

CANADA / JUDGMENT

## McConnan Bion v. Mega Wraps B.C. Restaurants Inc. et al, 2005 BCSC 1691

COURT

Supreme Court of British Columbia

DECIDED

5 December 2005

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2005 BCSC 1691err1.doc McConnan Bion v. Mega Wraps B.C. Restaurants Inc. et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McConnan Bion v. Mega Wraps B.C. Restaurants Inc. et al,,

2005 BCSC 1691

Date: 20051205

Docket: 05/3283

Registry: Victoria

Between:

McConnan Bion O'Connor & Peterson Law Corporation

Solicitors

And:

Mega Wraps B.C. Restaurants Inc.

and Mega Wraps B.C. Inc.

Clients

Before: D/Registrar Bouck

Reasons for Decision

Appeared for the Solicitors

(referred to herein as the "Law Firm")

Michael R. Mark

Grant N. Smith

Appeared for the Clients

John R. Shewfelt

Date and Place of Hearing:

August 29, September 28,

October 3 & 19 and

November 1, 2005

Written Submissions:

November 28, 2005

Victoria, B.C.

## INTRODUCTION

- [1] This is a proceeding brought under the Legal Profession Act, S.B.C. 1998 c.9 (the "Act"). The kind of proceeding under the Act and the remedies available therein are in dispute.
- [2] The Law Firm submits that there is an agreement between the parties which is subject to review under s.68 of the Act. That relief is not sought in any appointment. Regardless of the outcome of any such review, the bills in question may be reviewed pursuant to s.71: *Coad v. Rizk* (1999), 68 B.C.L.R. (3d) 340, 35 C.P.C. (4th) 114 (S.C.) and *Long, Miller v. Sawchuk* [2002 BCSC 542].

## BACKGROUND

- [3] The matter came before me after a convoluted journey through the judicial system. The review was precipitated by the order of Macaulay, J. made in B.C.S.C. Action No. 05/2083, Victoria Registry (the "Collection Action"). It is necessary to review the steps taken in and around the Collection Action to put the issues before me in context.
- [4] The Collection Action was commenced by the Law Firm on April 22, 2005. The purpose was to collect on the bills which are the subject matter of this review. The Law Firm sought judgment in the amount of \$21,048.43.
- [5] On May 3, 2005, the Law Firm/plaintiff obtained a garnishing order before judgment. The Clients/defendants subsequently applied to set aside the garnishing order and have any monies paid into court or received by the Law Firm/plaintiff returned. That application was heard by Master McCallum who granted the relief sought on May 6, 2005.

- [6] On May 9, 2005, the Law Firm obtained a second garnishing order before judgment. The Clients again sought to have that order set aside. Mr. Justice E.R.A. Edwards dismissed that application, although there is no entered order to that effect.
- [7] On May 17, 2005, the Clients entered into an agreement with the Law Firm in which the latter agreed to accept a reduced amount of the fees and disbursements on certain terms and conditions. One condition was that the Clients pay \$1,000 to the Law Firm by May 18, 2005. The Clients executed a Consent to Judgment in the compromised amount of \$18,750. The Clients say that the agreement was made under duress, and only to stop the execution proceedings which were allegedly harming its business.
- [8] The compromise or settlement agreement is contained in a letter dated May 17, 2005 and endorsed by a representative of the Clients, Mr. Pouladi. It is this agreement which the Law Firm says is subject to review under s.68 of the Act. If enforced, the agreement would require the Clients to pay the sum of \$18,500.
- [9] The Clients were not able to live up to the terms of the settlement agreement and accordingly, the Law Firm began collection proceedings once more.
- [10] On May 20, 2005, the Clients/defendants took out a notice of motion seeking the following relief:

"1. the consent order between the Plaintiff and the Defendants for payment of \$18,750.00 by the Defendants to the Plaintiff is of no force and effect;

2. the Plaintiff be enjoined from making any further garnishment applications to the court without a proper hearing or judgment;
3. the Plaintiff's bill for legal services rendered to the Defendants be reviewed pursuant to the Legal Profession Act;
4. the Defendant's [sic] costs of this application, at scale [3], be costs in the cause; and;
5. any further and other relief as to this Honourable Court seems just and meet;

Or in the alternative,

6. the consent order between the Plaintiff and the Defendants for payment of \$18,750.00 by the Defendants to the Plaintiff is of no force and effect;
7. the arrangement between the Plaintiff and Defendants for payment of the \$18,750.00 is varied as follows:
  - a. the Defendants pay to the Plaintiff an initial payment of \$1,000.00 by May 25, 2005;
  - b. the Defendants pay to the Plaintiff two payment [sic] of \$500.00 each on June 3, 2005 and June 10, 2005;

- c. the Defendants pay to the Plaintiff an amount of \$250.00/week starting on Friday June 17, 2005 and continuing on Friday of each subsequent week;

Such payment is to continue until the earlier of (i) the completion of review of bill amounts claimed by the Plaintiff under the Legal Profession Act is completed, or (ii) resolution of this proceedings in court.

8. the Defendant's [sic] costs of this application, at scale [3], be costs in the cause.
9. any further and other relief as to this Honourable Court seems just and meet;"

[11] That application appears to have come before Mr. Justice R. D. Wilson on June 14, 2005. I say appears as, without an entered order, it is difficult to determine the precise application before the court on that day. The court's reasons for judgment were given orally. Mr. Justice Wilson ordered a stay of proceedings in the Collection Action. The court did not make any ruling with respect to the compromise agreement reached between the parties. The court intimated that the Clients were obliged to initiate an action to have that agreement set aside.

[12] Also on May 20, 2005, Mega Wraps B.C. Ltd. ("MW B.C.") took out an appointment in the Vancouver Registry and fixed the date of July 21, 2005 for a review of "the bill" (sic) of the Law Firm.

[13] The Law Firm's appointment initiating this proceeding was filed June 30 fixing July 12, 2005 as the hearing date.

[14] On July 11, the Clients applied to have the appointment in Victoria "struck". The result of that application is the order of Mr. Justice Macaulay which provides as follows:

"THE APPLICATION of the defendant (sic) coming on for hearing at Victoria, British Columbia, on the 11th day of July, 2005, and on hearing Grant N. Smith, counsel for the plaintiff and Ali Pouladi, appearing for the defendants.

### **THIS COURT ORDERS that**

1. The date for taxation (sic) hearing will be scheduled in Victoria for August 02, 2005 or as soon thereafter as the Registrar can make a date available convenient to counsel for the Plaintiff. This date is peremptory against the Defendant.
2. The Defendant will not be entitled to the costs of today's proceeding regardless of the outcome of the taxation hearing.
3. The Defendant's requirements to approve the form of this Order be dispensed with."

[15] The appointment scheduled for July 12, 2005 did not proceed.

[16] In late August 2005, the Law Firm was advised of Mr. Shewfelt's possible retainer. The matter was therefore adjourned to August 29, 2005. On that date, the Clients made a further application to have this appointment struck out or adjourn the hearing date. I dismissed that application to strike the appointment for the reasons found at 2005 BCSC 1239. I gave

directions that Briefs be exchanged with the obvious purpose to delineate the issues between the parties in order to afford each the opportunity to prepare its evidence for the eventual hearing.

- [17] Regrettably, the exchange of Briefs did not accomplish this goal as the Clients sought to introduce new issues throughout the hearing. The Clients submit that the Law Firm is guilty of the same practice.

## THE ISSUES

- [18] At the outset of the hearing, the Law Firm asserted that the registrar is to not only conduct a review under s.71 of the Act but also review the so-called settlement agreement pursuant to s.68 of the Act. A s.68 review should precede the s.71 review: Long, Miller v. Sawchuk, supra.
- [19] In final submissions, the Law Firm appears to have resiled from that position. It still argues that the registrar can "enforce" the settlement agreement. In the alternative, the registrar can find that the Clients repudiated the agreement and, therefore, the Law Firm is entitled to claim the total amount of fees outstanding.
- [20] As will be further discussed below, the Clients submit that the Law Firm failed to conclude its retainer and the withdrawal by counsel amounted to breach of contract. As such, the Clients are entitled to be repaid all of the monies they have paid to the Law Firm and no fees should be allowed. With the exception of travel costs, the Clients acknowledge that the Law Firm is entitled to be paid for disbursements incurred.
- [21] The parties also disagree as to which of the bills issued by the Law Firm are subject to review under s.71.
- [22] The Law Firm's appointment does not seek a review of any agreement; nor have the Clients taken out an appointment to have an agreement reviewed.
- [23] The appointment merely appends the affidavit of Mr. Smith filed May 17, 2005 in the Collection Action. That affidavit in turn exhibits all of the bills issued by the Law Firm to the Clients including three which have been paid: August 25, September 9, and October 27, 2004. The Law Firm submits that the only fees which are subject to review are those which remain unpaid.
- [24] The Clients submit that all of the bills issued by the Law Firm are subject to review. They also submit that an account issued June 21, 2004 by a third member of the Law Firm falls within the review. That account is also exhibited to Mr. Smith's affidavit.
- [25] The appending of Mr. Smith's affidavit to the appointment is poor practise. The Law Firm should have directed its mind as to which accounts it sought to have reviewed and appended only those bills. It may not now resile from the review of bills which are appended to the appointment.

- [26] Furthermore, based on the evidence before me, I find that the work performed from and including June 2004 is part and parcel of the same retainer with the Law Firm. As such, all of the bills are subject to review: *Doig v. Davidson Muir* (1998), 48 B.C.L.R. (3d) 53 (C.A.).
- [27] I have no jurisdiction to conduct a review of any agreement under s.68. As noted, there is no appointment calling for a review of any agreement. And, only the Clients may seek such a review, not the Law Firm: *Coad v. Rizk*, *supra*, at para 17.
- [28] In any event, on plain reading of the statute, the settlement agreement is not an "agreement" as defined under s.68 of the Act. The agreement is a compromise in a separate cause of action.
- [29] The definition of "agreement" under the Act might arguably be broad enough to include this agreement. However, that definition must be considered in the context of the provisions under s.68. I note that pursuant to s.68 (3) of the Act, any agreement as to fees is may be examined within 90 days. Neither party contemplated such a review, because neither saw this as an agreement governing fees. Rather, the agreement represented a resolution to a collection action. As stated by R.D. Wilson, J., it is the "characterization" of the agreement that is all important.
- [30] As I read his reasons for judgment, Mr. Justice Wilson did not say that the enforceability of the agreement was within the purview of the registrar; in fact he would be "amused" if that were the case. Rather, he declined to make a ruling on the agreement's enforceability absent viva voce evidence. He suggested that a review of the Law Firm's bills under s.71 of the Act would make the enforceability of the settlement agreement moot.
- [31] I agree with the comments of Mr. Justice Wilson: the remedy for enforcing (or setting aside) the agreement lies within the jurisdiction of a s.96 judge. It is up to the parties to either commence separate proceedings or (as may have been the case here) bring a motion within the Collection Action: *McKenzie v. McKenzie* [1975] 4 W.W.R. 214, *aff'd* [1976] 5 W.W.R. 214 (B.C.C.A.) and *Ulrich v. Ulrich* 2004 BCSC 95 @ para. 65.
- [32] Thus, my reasons will only address the reasonableness of the bills issued by the Law Firm between June 21, 2004 and February 15, 2005. That analysis includes a determination of whether the Law Firm's fees should be reduced because of its failure to follow instructions or perform the work competently and adequately: *Davies v. Hunter* (1995), 40 C.P.C. (3d) 274 (B.C.S.C.)

#### THE BILLS TO BE REVIEWED

[33] The following bills are the subject matter of this review:

| File No. | Date | Fees | Disb. | Taxes | Total |
|----------|------|------|-------|-------|-------|
|----------|------|------|-------|-------|-------|

|       |          |             |         |           |             |
|-------|----------|-------------|---------|-----------|-------------|
| 41922 | 06/21/04 | \$ 1,310.05 | \$ 0.00 | \$ 189.95 | \$ 1,500.00 |
|-------|----------|-------------|---------|-----------|-------------|

|       |          |             |           |            |             |
|-------|----------|-------------|-----------|------------|-------------|
| 41922 | 08/25/04 | \$11,560.00 | \$ 603.99 | \$1,703.92 | \$13,867.91 |
|-------|----------|-------------|-----------|------------|-------------|

41922 09/09/04 \$15,832.50 \$ 1,934.77 \$2,426.81 \$20,194.08

41922 10/27/04 \$10,935.00 \$ 941.89 \$1,596.83 \$13,473.72

41922 12/10/04 \$ 4,320.00 \$ 1,804.45 \$ 731.11 \$ 6,855.56

41922 01/25/05 \$ 935.00 \$ 32.58 \$ 133.18 \$ 1,100.76

41922 02/15/05 \$ 460.00 \$ 17.99 \$ 65.66 \$ 543.65

42150 08/26/04 \$ 6,585.00 \$ 335.00 \$ 978.28 \$ 7,898.28

42160 10/29/04 \$ 2,482.50 \$ 0.00 \$ 347.56 \$ 2,830.06

42160 12/23/04 \$ 5,180.00 \$ 763.65 \$ 778.66 \$ 6,722.31

TOTAL: \$ 59,600.05 \$ 6,434.32 \$ 8,951.96 \$ 74,986.33

## THE EVIDENCE

- [34] Both Mr. Mark and Mr. Smith gave evidence on behalf of the Law Firm. On behalf of the Clients, evidence was heard from the Clients' principals, Ali Pouladi and Nima Ferdowsi.
- [35] The parties also made reference to affidavits filed in the Collection Action. I rejected the Clients' request that the affidavits be admitted "for the truth of their contents".
- [36] Mr. Ferdowsi's direct examination consisted of his affidavit sworn September 27, 2005 but delivered for filing on October 19, 2005. Once again, the Clients did not serve the affidavit in advance of the hearing, but it was delivered in advance of the continuation date. Mr. Ferdowsi was apparently unable to attend beyond October 19, hence the reliance on the affidavit rather than the potentially more lengthy viva voce evidence.
- [37] The Law Firm objected to the admission of Mr. Ferdowsi's affidavit given the late delivery and on the basis that its sole intention was to create an unbalanced record when my decision is appealed by the Clients.
- [38] Despite the late delivery, I allowed the affidavit as evidence in this hearing, but little weight was given to its contents. Most, if not all, of the allegations contained in the affidavit were not put to either Mr. Mark or Mr. Smith. Furthermore, in cross-examination, Mr. Ferdowsi gave inconsistent evidence about discussions he had with Mr. Smith concerning the conduct of the below described Khatra action. He blamed these inconsistencies on poor memory, even when faced with documentary evidence that challenged his version of events. Some of Mr. Ferdowsi's evidence is meaningless in the context of this review. For example, the number of cases cited by counsel at a particular hearing is not determinative of the quality of legal services.
- [39] As for the record of this proceeding, both parties were aware from the outset that registrar's hearings are not recorded and thus either party could have retained the services of a court reporter for part or all of the proceeding. Neither chose to exercise this right.

- [40] On October 3, the Clients sought to tender an affidavit of Mr. Pouladi sworn that same day. The affidavit was to be relied on in addition to Mr. Pouladi's viva voce evidence. I ruled that the affidavit was inadmissible not only because it had not been served in advance as required under the Rules but also because there was no reason why it was necessary given that Mr. Pouladi was present to give oral evidence and be cross-examined: see *Hogg v. Hogg* (1977), 6 C.P.C. 53 (B.C.S.C.) and *Dixon v. Deacon Morgan McEwen Easson* (1989) 41 B.C.L.R. (2d) 180 (S.C.)
- [41] No explanation was given as to why the affidavit was sworn so late in the proceeding. Mr. Pouladi later testified that he believed that this and the introduction of documents without notice to the other party was permitted because the Law Firm had earlier tendered a transcript of the hearing before Macaulay, J. without notice to the Clients. I found Mr. Pouladi's excuse for his conduct disingenuous. He was aware that the Clients' counsel raised objections over the admissibility of that transcript, although as described below, the objection was later retracted. As well, the Clients would not be surprised by the contents of the transcript as Mr. Pouladi was present at that hearing.
- [42] The Clients initially objected to the admission of the transcript because it was relied on to show that the Clients deliberately misled the court as to Mr. Shewfelt's retainer and the basis for postponing this review. Mr. Shewfelt objected to the admission of the transcript on the basis that this evidence went to the "collateral issue of credibility". That objection was made at the conclusion of the September 29 hearing date. Accordingly, I asked counsel to be prepared to argue the point when the hearing resumed. At the resumption of the hearing, Mr. Shewfelt advised me that the Clients were no longer objecting to the admissibility of the transcript. However, a similar objection was raised with respect to some Mr. Smith's viva voce evidence and that objection was upheld.
- [43] I do not intend to recite all of the evidence presented. The lawyers were carefully cross-examined with respect to many of the billing entries, including whether the time recorded was the time actually spent. The bills describe in detail the services performed.
- [44] The Law Firm represented the Clients in litigation arising from the breakdown of the Clients' franchise operation.
- [45] By way of background, the Client MW B.C. was the regional franchisor to the head franchisor in Ontario, Mega Wraps Holdings Ltd. ("Holdings"). Mega Wraps B.C. Restaurant ("Restaurant") was the tenant named in leases for locations operated by the B.C. franchisees.
- [46] In the spring of 2004, Holdings purported to terminate the franchise relationship with MW B.C. It directed the regional franchisees to pay royalties and such to Holdings directly. Litigation ensued in Ontario with MW B.C. represented by the Toronto law offices of Gowlings. Eventually the Law Firm was asked to become involved in the Ontario litigation.

- [47] Around the same time, and possibly in answer to these actions, MW B.C. chose to terminate the franchise operated by a Mr. Jubran at the Bay Centre in downtown Victoria. Mr. Jubran retained Mr. Scott McDonald, at Richards Buell Sutton to prosecute a claim for wrongful termination. MW B.C. assumed the operation of the Bay Centre franchise, although Mr. Jubran continued to operate a second franchise in Victoria. Mr. Jubran obtained an injunction restraining MW B.C. from selling or disposing of the business pending the outcome of the litigation.
- [48] Later in the summer of 2004, a dispute arose with a franchisee on the Lower Mainland, Mrs. Khatra. MW B.C. again attempted to assume control of that store. On August 14, 2004, the franchisee obtained an ex parte injunction from Masuhara, J. restraining MW B.C. from "selling, transferring or otherwise dealing with any fixtures, furniture, equipment and stock and trade" located at the store.
- [49] Mr. Mark performed most of the services relating to the Jubran and Ontario actions. Mr. Smith had primary conduct of the Khatra action. None of the bills relating to the Khatra action have been paid by the Clients.
- [50] When the Clients began operations in B.C., they chose the Law Firm as their registered and records office. It appears that the Clients operate their business primarily from Vancouver.
- [51] According to Mr. Pouladi, the Clients had initially retained Gowlings in Vancouver to address the dispute with Holdings and deal with the Jubran termination. However, that retainer was terminated when counsel at Gowlings indicated the costs of legal services would be "too much".
- [52] Mr. Pouladi first visited McConnan Bion's office in June 2004. He met with Stephanie Sieber who was instructed to send a letter to the landlord at the Bay Centre addressing the continued operation of that franchise. Ms. Sieber's bill on behalf of the Law Firm was issued June 16, 2004.
- [53] The Clients next attended the Law Firm's offices on July 15, 2004 seeking to meet with litigation counsel on an urgent basis. Mr. Jubran's counsel had scheduled a summary trial application for July 20, 2004. Mr. Mark was instructed to seek an adjournment of the summary trial.
- [54] Mr. Pouladi initially testified that the adjournment was sought in order to allow for negotiations and eventual settlement of the claim. He later stated that that the Clients in fact wanted "all of the evidence" before the court. Mr. Mark says that he was instructed to resist any negotiations and pursue a counterclaim.

- [55] According to Mr. Mark, the terms of the Law Firm's retainer were discussed at the initial meeting. The legal services would be billed at Mr. Mark's hourly rate (\$200/hour) but no fee estimates were given. Aware that the litigation was based in Vancouver, Mr. Mark raised the matter of counsel's travel costs and was assured by Mr. Pouladi that such time and expense could be billed to the Clients.
- [56] According to Mr. Pouladi, Mr. Mark assured him that travel costs would not be billed at all. And further, Mr. Mark gave a fee estimate of \$10,000 to \$15,000 which Mr. Pouladi understood to cover the entire piece of litigation regardless of whether the matter was concluded with a summary trial or proceeded to examinations for discovery and/or trial.
- [57] Mr. Mark was able to negotiate an adjournment and the matter was put over to September 3, 2004. In the meantime, Mr. Mark prepared the statement of defence and counterclaim which, in turn, was vetted and approved by the Clients. Disclosure of documents followed and affidavit material was prepared to answer the summary trial application. The Clients prepared some drafts of these affidavits.
- [58] Mr. Jubran would not agree to attend examinations for discovery in advance of the summary trial. The Law Firm says that it was instructed in late August to apply pre-emptively for an adjournment of the summary trial. The Clients deny issuing those instructions, saying that they left the strategy of the litigation entirely up to the Law Firm.
- [59] On August 27, 2004, Master Tokarek granted the Clients' application to allow an examination of Mr. Jubran but declined to adjourn the summary trial hearing deeming it to be a matter for the trial judge. That meant a small window of opportunity to conduct the examination for discovery of Mr. Jubran. That examination was conducted in late August.
- [60] The matter came before Williamson, J. on September 3, 2004. Many of the undertakings resulting from Mr. Jubran's examination remained outstanding.
- [61] As a result of submissions made by Mr. Mark, the summary trial was again adjourned pending further discovery.
- [62] Also in late August, the Law Firm was asked to file a defence to an application by Holdings to add Restaurants as a party in the Ontario action.
- [63] Mr. Mark says that he received these instructions from both Mr. Pouladi and the Clients' Ontario counsel at Gowlings. It was decided by Gowlings, and not opposed by the Clients, that Restaurants should have separate counsel in that application primarily for "optics". Mr. Mark prepared a factum for the application which was spoken to by counsel from Gowlings as the Law Firm's agent. Holdings was nevertheless successful in the application and the Law Firm's retainer in that matter came to an end.
- [64] In contrast, Mr. Pouladi testified that the Law Firm was instructed not only to defend the application, but also to represent Restaurants in the ongoing Ontario litigation if the application was successful. This despite the fact that the idea of separate counsel for the

application was a strategic decision and inconsequential once Restaurant was added as a party. Mr. Pouladi further testified that the Law Firm retained Gowlings as its agent independent of any advice from the Clients. It was alleged that default judgment was taken in the Ontario action, although there is no documentary evidence to substantiate this claim. The Clients blame the Law Firm for the alleged default judgment.

- [65] The Law Firm's accounts issued in September and October 2004 in the Jubran matter were paid in full, although not on the terms requested. A \$15,000 cheque provided by the Clients was returned N.S.F. The Law Firm requested an additional retainer before proceeding on any of the actions.
- [66] Repeated requests for further retainers were either ignored or belatedly answered. From Mr Pouladi's perspective, the accounts in the Jubran action were current by mid-November 2004. The N.S.F. cheque is described by Mr. Pouladi as "no big deal" and "typical in business". The sum of \$25,000 paid by the end of November was applied to outstanding accounts in the Jubran action. The Clients declined to pay any monies towards the Khatra accounts issued by that date as there had been "no result" in the proceeding.
- [67] According to both lawyers, Mr. Pouladi, the main principal instructing the Law Firm, was often late for meetings and sometimes did not appear at all. These included at least one meeting in Vancouver for which Mr. Smith had specifically travelled.
- [68] In the meantime, the ex parte injunction obtained by Mrs. Khatra continued.
- [69] The Law Firm was instructed to apply to have the injunction set aside. Again, Mr. Pouladi suggests that this step was taken on the Law Firm's own initiative as the Clients were kept in the dark about the Khatra proceedings. This, despite the fact that affidavits were prepared for and sworn by Mr. Pouladi with respect to the application.
- [70] Mr. Smith attended in Vancouver on one occasion in August only to be told that a judge was not available to hear that application. Mr. Smith made use of the time in Vancouver to conduct lengthy negotiations with Mrs. Khatra's counsel. Those negotiations continued through September 2004. According to Mr. Smith, Mrs. Khatra rejected every reasonable offer, contrary to the advice of counsel.
- [71] As noted, the Law Firm issued accounts in September and October 2004 and requested further retainers. The Clients were repeatedly advised that the Law Firm would not undertake any further work until the outstanding accounts were paid in full and a further retainer provided. Mr. Pouladi suggests that the Law Firm should have continued acting as counsel on "good faith".
- [72] Relying on a promise of payment from the Clients, Mr. Smith attended in Vancouver on both December 7 and 16 to argue that the injunction should be set aside. The basis for the application was that not all relevant facts had been disclosed to Masuhara, J.

- [73] On December 7, Mrs. Khatra, now unrepresented, succeeded in her application to have that hearing date adjourned.
- [74] The hearing proceeded before Madam Justice Bennett on the afternoon of December 16. The court concluded that the transcript from the original injunction application should be reviewed before considering the matter further.
- [75] Mr. Smith reported these events to Mr. Pouladi and Mr. Ferdowsi. Mr. Pouladi alleges a misunderstanding with respect to who was to obtain the transcript. Mr. Smith says that the onus was put on the Clients to either provide funds to pay for the transcript or to obtain the transcript directly. If properly retained, Mr. Smith was prepared to return in the New Year to continue argument in the matter. Mr. Pouladi says that the Law Firm agreed to obtain the transcript but the Clients went ahead anyway when this was not done.
- [76] By February 15, 2005, the Law Firm had withdrawn as counsel in the Jubran matter.
- [77] The application to set aside the injunction was continued before Madam Justice Bennett on March 4, 2005. The Clients' application was dismissed: *Khatra Enterprises Ltd. v. Mega Wraps B.C. Restaurants Inc. and Mega Wraps B.C. Inc.* 2005 BCSC 656, [2005] B.C.J. No. 984. The Clients were self-represented.
- [78] On February 17, 2005, Mr. Justice Pitfield heard the merits of the summary trial in the Jubran action. The Clients were represented by Mr. Pouladi at this application. The Court found in favour of the franchisees but ordered the assessment of damages to be postponed: *677815 B.C. Ltd. v. Mega Wraps B.C. Restaurants Inc.* 2005 BCSC 503, [2005] B.C.J. No. 720.
- [79] The Clients allege that the material before both courts was deficient because the Law Firm had not provided its file contents in a complete or timely manner. No reference is made to any deficiencies in the respective reasons for judgment. Nor did the Clients request an adjournment of either hearing in order to obtain the allegedly missing material.
- [80] Having withdrawn as counsel, and with the sum of \$21,048.43 in unpaid charges outstanding, the Law Firm commenced the Collection Action.
- [81] The Clients say that the Jubran bills are unpaid because the fees exceeded the original estimate of \$15,000 - \$20,000; time was duplicated and the amount recorded is excessive in many of the bills. Mr. Pouladi says that the Law Firm promised fees of no more than \$3,000 with respect to the Khatra action. The Clients also say that the Law Firm is responsible for the poor result in each of the actions.

## DISCUSSION

- [82] The Law Firm submits that all of its bills are more than fair and that it acted reasonably and professionally throughout, including at the conclusion of the retainer. It submits that Mr. Pouladi is not to be believed on any issue, but particularly with respect to the terms of the retainer.

- [83] In comprehensive oral and written submissions, the Clients raise a number of legal issues, including whether the registrar should disallow the Law Firm's fees in their entirety based on a breach of contract. The Clients submit that Mr. Mark's withdrawal on the eve of the summary trial application amounts to such a breach. Accordingly, no fees are payable under the principles enunciated in *Ladner Downs v. Crowley* [1987] 5 W.W.R. 322 (B.C.S.C.)
- [84] The contract which the Law Firm is said to have breached is found in Mr. Mark's letter of July 22, 2004. It is submitted that based on the letter, the Law Firm agreed to complete a full trial (as opposed to summary trial) of the Jubran action for the estimated sum of \$10,000 to \$15,000. The withdrawal based on non-payment of fees in advance of any trial represents the breach.
- [85] I reject this submission. First, reading the letter of July 22, 2004 as a whole, it is apparent that the Law Firm was providing an estimate for fees if the summary trial application proceeded on September 3, 2004, without the necessity of additional court appearances and examinations for discovery. As the Law Firm submits, the fees relating solely to the summary trial (but excluding the examinations for discovery) up to and including September 3 amount to about \$15,000.
- [86] I also find that the Clients understood this to be the case when that letter was received and offers revisionist testimony only to avoid payment of fees.
- [87] Second, it was obvious by early September that fees exceeded \$15,000 yet there was no attempt by the Clients, until collection actions were taken, to rely on the July estimate as binding on the Law Firm.
- [88] The mischief that Madam Justice Southin was addressing in *Ladner Downs v. Crowley* was an attempt by the solicitors to prevent the review of bills. That mischief is not present here. Nor is this a case where a comprehensive retainer letter and/or Contingency Fee Agreement stipulate that billing and collection will be delayed until the end of the retainer. As Southin, J. (as she then was) stated in *Ladner Downs v. Crowley*, *supra*, at common law, a solicitor is entitled to ask for monies during the course of the retainer.
- [89] Relying on the evidence of Mr. Mark and as reflected in the July 22, 2004 letter, I find that the agreement between the parties amounted to simply this: the Law Firm would bill for its services intermittently and on an hourly rate basis, and the Clients were to provide sufficient monies to keep the Law Firm's accounts current. The scope of the services was unknown at the time of the initial retainer, but for the Clients' instructions that the Jubran action should be vigorously defended and a counterclaim pursued. There is no suggestion that the Clients were precluded from having the interim bills reviewed under the Act.
- [90] The withdrawal of Mr. Mark in the Jubran action came after many requests for payment and some concessions made by the Law Firm in that regard. The withdrawal was not made without warning, or, in my view, on the "eve" of the summary trial such that the Clients were prejudiced. To the contrary, the court found that Mr. Pouladi represented the Clients well in

that application. Furthermore, the Law Firm made efforts to ensure that material was provided to the Clients in advance of the hearing. Finally, the Clients declined the opportunity given by the court to adjourn the summary trial application.

- [91] I find that the Law Firm's withdrawal in these circumstances was reasonable: Peterson Stark Scott v. Tseuoa 2002 BCSC 1779. If anyone is in breach of the retainer, it is the Clients.
- [92] With respect to the Khatra matter, I find that the Clients understood the same terms and conditions to apply to Mr. Smith's services.
- [93] Nonetheless, in both instances, it would have been preferable to have the terms of a retainer set out in writing (and the agreement endorsed by both parties). That alone may have prevented the Clients from launching the breach of contract argument.
- [94] The other point to make is that the Clients' argument rests on my acceptance of Mr. Pouladi's evidence.
- [95] Upon considering the evidence of Mr. Pouladi, particularly in contrast to the objective documentary evidence, I have no hesitation in finding him to be a witness without any credibility. I have already commented on the reliability of Mr. Ferdowski's evidence. Where there is any conflict, I prefer the evidence of the Law Firm over that presented by the Clients.
- [96] Mr. Pouladi appears to have no difficulty making false statements. One example is his remarkable allegation that he instructed the Law Firm to obtain a "quick settlement" in the Jubran action yet admits that the Clients were unprepared to make any offers. Another example is his assertion that he paid the Law Firm's bills upon receipt and provided retainers as requested. At the same time, Mr. Pouladi acknowledges receipt of several reminder letters from the Law Firm which included advice that counsel would withdraw unless the overdue accounts were paid in full.
- [97] I find that Mr. Pouladi misled the Law Firm about payments on account with the intention of luring the Law Firm to perform further services.
- [98] Absent some corroborative evidence, I do not accept Mr. Pouladi's evidence that either default judgment has been taken against Restaurants in the Ontario action or that it was within the Law Firm's retainer to prepare the defence in that action.
- [99] I find that with only few exceptions, all of the work performed by the Law Firm was either necessary for the disputes or, if not necessary, was done at the Clients' request. I also find that the Clients were well aware of the potential costs of proceeding with such steps.
- [100] Mr. Pouladi is not an innocent to litigation and indeed, made use of whatever rules and strategies available to him to delay this review. The correspondence put in evidence concerning the Collection Action displays Mr. Pouladi's relatively sophisticated knowledge of the law and the litigation process in particular.

[101] With respect to the factors under s.71(4) of the Act, I find as follows:

(a) the complexity, difficulty or novelty of the issues involved

[102] All three of the proceedings which are the subject matter of the bills under review involve legal and factual issues of more than average complexity. In my view, the complexity of the B.C. actions is demonstrated in the reasons for judgment of both Pitfield, J. and Bennett, J. To add to the complexity, consideration needed to be given to injunctions and other orders emanating from Ontario.

(b) the skill, specialized knowledge and responsibility required of the lawyer

[103] The lawyers involved were required to not only invoke their negotiation skills (which proved to be successful) but also apply specialized knowledge in the areas of injunctive relief and franchise law. The responsibility borne by the Law Firm was high given that the litigation involved the continued operation of the Clients' business.

(c) the lawyer's character and standing in the profession

[104] Not in issue.

(d) the amount involved

[105] The Khatra action involved an amount of at least \$26,000 (initially denied by Mr. Pouladi, but a fact that he eventually conceded in cross-examination). If the Khatra injunction were set aside, the Clients could possibly have sold the location for a profit of about \$175,000.

[106] No amounts were put in issue with respect to the Jubran matter. However, I accept the Law Firm's submission that the financial success of the Clients' franchise operation in general depended upon the outcome of this dispute.

(e) the time reasonably spent

[107] Having reviewed all of the bills, I find the time spent to be reasonable, including the time recorded for inter-office conferences. This is not a case where the inter-office conferences were casual discussions of the law. Rather, both Mr. Mark and Mr. Smith needed to know what and how the other was doing for strategic purposes. Given the urgency of the matters, it would have been impossible for one lawyer to have conduct of all three pieces of litigation.

[108] I reject the Clients' assertion that the Law Firm promised not to bill for travel time. When the Law Firm was retained, Mr. Pouladi was aware that the litigation was based in Vancouver. He can point to no electronic or other communication in which the issue of travel is raised, let alone complained of. The bills which were paid without complaint contain charges for travel time. If the arrangement with the Law Firm had been otherwise, I am confident that the Clients would have raised the issue in advance of this review and indeed declined to pay for that travel time.

- (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
- [109] There is no retainer letter but the subject of hourly rates is raised in various correspondences. I find that the hourly rates charged by each of the lawyers involved to be reasonable.
- (g) the importance of the matter to the client whose bill is being reviewed
- [110] These matters were of obvious importance to the Clients, hence the urgency on which the services of the Law Firm were sought.
- (h) the result obtained
- [111] The result obtained in the actions has nothing to do with any default or omission on the part of the Law Firm. As noted, I find that the Law Firm was retained in the Ontario action for the limited purpose of defending an application to add Restaurants as a party. With respect to the Khatra and Jubran actions, I find nothing in the respective reasons for judgment that suggests the Law Firm's work was determinative of the result.
- [112] Nor is there any suggestion in the reasons of either Bennett, J. or Pitfield, J. that the material prepared by the Law Firm is deficient.
- [113] With respect to the hearing before Bennett, J., in hindsight, it may well have been prudent for the Law Firm to have had on hand the transcript of the proceeding before Masuhara, J. However, the Law Firm may also have fairly assumed that reference need only be made to the affidavit material in support of the injunction. In any event, this was the only omission in the material before Bennett, J. and the Law Firm made the other necessary submissions to have the injunction set aside, including reference to affidavit material. The Clients were not compelled to pay counsel twice to make the same argument at a later date. Therefore, I see no justification for reducing the Law Firm's fees based on this alleged omission. With respect to ordering the transcript, I find that the Clients understood that cost to be their responsibility.
- [114] The end result may be unhappy for the Clients, but, absent any fault of the Law Firm, that is not a basis for reducing the bills: *D. Brent Adair Personal Law Corp. v. Warren* (unreported, October 21, 1996, Rossland Registry 2922, B.C.S.C, Registrar).
- "all of the circumstances"
- [115] I have also considered the fee estimates provided by the Law Firm, including the estimate provided in the Jubran matter. As already stated, I find that the estimate did not encompass any work beyond the summary trial. Furthermore, other correspondence issued to the Clients makes it clear that the additional services require an additional retainer: *Price v. Roberts & Muir* (1987), 19 B.C.L.R. (2d) 275 (C.A.) @ para 13.

- [116] I also find that the Law Firm's fees are justified given the difficulties presented by these Clients including leaving matters to the last moment; failing to attend meetings; and being undependable in maintaining the Law Firm's retainer: *Connell Lightbody v. Hadfield* [1998] B.C.J. No. 433 citing with approval *Montaine Black v. Osadchuk* (Vancouver Registry CA000147) B.C.C.A. January 16, 1985.
- [117] I reject the suggestion that the Clients' ability to pay is a factor to consider. The Clients may have told the Law Firm that they had cash flow problems, but there was never a suggestion of a limited ability to pay, particularly at the outset of the retainer. To the contrary, the Clients continued to assure the Law Firm that they had an ability to pay.
- [118] I am compelled to disallow one charge found in the Law Firm's bills. The Law Firm admits that the August 25, 2004 bill contains an erroneous entry for time spent by "KAW" on August 12. Accordingly, that bill is reduced by \$60.00.

## COSTS

- [119] The Law Firm is entitled to its costs at Scale 3 pursuant to s.72 (1) of the Act. As such, there is no need to address the consequences of the Clients' prolongation of the hearing.
- [120] The registrar has no jurisdiction to award special costs in a review: *Aydin & Company v. Schaber* (Guardian ad litem of) (2000), 49 C.P.C. (4th) 77 (B.C.S.C.).

## INTEREST

- [121] As there is no written agreement, the Law Firm is entitled to court order interest only on the outstanding bills.

## SUMMARY

- [122] There is no agreement which might be subject to review under s.68 of the Act.
- [123] The Law Firm's bills issued from June 21, 2004 to February 15, 2005 inclusive are subject to review in this proceeding.
- [124] The fees, disbursements and charges described in the bills are reasonable in all of the circumstances and are allowed, with the exception of \$60 in fees found in the August 24, 2004 bill.
- [125] The Law Firm is entitled to court order interest on the amount outstanding. The calculation of interest should be appended as a schedule to any Certificate of Fees.
- [126] The Law Firm is entitled to its costs for this proceeding at Scale 3.

"District Registrar C.P. Bouck"

December 7, 2005 - Revised Judgment

Corrigendum to the Reasons for Decision issued advising that paragraph 2 should read:

"[2] The Law Firm submits that there is an agreement between the parties which is subject to review under s.68 of the Act. That relief is not sought in any appointment. Regardless of the outcome of any such review, the bills in question may be reviewed pursuant to s.71: Coad v. Rizk (1999), 68 B.C.L.R. (3d) 340, 35 C.P.C. (4th) 114 (S.C.) and Long, Miller v. Sawchuk [2002 BCSC 542]."

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