

Place and Dates of Hearing:

Vancouver, B.C.

May 30, June 17, June 23, and August 26, 2022

Written Submissions of the Law Firm:

September 6, 2022

Written Submissions of the Clients:

September 12, 2022

Place and Date of Decision:

Vancouver, B.C.

October 21, 2022

Introduction

- [1] This was a hearing to review accounts of Guild Yule LLP (the "Law Firm").
- [2] There were two legal matters dealt with during the retainer between Brian Heck and Camilla Heck (the "clients") and the Law Firm. Both arose as a result of a personal injury action in the Vancouver Registry, Action No. S174075 (the "personal injury action") commenced by the clients' daughter against, inter alia, Strathcona Park Lodge Ltd. ("Strathcona Park").
- [3] The first retainer was to defend against an application brought by Strathcona Park and others in the personal injury action to add the clients as third parties (the "third party application"). The third party application was dealt with primarily by Jim Doyle ("Mr. Doyle").
- [4] The second retainer was for an opinion and letter to the clients' insurer regarding insurance coverage (the "coverage opinion") resulting from a refusal by the clients' insurer to fund their defence costs with respect to the third party claim. This was dealt with primarily by Neil MacLean ("Mr. MacLean").
- [5] Both Mr. MacLean and Mr. Doyle are partners in the Law Firm.
- [6] The account for the coverage opinion dated June 30, 2021 totalled \$5,757.37, of which \$5,140.50 was for fees.
- [7] With respect to the third party application, there were three accounts as follows:

Date of Account

Amount

Fees

June 30, 2021

\$6,852.34

\$5,624.50

September 30, 2021

\$7,870.38

\$6,174.00

October 31, 2021

\$1,602.55

\$1,330.00

Total

\$16,325.27

\$13,128.50

[8] In addition to the matters to be considered by a registrar on a review of a lawyer's accounts, as required by s. 71 of the Legal Profession Act, S.B.C. 1998, c. 9 [LPA], the clients raised two legal issues:

- a) whether the contract of retainer was an entire contract, such that the Law Firm had no entitlement to any fee as the work was not concluded; and
- b) the effect of an alleged fee estimate.

Preliminary Objection

[9] When final argument was made in this matter, I granted leave to the Law Firm to provide written reply submissions. I cautioned counsel that these submissions should be true reply and they were not to raise new issues or cover old ground. I also granted leave to the clients to provide written sur-reply if they viewed any of the reply submitted by the Law Firm as improper.

[10] Both sides provided further written submissions. The reply submissions of the Law Firm were 12 closely-spaced pages. The clients' sur-reply was 21 pages. Counsel for the Law Firm objected to the entirety of the clients' sur-reply as being improper and asked that it be struck. The clients responded that the leave granted to them was not limited to objecting to improper reply but was open-ended, and provided some excerpts of the transcript in support.

- [11] With respect, I believe that the clients have misunderstood the process and taken my comments out of context. The leave I granted to them was indeed limited to objecting to improper reply, it was not an open invitation to make further or repeat submissions on ground that had already been amply covered.
- [12] I also note that the Law Firm's reply was excessive. There is no need to "strike" either argument. They are not evidence. I have disregarded the excesses of both sides.

Background

- [13] In 2012, the clients' daughter was injured while on a school mountain hiking trip operated by Strathcona Park as part of her Grade 10 curriculum. She was 14 years old at the time.
- [14] After she reached the age of majority, the clients' daughter commenced an action with respect to her injuries against Strathcona Park, her school, and two mountain guides. The action was settled as against her school in 2021.
- [15] In the third party application filed by Strathcona Park and the mountain guides on April 9, 2021, they sought to add the clients and their daughter's treating psychologist as third parties, alleging that the clients' daughter, who was a child at the time, had not received proper psychological care.
- [16] Mr. Heck is a retired lawyer, having practiced with a large firm in Alberta and then as in-house counsel for several public corporations.
- [17] The clients made a claim to their household insurer for coverage, but the claim was denied.

The Retainer of the Law Firm

- [18] After they were served with the third party application, the clients sought a recommendation from their daughter's lawyer for counsel to represent them. They were given Mr. Doyle's name.
- [19] The clients contacted Mr. Doyle on April 15, 2021 and had a preliminary discussion about the third party application and that their insurer was denying coverage. Mr. Doyle said he would have to do a conflicts check and the clients agreed to send him the application materials that they had.
- [20] On April 29, 2021, the clients and Mr. Doyle had another telephone conversation. Mr. Doyle advised that he would need more information, including the notice of civil claim and any other application documents, and the clients agreed to get those to him. They also discussed that Mr. MacLean would handle the coverage issue.
- [21] Mr. Doyle told the clients he thought the third party application was unusual, as it was alleging a failure to mitigate directed at the clients as parents.

- [22] Some terms of the retainer were discussed, including that Mr. Doyle would bill at \$350 per hour and would use the Law Firm's junior lawyers as appropriate. Mr. Doyle said he would want funds paid into trust as a retainer. He indicated that accounts would have to be paid within 30 days and that the account would be reviewed monthly.
- [23] There was also a discussion of the anticipated cost of both the coverage opinion and the third party application.
- [24] The nature of that conversation is disputed.
- [25] The evidence of Mr. Heck, as confirmed by Ms. Heck, is that Mr. Heck sought a true estimate of the expected fees from Mr. Doyle in the telephone conference on April 29, 2021. They assert they were given an estimate of \$2,000 to 3,000 for the coverage opinion and \$5,000 for the third party application, but Mr. Doyle said that it could be more. The clients' evidence was that Mr. Doyle agreed that if the estimates were going to be exceeded, it would have to be by agreement in advance.
- [26] Mr. Heck said that in his past experience as a lawyer, he had often dealt with retaining other counsel in his work and would invariably require a firm estimate as well as a term that the estimate would not be exceeded without prior discussion and agreement.
- [27] Mr. Doyle's evidence was that he often provides budgets or rough ideas of costs, both of which could be exceeded, but that he had never provided a firm estimate on any matter.
- [28] Mr. Heck's notes of the conversation with Mr. Doyle, made contemporaneously, read:
- \$350 hr. is his rate, will use juniors, Neil McLean's rate a bit less - will confirm.
- Will send us a retainer letter - will want \$ in trust.
- Expects bills paid w/I 30 days or so - review monthly.
- Expected fees - \$2 - 3k for coverage opinion, \$5k or so for applic but can be more - will advise if more.
- [29] Mr. Doyle sent an email to the clients at 10:06 a.m. the same day:
- As we just discussed, I am sending this email to outline the terms of the retainer. I have copied my partner, Neal McLean.
- There are two aspects to the retainer. First, we need to deal with the application to add you as third parties to the existing litigation. I will handle that aspect. Second, we will provide a coverage opinion regarding the denial by your insurer. Neal will handle that aspect. Where possible, and where it will benefit you, we will use more junior lawyers or paralegals at lower billing rates. Otherwise, the following are the terms of the retainer:
- (1) You will provide us with a cheque or e-transfer in the sum of \$5000 made payable to Guild Yule LLP "in trust".

- (2) The retainer will remain in our trust account until the final billing, at which time it will be applied.
 - (3) My current billing rate is \$350 per hour. Neil's rate is \$330 per hour.
 - (4) In the unlikely event there is a need to incur significant disbursements (e.g. hiring an expert) it will be discussed with you in advance.
 - (5) We will review the work in progress each month, and unless the amount is nominal, we will bill you monthly.
 - (6) The bill rendered will be paid promptly, ideally within 30 days.
- [30] Although counsel for the Law Firm tried to characterize this email from Mr. Doyle to the clients as a retainer letter setting out the complete terms of the retainer, it clearly is not. There are many aspects of the retainer that are not captured in the email.
- [31] At 10:12 a.m., Mr. Heck, for the clients, emailed that the proposed terms of the retainer were acceptable. His evidence was that the email obviously contained only some of the terms of the retainer and he did not think he had to ensure the estimates were specified, as he trusted Mr. Doyle.
- [32] Mr. Doyle indicates the following in his memo to the file drafted later that day:
- I outlined the hourly rates for Neal (\$330) and me (\$350). They are fine with that. He asked for ballpark figures, out. I said that is very difficult to do at this time particularly when there is a lot of information to be provided. However I could see at a minimum, the coverage opinion being in the range of \$3,000. This would not include a court application if that was needed. In terms of the application to add them as parties, this alone would likely be at least \$5000.
- [33] Mr. Doyle's evidence was that he was asked about cost and gave only ballpark numbers as he did not have enough information to provide an estimate.
- [34] When Mr. Doyle saw the full application materials he immediately took the position that the application would take more than two hours and that it should be set for a full day. The application was adjourned to a full day in October.
- [35] As can be seen from the amount of the accounts set out above, the 'estimates' were both exceeded before the first billing for each matter.
- [36] There was no discussion or consultation about the scope of the work or the amount of work in progress at any time. Mr. Doyle acknowledged that he was supposed to review the work in progress monthly, but said he did not do so. His evidence was that he saw no reason to advise the clients that his ballpark estimate of fees would be exceeded.
- [37] Mr. Heck sent an email to Mr. Doyle on June 26, 2021 noting that they had yet to see a bill for any work done:

We don't seem to have a bill from you yet for work to date. I'd like to stay pretty current so unless your time so far is insignificant please render an account in your normal cycle.

- [38] There was no response to this request, but it perhaps prompted Mr. Doyle to review the account and have invoices prepared.
- [39] The first notice that the clients would have had that the estimates had been exceeded was when the accounts dated June 30, 2021 were sent to them by email by a staff person at the Law Firm. The coverage opinion account was sent on July 23, 2021 and the third party application account was sent on July 20, 2021.
- [40] Unfortunately, those emails were not seen by the clients at that time. Mr. Heck's evidence was that they were away and he must have missed these emails in the deluge of emails he was dealing with on his return.
- [41] Despite the fact that accounts were to be paid within 30 days (or so), there was no follow up from Mr. Doyle or the Law Firm about payment of these accounts.
- [42] As noted, the hearing of the third party application had been reset for early October 2021, but because the applicants provided additional affidavit materials, the hearing was again adjourned. It was rescheduled for March 2022, now for two full days.
- [43] To further complicate matters, the clients did not receive the September and October 2021 accounts that were also emailed to them. Although they accept these accounts were sent, the evidence of Mr. Heck was that they may have been captured and purged by his anti-virus software but, in any event, he did not receive them. These accounts were not brought to the clients' attention until February 2022, when Mr. Doyle was seeking payment of the outstanding accounts.
- [44] Mr. Heck was surprised when he reviewed the accounts. He found the June 2021 accounts and noted that they were already in excess of the estimates with no discussion or contact from Mr. Doyle. He could not locate the September and October 2021 accounts and they were provided to him again by Mr. Doyle.
- [45] When the clients were made aware of the full amount of the accounts, the relationship ended. At that point, the coverage opinion work had been completed, but the third party application had not yet come on for hearing.
- [46] The clients and the Law Firm parted ways and the clients dealt with the third party application on their own.
- [47] Mr. Heck indicated that had they been properly advised that the fee estimates would be exceeded, the parties could have either agreed to a new fee estimate, decided on some other way to achieve the result, scaled back the work, or ended the retainer.

- [48] Mr. Heck says that given that he and Ms. Heck are both retired, it was important to them to know how much this was going to cost them to ensure they could budget properly and safeguard their resources.
- [49] Mr. Heck's evidence was that had Mr. Doyle told him at the outset that the cost would be in excess of \$20,000 even before the third party application was heard, he would have thanked him and moved on. Further, that he would not have retained Mr. Doyle if Mr. Doyle had refused to provide a fee estimate or had only provided a minimum number. He wanted a realistic estimate.

Analysis of Legal Issues

Entire contract

- [50] This argument only arises in regard to the retainer for the third party application. I am satisfied that the retainers for the two matters, although in the same terms, were sufficiently disparate as to be considered separate retainers for the "entire contract" argument.
- [51] The retainer for the coverage opinion was completed.
- [52] The argument regarding the third party application comes from well settled law, referenced in the decision of the court of appeal in *Morrison Voss v. Smith*, 2007 BCCA 296, as follows:
- [30] In summary, the parties agreed that legal services would be charged by the solicitors, and paid for by the client, as a percentage of the amount recovered on settlement or judgment. The parties also agreed that if the solicitors withdrew for good reason, the client would pay an hourly fee up to the time the solicitors stopped acting.
- [31] The retainer agreement does not say what the solicitors' rights would be if they terminated the agreement without good reason. However, the case appears to have been argued throughout, as it was in this Court, on the basis that if the solicitors terminated the agreement without good reason, they would forfeit the right to any remuneration.
- [32] This was, in my view, an implied term of the retainer agreement. A contract of retainer for a single transaction, such as a common law action, is an entire contract: see *Campney and Murphy v. Arctic Installations(Victoria) Ltd.* (1994), 86 B.C.L.R. (2d) 226 (C.A.). It is settled law that solicitors must have reasonable grounds for terminating an "entire contract" before completion, if they still wish to be remunerated: see *Underwood, Son and Piper v. Lewis* [1891-94] All E.R. Rep. 1203; see also *Halsbury's Laws of England*, (4th ed.) Vol. 44(1) para. 117.
- [53] The clients argue that the Law Firm's insistence that the accounts rendered be paid before further work was done was improper and cannot be reasonable grounds for terminating the contract.

[54] The Law Firm argued that the solicitor-client relationship had foundered and was terminated by mutual consent. This was evidenced by two emails. The first being an email from Mr. Doyle to Mr. Heck dated February 7, 2022, which stated:

You received the accounts on the dates set out above but did not deal with them in accordance with the retainer agreement and you are only now raising an issue as to amounts.

Our expectation is that these accounts will be paid in full and in accordance with the retainer agreement.

In terms of going forward, it is clear that there has been a breakdown in the relationship and you would be better served by having another firm represent you and Camilla.

[55] The second is an email from Mr. Heck to Mr. Doyle of February 10, 2022, where Mr. Heck notes:

I do agree that you should not continue to represent us, though we will of course also incur additional cost with new counsel. We could see 4x your estimate yet.

[56] Ultimately, the clients signed a notice of intention to act in person.

[57] The reality, of course, is that the parties were not on the same page regarding the foundation of the retainer. Where there is such a fundamental dispute as to the terms of the retainer, in my view, the lawyer has reasonable grounds for terminating the contract.

[58] A similar issue was considered by Justice Blok (sitting as Registrar) in *Conkie & Company v. Free Quincy Productions Ltd.*, 2012 BCSC 33, where he noted:

[72] I make the following observations:

- (a) It is clear that the initial estimate, given in June 2003 (that is, two years before Ms. Raskin instructed Ms. Conkie to proceed with the litigation) was a very rough estimate only and not a "true estimate", as that phrase was used by McLachlin J.A. (as she then was) in *Roberts & Muir v. Price* (1987), 19 B.C.L.R. (2d) 375, [1988] 1 W.W.R. 689 (C.A.). In this regard, I accept Ms. Conkie's evidence about the 2003 estimate, rather than Ms. Raskin's (whose evidence was that the initial estimate was in the range of \$75,000 to \$100,000), largely on the basis that Ms. Conkie made a contemporaneous note of the discussion;
- (b) The initial estimate was revised, as follows: (1) in May 2008 when Ms. Conkie told Ms. Raskin that "the fees to continue to trial will be more like \$200,000 or easily more than that" (this at a time when Ms. Raskin had already been billed a total of \$92,600); and (2) in April 2009 when Ms. Conkie told Ms. Raskin that if total legal costs "come in around \$350,000 at a minimum, this is really too risky a case for you";

- (c) In any event, I do not accept that an estimate may preclude a solicitor from requiring the full amount of a proper monetary retainer for future work, where that right exists. Consider, for example, a case where, for entirely legitimate reasons, an estimate has been exceeded prior to trial but where the solicitor nonetheless has the right to request a monetary retainer for the trial. On the client's argument the solicitor could not ask for a trial retainer because the estimate had already been exceeded.
- [73] On the latter point, it is my view that the effect, if any, of any estimate is to be determined upon the consideration of the final or overall fee, and by a fee review if need be, and it is not a factor, or certainly not a determinative factor, to be taken into account for the purposes of fixing the amount of a trial retainer. I return to the subject of estimates in the next section of these reasons.
- [59] Justice Blok concluded that the refusal of the client to provide a further retainer for trial brought the solicitor-client relationship to an end and that the law firm was entitled to be paid for its work done to that point.
- [60] Similarly here, the fundamental dispute as to the fees charged by the Law Firm brought the relationship to an end. That ending was either by mutual agreement, or it was reasonable for the Law Firm to terminate the retainer in the circumstances.

Fee estimate

- [61] Whether this was a true estimate (which became part of the retainer agreement) or a ballpark estimate was argued at great length and numerous cases were canvassed.
- [62] Both sides in particular dealt with the decision in *Price v. Roberts & Muir*, [1988] 1 W.W.R. 689 (B.C.C.A.). That case is completely distinguishable on the facts from this case.
- [63] I have concluded that even on the evidence of the clients, the estimates provided by the Law Firm here were not true estimates. Mr. Heck's note of the conversation indicates that this was a ballpark estimate:

Expected fees - \$2 - 3k for coverage opinion, \$5k or so for applic but can be more - will advise if more.

- [64] Regardless of what Mr. Heck wanted or what he expected to get, what he got was a ballpark estimate and no more.
- [65] Further, when the application morphed from two hours to a full day and then to two days, any reasonable person would expect that the initial estimate would be exceeded.
- [66] That is not the end of the matter, however. The impact of these ballpark estimates on the fees to be allowed is discussed below.

Analysis of Assessment Issues

[67] On a fee assessment, the court is directed to consider the factors in s. 71 of the LPA:

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.

Complexity, difficulty, or novelty

- [68] The third party application was recognized by Mr. Doyle from the outset as unusual or novel. It was an application to add the clients as third parties on the basis they failed to mitigate their daughter's damages by ensuring that she had appropriate psychological treatment.
- [69] It was also, however, a very standard application for leave to bring a third party claim. Had the third party claim been made in time, there would have been no need for such an application and Mr. Doyle recognized that the applicants faced a very low bar to the application and that the merits of the claim were not considered beyond the "bound to fail" test.
- [70] Mr. Doyle was very familiar with applications for leave to bring a third party claim. Thus, although the basis for the third party claim was novel, the application itself was not. The application did grow from two hours to two days, and obviously increased in complexity but that had little impact on Mr. Doyle as other than overseeing the response materials he did not attend to the application itself.
- [71] As to the coverage opinion, Mr. MacLean's evidence was that it was a complex matter in that they were trying to find a duty to defend over several years. He noted that there was little caselaw on point. There was nothing particularly unusual about the work undertaken, however.

Skill, specialized knowledge, and responsibility required of the lawyer

- [72] As noted, although the underlying theory behind the third party claim is somewhat novel, the application to add the clients as third parties is not. Mr. Doyle was retained because of his skill as a litigator. It is not, however, a significant factor in this assessment, as the work got no farther than some dealings with other counsel and the drafting of an application response.
- [73] As to the coverage opinion, Mr. MacLean is experienced insurance counsel. His specialized knowledge in that area no doubt assisted in providing the opinion sought.

The lawyer's character and standing in the profession

- [74] Both Mr. MacLean and Mr. Doyle are senior counsel, respected in their fields. Their character was not challenged.

The amount involved

- [75] The actual amount involved is unknown, of course, as what was really in play was the cost to defend the clients against the third party claim. It was clearly recognized as a significant amount, however.

[76] The damages being sought by the client's daughter were approximately \$1 million. If the clients were joined as third parties, it is possible that they would be found liable for some percentage of the damages.

The time reasonably spent

[77] The Law Firm submits that all the time charged was reasonable and necessary and, indeed, was low.

[78] Mr. MacLean's evidence was that he did not know of the fee estimate Mr. Doyle gave to the clients but that he had given Mr. Doyle his view of the cost for the work described. Had he known of the fee estimate, Mr. MacLean said he would have still worked the hours billed as he would want to make sure the job was done correctly. He noted that approximately \$2,400 of time recorded had been written off.

[79] Mr. MacLean said his practice would have been to take a fee estimate into consideration when finalizing the account.

[80] Mr. Doyle does not appear to have written down his time to any degree.

[81] The clients took issue with the time spent, particularly on the third party application. They point to numerous problems in the timekeeping for the third party application, including time entries that are wrong, e.g., an entry for a telephone call on September 24, 2021 that did not occur, a lack of detail in time entries, and potential duplication of work between Mr. Doyle and an associate who worked on the file, Mr. Gubeli.

[82] In addition, given the type of application being dealt with and the low hurdle for granting leave to bring a third party claim, there seems to have been an excessive amount of time spent on the potential liability of the clients.

[83] The fee estimate itself is some indication that the time spent was not reasonable. The fee charged for the work on the coverage opinion was \$5,140.50, about 1.7 times greater than the maximum estimate of \$3,000. The fee charged for the work on the third party application, which, of course, was not finished, was \$13,128.50, more than 2.6 times greater than the estimate of \$5,000.

[84] Work on a two-day application alone, at Mr. Doyle's hourly rate of \$350, could easily exceed the estimate in and of itself.

[85] Thus, either the initial fee estimate was grossly understated or the work involved increased dramatically. In my view, the estimate was indeed understated and the work did increase, although as Mr. Doyle did not argue the application, the full impact of the increase in work cannot be considered in assessing the fee.

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

[86] The clients, of course, dispute that hourly rates were to be the basis of the fee charged, as they rely on the estimates. However, hourly rates were set out in the email from Mr. Doyle. The hourly rates were discounted from the normal charge out rates for Mr. MacLean and Mr. Doyle and those hourly rates are reasonable.

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

[87] This was clearly a matter of some considerable importance to the clients. It was not, however, to the level where they ultimately retained other counsel, choosing instead to deal with the third party application on their own.

The result obtained

[88] It cannot be said that the retainer produced much in the way of result for the clients. Although the coverage opinion matter was concluded, and a letter was drafted to be sent by the clients to their insurer, the insurer continued to refuse coverage. As to the third party application, the retainer was terminated before the application was heard.

Fee estimate

[89] Numerous decisions have concluded that an estimate, even a ballpark estimate, is relevant to the analysis of a fair fee.

[90] Counsel have an obligation to provide proper and considered advice to their clients. As was noted by Master McDiarmid in 0751548 B.C. Ltd. v. Burke, 2015 BCSC 665:

[91] In determining the effect of the fee estimate given in writing by Mr. Burke on June 7, 2013, and the oral estimate given on November 13, 2013, I have reviewed the Annotated Legal Profession Act by Gordon Turriff, Q.C. pages 8-77 to 8-78. A summary of relevant annotations is as follows:

[]

- Lawyers are bound to use reasonable care and skill when estimating the cost of particular pieces of work.
- Lawyers should give clients clear, specific and unambiguous information about the cost of legal services

[91] A similar conclusion is expressed by Master Tokarek in Koffman Kalef LLP v. Identity Rehab Corporation, 2010 BCSC 27:

[32] When a client retains a solicitor, a duty arises on the part of that solicitor because of the relationship of trust and confidence, and consequently there is a requirement on the lawyer to be candid and transparent in his dealings with the client. Here the lawyers had every imaginable opportunity to inform the client of the magnitude of increase in the estimated fees. There is nothing in the evidence before me to suggest any rational basis for an experienced lawyer to make an estimate of \$100,000 for an IPO and end up charging three

times that amount without any indication to the client. Granted the estimating of fees is certainly not an easy task in many instances, but once a lawyer embarks upon that course of action, he is obliged to not only be as reasonably accurate as possible but to advise the client of any unusually high increase beyond the estimate.

[92] Mr. Doyle breached his obligation to the clients in three ways:

- 1) he did not give due consideration to the estimates he was providing the clients;
- 2) he did not review the work in progress ("WIP") monthly, as he acknowledged he was supposed to do and as is set out in the retainer email to the clients; and
- 3) he failed to advise the clients when he knew that the estimates he had given them were grossly inadequate.

[93] Estimates, even ballpark estimates, are important to clients. As was noted in *Best Industries et al v. Fulton and Lawson Lundell LLP*, 2006 BCSC 611 by then Registrar Blok:

[28] The other factor is the estimate itself. Although I have found that it is not a fixed fee quote nor even a true estimate, as the authorities define that term, but merely a preliminary or ballpark estimate, I conclude that this must still be taken into account in moderating the amount of fees that are properly charged in this matter. Even ballpark estimates give rise to expectations on the part of clients, expectations which can lead to most unpleasant surprises if the ultimate bill exceeds the estimate given by a material amount. The solution, of course, is for the solicitors to disabuse the client of those expectations as soon as it is reasonably known that the estimate is no longer accurate, even on a ballpark basis. Thus I have concluded that the fee estimate of \$30,000 must be taken into account in moderating the fee assessment in this case.

[94] As to the coverage opinion, the evidence satisfies me that although Mr. MacLean was asked for his input by Mr. Doyle, he was not aware any estimate had been provided. His view was provided without seeing most of the documents and without consulting with the clients.

[95] Mr. MacLean's evidence, however, was that no work was requested that was outside of the scope anticipated and that nothing the clients did unduly increased the amount of work.

[96] Mr. MacLean noted the only unforeseen circumstance was that there were a number of insurance policies and a number of policy years to be considered. He indicated that would have increased the work by 10 to 15%.

[97] For the third party application, I am of the view that although he did not have complete information, Mr. Doyle knew that this was an unusual application, that it was a strategic one, that it was the type of application that has a low threshold for success and thus a difficult application for the clients to resist, and that it was set for two hours.

[98] Based on my experience as a Registrar, an estimate of \$5,000 for such an application is extraordinarily low.

- [99] Almost immediately after reviewing the affidavit materials, Mr. Doyle concluded that the matter was more complicated than he had thought and he believed the application would take a full day, yet, although he had discussions with the clients, he did not disabuse them of his estimate of the ballpark cost of \$5,000.
- [100] Had Mr. Doyle done so at that point, there is a strong likelihood that the clients would have terminated the retainer and represented themselves on the application, as they ultimately did, with considerably less time being invested by the Law Firm. I accept the evidence of Mr. Heck that had he and Ms. Heck been provided with an estimate in the range of \$20,000 at the outset, they would not have retained the Law Firm.
- [101] It was argued for the Law Firm that the provision of the accounts themselves to the clients was sufficient notice to them that the fee estimates given were seriously underestimated. I do not agree. An email from someone in the firm's administration attaching an account does not satisfy the obligation that Mr. Doyle had here to disabuse the clients of his seriously flawed estimates.
- [102] The provision of the account in July 2021 for the coverage opinion would, of course, serve as notice that the cost of the coverage opinion was as set out in the account--as the work was finished.
- [103] As for the third party application, the provision of the first account in July 2021--or the later accounts for that matter--could not serve as revised estimates or full, frank, and transparent discussions of the ultimate cost of the matter to the clients.
- [104] Nor does the fact that Mr. Heck is a retired lawyer impact Mr. Doyle's obligation to provide proper advice. It is not for the clients to bring to counsel's attention that the clients are relying on advice that counsel gives to them. That is the nature of the relationship regardless of whether or not the client is a former lawyer. The clients were entitled to rely on the advice given to them by Mr. Doyle. When that advice proved to be wrong, Mr. Doyle himself had an obligation to so advise the clients.

Conclusions

Coverage opinion

- [105] I am satisfied that the work done by Mr. MacLean was reasonable and necessary to provide the opinion sought.
- [106] In reviewing the factors set out in s. 71(4) of the LPA, there are none that have a significant positive or negative impact on the fee assessment, other than the ballpark estimate given.
- [107] I must also consider that the work done was perhaps 10 to 15% greater than anticipated.
- [108] I have concluded that a fair fee in all of the circumstances was \$4,000 plus taxes, of \$200 GST and \$280 for PST. There were no disbursements charged to the clients.

[109] Thus, the total fee for the coverage opinion is assessed at \$4,480.00.

Third party application

[110] This retainer is more problematic.

[111] I have concluded that had the clients been given an estimate of \$20,000 at the outset that they would not have retained Mr. Doyle's firm for either retainer.

[112] I have also concluded that Mr. Doyle breached his obligations to the clients in failing to provide a reasonable estimate for the third party application, to review the WIP monthly, and to advise the clients when he knew that the estimate given would be grossly inadequate.

[113] Had Mr. Doyle advised the clients at the time the first billing was sent out of a reasonable estimate for the balance of the work then to be done, I conclude that the clients would have terminated the retainer and represented themselves on the third party application.

[114] Thus, it cannot be said that the work done after that point was either reasonable or necessary.

[115] The clients did receive benefit from some of the work done after that point, however. Mr. Doyle did some negotiations with other counsel and the application response was drafted.

[116] There is no way of making a precise arithmetical calculation, but in all of the circumstances, I have concluded that a reasonable fee for this retainer is \$6,000 plus taxes.

[117] As to disbursements, there was little evidence directed to them. Disbursements were not specifically discussed, but I have concluded that there was an implied agreement to pay reasonable disbursements based on the term in Mr. Doyle's email that significant disbursements would be discussed in advance.

[118] The clients point out that there was no evidence as to the necessity of any of the disbursements, nor were any records produced in support.

[119] I note that no rationale is provided for using fee-based computer legal research or colour photocopies. Those charges are disallowed. It is reasonable that some copy charges would have been necessary given the evidence as to the volume of application material being dealt with. The charges advanced seem reasonable.

[120] Although there is no evidence in support of the court services online charges, again, I appreciate that such charges would necessarily have been incurred for filings. They, too, seem reasonable.

[121] Thus, disbursements are allowed as follows:

June 30, 2021

Taxable disbursements

Long distance charges

\$4.80

Copy charges

\$341.70

Fax charges

\$3.00

Total

\$349.50

Non-taxable disbursements

Court services online

\$12.00

Court services online

\$36.00

Total

\$48.00

September 30, 2021

Taxable disbursements

Long distance charges

\$2.16

Copy charges

\$206.40

Total

\$208.56

Non-taxable disbursements

Court services online

\$12.00

Court services online

\$6.00

Court services online

\$30.00

Total

\$48.00

October 31, 2021

Taxable disbursements

Registry services

\$25.00

Courier charges

\$7.80

Copy charges

\$68.10

Total

\$100.90

Non-taxable disbursements

Registry services

7.00

[122] Accordingly, the Law Firm is entitled to taxable disbursements in the amount of \$658.96, plus \$32.95 GST and \$46.13 PST, and \$103 in non-taxable disbursements. The total amount of allowable disbursements is \$841.

Costs

[123] I know of no reason why the normal rules of costs would not apply here. As the accounts of the Law Firm have been reduced by more than 1/6, the clients will have their costs of this fee review.

[124] If the parties feel submissions on costs are required, they may be made in writing within ten days with a copy to the other party. Any response required must be provided within 5 days of receipt of the submission. Submissions are limited to five pages for each party and responses are limited to two pages for each party.

"Master Muir"

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