
CANADA / JUDGMENT

MacAdams Law Firm v. Racicot,

2012 BCSC 548

COURT

Supreme Court of British Columbia

DECIDED

30 March 2012

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2012 BCSC 548 MacAdams Law Firm v. Racicot

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacAdams Law Firm v. Racicot,

2012 BCSC 548

Date: 20120330

Docket: 33519

Registry: Penticton

Between:

MacAdams Law Firm

Solicitor

And:

Susan Racicot and Glenn Bergen

Clients

Before: District Registrar Cameron

Oral Reasons for Decision

Counsel for the Solicitor:

M.A. Misner

The Clients:

G. Bergen

Place and Date of Hearing:

Vancouver, B.C.

February 24, 2012

Place and Date of Decision:

Vancouver, B.C.

March 30, 2012

- [1] This is a Legal Profession Act review of the accounts of MacAdams Law Firm rendered to Susan Racicot and Glenn Bergen ("the clients") for legal services provided respecting civil litigation commenced on behalf of the clients. The litigation concerned the alleged breach of a lease for the occupation of commercial premises where the clients planned to continue the operation of what, to that point, had been a successful fitness facility known as "Women's Own Pace". This matter was heard on February 24th, 2012.
- [2] At the outset, Mr. Bergen was referred to the Cascade Law Corporation and he met with Mr. Misner who became the responsible lawyer for this retainer. Mr. Misner was called to the Bar in British Columbia in May 2006. He concentrated his practice on litigation and he met Mr. Bergen initially in October of 2007, to review matters and to discuss the course to follow.
- [3] Cascade Law Corporation was formally retained on or about November 22nd, 2007 when the clients returned a signed copy of a retainer agreement dated October 7th, 2007. The agreement confirmed an hourly rate of \$175.00 for Mr. Misner. It was not specific about the billing rate for other members of the firm but provided that "any work performed by other members of Cascade Law Corporation may be billed differently". An initial retainer of \$2,000 was provided by the clients. No estimate was given as to the expected legal fees to see the matter through to a conclusion.
- [4] Mr. Misner explained in his evidence that he knew he was taking on a retainer that was of importance to the clients and, notwithstanding that he was a relatively junior lawyer, he felt well equipped to handle the matter given his prior training and experience.
- [5] He determined that at the crux of the dispute was the failure of the listing realtor and lessor to ascertain and communicate to the clients that the premises to be leased for the fitness facility did not have the appropriate zoning approval.
- [6] The clients had incurred considerable expense to relocate with the expectation of growing the business. Unfortunately, just the opposite occurred. After incurring costs for renovation and other related expenses, the facility could not open and the clients suffered a significant loss of income and goodwill running from the expected occupancy date of October 1st, 2006.

- [7] Early on in the retainer the clients estimated their losses to be in the range of \$150,000. Mr. Misner recommended that an action be brought against the realtor, the realty company, and the lessor. The claim would be for damages flowing from an alleged breach of lease, breach of fiduciary duty, and negligent misrepresentation.
- [8] On February 5th, 2008, Mr. Misner filed a Writ and Statement of Claim in the Penticton Registry of the Supreme Court on behalf of the clients.
- [9] Shortly thereafter, Mr. Misner relocated his law practice to MacAdams Law Firm. The accounts rendered to the time of his transfer from Cascade Law Corporation were paid in full and are not in issue in this assessment.
- [10] The MacAdams Law Firm filed this appointment consequent upon a termination of its retainer with the clients on or about December 23, 2009 and the law firm seeks a review of its unpaid accounts totalling \$15,676.44.
- [11] During the course of the retainer with MacAdams Law Firm, the clients received accounts dated April 10th, 2008, June 18th, 2008, July 14th, 2008, September 9th, 2008, November 24th, 2008, April 15th, 2009 and December 18th, 2009. Inclusive of fees, disbursements and taxes, the accounts total \$26,676.44. The clients have paid \$11,000 towards these accounts.

The MacAdams Law Firm Retainer

- [12] Mr. Misner alerted the clients to his decision to join MacAdams Law Firm and by letter dated February 29th, 2008 he confirmed the clients' instructions to transfer this matter to the MacAdams firm.
- [13] On March 27th, 2008, Mr. Bergen met with Mr. Misner and Mr. MacAdams. Mr. Misner explained that Mr. MacAdams was a senior and well respected practitioner who would assist with the litigation as may be necessary. Mr. Misner also advised that a paralegal would assist as required.
- [14] Mr. Misner testified that he confirmed at the meeting that his hourly rate on the matter going forward would now be \$200.00, that Mr. MacAdams would charge an hourly rate of \$350.00, and that his time would be kept to a minimum so as to avoid any duplication of effort and expense.
- [15] Mr. Misner said that Mr. Bergen agreed to these retainer arrangements, although as matters transpired this became a point of disagreement between the law firm and the clients. Unfortunately, Mr. Misner did not record the arrangements in a letter.

- [16] During the meeting, there was a discussion about the range of recovery the clients might anticipate if they were successful in the litigation. Mr. MacAdams, relying upon only a rough estimate of the expenses and losses provided by Mr. Bergen, thought the likely range of recovery would be between \$75,000 and \$100,000. It was early days in the litigation and a definitive estimate would need to await the exchange of all documents and a detailed review of the clients' business records.
- [17] During the spring of 2008, Mr. Misner moved the litigation forward. Statements of Defence were received, as well as a counterclaim from the lessor who alleged a breach of the lease by the clients.
- [18] The account rendered by the MacAdams Law Firm dated April 10th, 2008 amounting to \$1,939.60 was paid in full. It covered the time spent to deal with opposing counsel and to meet with the clients to discuss strategy.
- [19] The next account, dated June 18th, 2008 totalling \$1,158.34 was also paid in full. It detailed time spent preparing a defence to the counterclaim, a demand for documents to the other parties and the gathering of more client documents.
- [20] The July 14th, 2008 account of \$849.21 was also paid in full. This account covered further document review and fixing examination for discovery dates.
- [21] The next account, dated September 9th, 2008, was paid in full and amounted to \$1,776.90. More document discovery and correspondence respecting discoveries for four days that were to be held during the week of October 14th, 2008 featured in this account.
- [22] By the time Mr. Misner travelled to Penticton for the examinations for discovery that commenced on October 14th, 2008 and consumed four days, the law firm had a balance of \$5,275.95 in trust as a continuing retainer. To this point in time, the relationship with the clients was a good one. Mr. Misner met with the clients in Penticton and engaged in preparation for the four days of examinations for discovery of all of the parties.
- [23] After the completion of the last day of the discovery, an unfortunate and significant event took place that as matters unfolded was the beginning of the unravelling of the solicitor-client relationship. Ms. Racicot had a serious heart attack and was hospitalized. Naturally, the law suit took an immediate backseat to her health.
- [24] Mr. Misner did send an account dated November 24th, 2008 amounting to \$16,777.50. It covered all of the work done to prepare and conduct the examinations for discovery. The retainer was applied to that account in part leaving a balance of \$11,501.55. This amount still remains outstanding as do the accounts dated April 15th, 2009 totalling \$1,484.31 and December 18th, 2009 totalling \$2,690.58.

- [25] During late 2008 and into the spring of 2009, Mr. Misner said he was sensitive to the fact that Ms. Racicot was still recovering her health and he realized that while Mr. Bergen had always been his principal contact, that Ms. Racicot was the client most connected to and directly affected by the loss of the fitness club.
- [26] Eventually, Mr. Misner pressed Mr. Bergen for payment of the outstanding accounts and while Mr. Bergen provided three cheques totalling \$15,000 in June 2009, they were ultimately not negotiated as the first one was returned N.S.F.
- [27] On August 28th, 2009, Mr. Misner and Mr. MacAdams met with Mr. Bergen and endeavoured to iron matters out. No complaint was made about the fees, and while Mr. Bergen said they wished to pursue the lawsuit with vigour, it emerged within a few weeks that that was not to be. When the accounts remained unpaid, Mr. Misner exercised the law firm's right to withdraw and did so on December 23rd, 2009.
- [28] In cross-examination, Mr. Misner was clear that the clients did agree to his revised hourly rate of \$200.00 and that Mr. MacAdams himself would bill \$350.00. He agreed that the law firm did not advise of a subsequent increase in those rates that were in effect for the last account dated December 18th, 2009. He also agreed there was no specific advice given that the MacAdams Law Firm paralegal would have her time billed at \$175.00 per hour.
- [29] Mr. Misner said that he expected that, if successful, the clients would recover more than \$75,000 to \$100,000. He was hoping to obtain documents from the clients that would support a loss of profits claim that was more significant, but he did not ever receive them.
- [30] Mr. Misner also denied giving any firm estimate that another \$10,000 to \$15,000 would see the matter through trial after examinations for discovery.
- [31] Mr. Bergen asked about being billed for 8.6 hours for travel time to the examinations for discovery and back, and Mr. Misner said this was law firm policy to charge at the prevailing hourly rate. He did agree that this was not expressly made known to the clients.
- [32] Mr. Bergen gave evidence that he focussed on the fact that "to his mind much was spent and he felt little accomplished". While he questioned the \$200.00 hourly rate for Mr. Misner, I am satisfied that he accepted that figure when he met with Mr. MacAdams and Mr. Misner. He felt that Mr. Misner spent too much time learning the case. After Ms. Racicot suffered her heart attack, he wished to press ahead for her, but he made clear in his cross-examination that they eventually both decided not to carry on after they reviewed the account rendered following the examinations for discovery and felt it was too high. They were keen to avoid any more stress for Mrs. Racicot and ultimately concluded that her health had to take priority.

- [33] In his submissions, Mr. Misner argued that the work done was appropriate and carried out with the client's instructions. The matter was of importance to the clients and the litigation had some complex elements. He said the hourly rates were reasonable and that no specific complaints were made about the quality of the legal services provided throughout. He said the firm's paralegal had 12 years of experience to justify her time charges.
- [34] Mr. Bergen said that the MacAdams Law Firm terms of retainer should have been confirmed in writing and that there was no clear evidence of the clients' approval of the hourly rates. He submitted that the total fees billed were out of proportion to the likely recovery and that not too much had really been accomplished by Mr. Misner. He was satisfied as to the disbursements and I need not say anything more about them.
- [35] I must consider the following factors in assessing the accounts pursuant to s. 71(4) of the Legal Profession Act. They are 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.
- [36] Subsection (5) reads:
- (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.
- [37] I turn to these factors:
- (a) The complexity, difficulty or novelty of the issues involved
- [38] I agree with Mr. Misner that some facets of this claim had complexity but overall the litigation would properly be classed as of moderate difficulty. Mr. Misner had the necessary experience to conduct the matter, especially with the availability of Mr. MacAdams to serve as a "sounding board", as may have been necessary.
- (b) The skill, specialized knowledge and responsibility required of the lawyer

- [39] As I have said, this retainer was one that could be effectively handled by a lawyer with some litigation experience. It did not require senior counsel and to their credit, the MacAdams Law Firm was careful not to involve Mr. MacAdams more than necessary.
- (c) The lawyer's character and standing in the profession
- [40] There is no issue here.
- (d) The amount involved
- [41] The quantum of the claim was never brought into sharp focus but it would appear that the range of recovery was between \$75,000 and \$150,000 based on the evidence I heard.
- (e) The time reasonably spent
- [42] I have reviewed each of the MacAdams Law Firm accounts and subject to the specific comments I will make hereinafter, I consider the time spent by Mr. Misner and Mr. MacAdams, and the paralegal, was reasonably necessary for the effective and efficient conduct of the litigation. Mr. MacAdams recorded 2.5 hours of his time during the retainer. The bulk of that time was at the outset to assist in the review and assessment of the case, and to cement the clients' instructions on the course to follow. I conclude that the clients received good value for this time.
- (f) The fee rate and whether it was reasonable
- [43] While Ms. Misner would be classed as a junior lawyer while handling this retainer, I am satisfied his initial hourly rate of \$175.00 and then \$200.00 at MacAdams Law Firm is reasonable. I am also satisfied that Mr. MacAdams' hourly rate of \$350.00 is reasonable given his level of experience and seniority at the bar. As for the paralegal, while she only recorded a modest amount of time in her support role I am not satisfied that her hourly rate of \$175.00 was reasonable at the time. In my experience, the hourly rate for an experienced paralegal who performs active litigation support, is usually in the range of \$75.00 to \$100.00.
- (g) The importance of the matter to the client
- [44] This litigation was clearly of importance to the clients. They had invested much in building the fitness club and suffered financially and emotionally with its demise.
- (h) The result obtained
- [45] In this case, the law firm was not able to carry the matter to a conclusion. Accordingly, this factor carries little weight in the analysis.
- [46] Considering all of these factors and bearing in mind that I must allow pursuant to s. 71(2) of the Legal Profession Act all of those fees, charges and disbursements that are reasonably necessary and proper to conduct the proceeding or business to which they relate and that are authorized or approved by the client, I am satisfied that the accounts rendered by the law firm should be allowed as presented, save for the following matters.

Travel Time

[47] Mr. Misner charged \$200.00 per hour for 8.6 hours of travel for the examinations for discovery. This charge was not made known to the clients in advance and had not been agreed to. I do recognize that time spent on travel by a lawyer in connection with business for the client results in the lawyer losing the opportunity to be involved in other remunerative work for other clients. Accordingly, some allowance should be made for this time and I consider it to be fair to both lawyer and clients if I allow \$100.00 per hour for travel. This results in a reduction of the accounts by \$860.00.

Paralegal Time

[48] The paralegal charged out at \$175.00 per hour. She spent three hours assisting on the file and I will allow \$100.00 per hour for her time, resulting in a further reduction of the accounts by \$225.00.

[49] In summary, the law firm provided legal services in keeping with the instructions received from the clients. No evidence was elicited by the clients to show that the legal work was not of good quality or that it did not advance their interests in the litigation. I do not find that Mr. Misner spent too much time on any aspect of the case and I am satisfied that he kept the clients well informed throughout as to his progress.

[50] Some frustration crept into the matter after Ms. Racicot became ill that I do not fault either lawyer or client for. It was a very unfortunate event and it caused the clients to make a decision in their best interests to abandon the lawsuit.

[51] In looking specifically at Mr. Misner's time respecting the last account of December 18th, 2009, I find I must make one more adjustment. Mr. Misner billed 2.8 hours on and after November 30th, 2009 at his increased hourly rate of \$250.00. This was not communicated to the clients nor accepted by the clients. I also find that the time component of 2.2 hours relating to a file review and a final letter to the clients terminating the retainer on December 16th, 2009 is not properly charged to the client. As such, the final account should be reduced by \$550.00.

[52] I have reduced the bills by \$1,635.00. To that there must be added an adjustment for the GST of 5% and the PST of 7% totalling \$196.20. That yields a reduction of \$1,831.20. The net amount due to the law firm is \$13,845.24.

Costs

[53] Section 72 of the Legal Profession Act reads:

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; .
- (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.
- [54] While the reduction of the accounts is not as much as one sixth of the total amount, I am going to take into account under subsection (2) as a special circumstance that the assessment was somewhat more time consuming than it needed to be by virtue of the fact that MacAdams Law Firm did not record all of the retainer arrangements with the clients in writing. The hourly rates and travel time were issues that would likely not have been subject to controversy if a retainer letter had been sent.
- [55] Accordingly, rather than allowing the law firm all of its costs for this one day hearing, I will fix those costs as for one half day and assess them summarily under s. 73(2)(b) of the Legal Profession Act at \$375.00 inclusive of taxes and disbursements.
- [56] Pursuant to s. 73(3) of the Legal Profession Act, the law firm is entitled to Court Order interest on the outstanding amount of the accounts from time to time from the date of delivery of the bill to the date of the Certificate.
- [57] The law firm should submit a Certificate for the outstanding fees including a detailed calculation of the interest.

"District Registrar Cameron"

District Registrar Cameron

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Prepared on 28 October 2026 · Esheria