

CANADA / JUDGMENT

# Mickelson v. Cragg

2011 BCSC 604

## COURT

Supreme Court of British Columbia

## DECIDED

6 May 2011

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2011 BCSC 604 Mickelson v. Cragg IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Mickelson v. Cragg, 2011 BCSC 604 Date: 20110506 Docket: S107137 Registry: Vancouver Between: Howard Mickelson Q.C. Plaintiff And: George Philip Cragg and Peter David Mark Cragg Defendants Before: The Honourable D.M. Masuhara Reasons for Judgment In Chambers Counsel for the Plaintiff: R. McFee, Q.C. Acting on his own behalf and Peter Cragg: G. Cragg Place and Date of Hearing: Vancouver, B.C. March 16, 2011 Place and Date of Judgment: Vancouver, B.C. May 6, 2011

## Introduction

- [1] The defendants, George and Peter Cragg, wish to have a review before the registrar pursuant to s. 70 of the Legal Profession Act, S.B.C. 1998, c. 9 [Act], of a bill for legal services provided by their former counsel Mr. Mickelson. The difficulty is that their application for a review was made a day or two after the three-month limitation period. As a result, the defendants require an order of this court under s. 70(11) of the Act to permit a review. The provision requires that "special circumstances" justifying a review of the bill be demonstrated.
- [2] In addition, counsel for Mr. Mickelson submits that the review sought by the Craggs is in relation to a written fee-for-service agreement entered into between the parties on July 9, 2010. Counsel argues that, as a result, the proper provision for a review is s. 68 of the Act. As this provision does not allow the court to permit a review for applications made outside of the three-month limitation period, the application by the Craggs cannot proceed.
- [3] Section 68 of the Act reads as follows: 68 (1) This section does not apply to agreements entered into before June 1, 1988.
- (2) A person who has entered into an agreement with a lawyer may apply to the registrar to have the agreement examined.
- (3) An application under subsection (2) may only be made within 3 months after
- (a) the agreement was made, or
- (b) the termination of the solicitor client relationship.

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- (4) Subject to subsection (3), a person may make an application under subsection (2) even if the person has made payment under the agreement.
  - (5) On an application under subsection (2), the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into.
  - (6) If the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into, the registrar may modify or cancel the agreement.
  - (7) If an agreement is cancelled under subsection (6), a registrar
    - (a) may require the lawyer to prepare a bill for review, and
    - (b) must review the fees, charges and disbursements for the services provided as though there were no agreement.
  - (8) A party may appeal a decision of the registrar under subsection (5) or (6) to the court.
  - (9) The procedure under the Supreme Court Civil Rules for the assessment of costs, review of bills and examination of agreements applies to the examination of an agreement.
  - [4] Sections 70 and 71 of the Act address the review of a lawyer's bill. The relevant provisions are as follows: Review of a Lawyer's Bill 70 (1) Subject to subsection (11), the person charged or a person who has agreed to indemnify that person may obtain an appointment to have a bill reviewed before
    - (a) 12 months after the bill was delivered under section 69, or
    - (b) 3 months after the bill was paid, whichever occurs first. ...
  - (11) In either of the following circumstances, the lawyer's bill must not be reviewed unless the court finds that special circumstances justify a review of the bill and orders that the bill be reviewed by the registrar: ...
    - (b) application for the review was not made within the time allowed in subsection (1) ...
  - (13) The procedure under the Supreme Court Civil Rules for the assessment of costs, review of bills and examination of agreements applies to the review of bills under this section.
  - (14) The registrar may refer any question arising under this Part to the court for directions or a determination.
  - [5] The matters to be considered in a review by the registrar are set out in s. 71. The relevant provisions read as follows: 71 (1) 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.

## Background

- [6] The relationship between Mr. Mickelson and the Craggs arose from claims of professional negligence against certain lawyers. Settlements were achieved in the actions against those lawyers.
- [7] The Craggs, I am told, had a land development business that enjoyed some success. The fact relevant in this case is that they had undertaken a large project and needed significant financing. A long time friend acted as a solicitor ("Lawyer A") for them with respect to obtaining and securing financing with a bank. It appears difficulties arose at some point with the bank and it refused to release the needed funds. The Craggs then approached another long time friend who is a senior litigation lawyer ("Lawyer B") regarding the bank's refusal. This lawyer provided legal advice to the Craggs and took on the task of compelling the bank to provide the needed funding. That effort failed. Consequently, the Craggs' business unravelled and failed.
- [8] As a result of the unfortunate results, the Craggs brought separate claims against Lawyer A and Lawyer B alleging professional negligence.
- [9] The Craggs retained several counsel to act for them prior to retaining Mr. Mickelson.
- [10] At an early point, a settlement for a significant sum against the estate of Lawyer A (as he had died) was obtained.
- [11] The Craggs then turned their focus on the claim against Lawyer B. A written retainer agreement was entered into between Mr. Mickelson and the Craggs dated September 15, 2008. I am told the funding for the claim was from the settlement with the estate of Lawyer A. A vigorous defence was put up by Lawyer B. Significant funds were expended by the Craggs in prosecuting the claim.

- [12] I am told that as a result of the depletion of the funds, the Craggs sought and obtained a new agreement with Mr. Mickelson, dated February 10, 2010, which was a contingency fee agreement.
- [13] A Judicial Settlement Conference before Mr. Justice Sigurdson was conducted over four days in February and March 2010. Mr. Justice Sigurdson provided views as to causation and damages. Settlement negotiations continued after the conference. In June 2010, a final offer to settle was communicated to the Craggs. Mr. Mickelson recommended acceptance but the Craggs rejected the offer after having consulted with "advisors" whose identities were not provided to Mr. Mickelson. They also sought to find other counsel. It is not disputed that a breakdown in the solicitor-client relationship and loss of confidence had occurred on both sides. Mr. Mickelson withdrew as counsel on or about June 23, 2010 and a notice of intention to withdraw as solicitor was filed and provided to the Craggs.
- [14] Two weeks later, the Craggs returned to Mr. Mickelson and requested that he resurrect the last communicated final settlement offer. Mr. Mickelson drafted a limited services agreement setting out the precise nature of what he was to do and how the funds from the settlement were to be distributed, including to legal fees, disbursements, experts, and to the Craggs.
- [15] The agreement was executed July 9, 2010.
- [16] The original offer could not be revived; rather, a somewhat lesser amount was offered. Discussions ensued between Mr. Mickelson and George Cragg; it was agreed that Mr. Mickelson and the Craggs would each absorb one-half of the reduction. Mr. Mickelson was then instructed to accept the new offer to settle.
- [17] It appears that a cheque for the settlement amount was paid into the trust account of Gudmundseth Mickelson LLP on July 23, 2010. A bill for legal services was issued July 23, 2010. A cheque for the agreed amount was issued to the Craggs who picked it up that same day.
- [18] George Cragg says that he first attempted to schedule an appointment for review of the bill on October 21, 2010 on-line and attended at the registry again on October 25, 2010. He says that he was told that the registry would not accept his application because of an error in the style of cause. He says that as a result he was delayed in correcting the error that had been pointed out by registry staff. He was able to obtain an appointment on October 26, 2010 after making the changes as he was directed. The style of cause reflects these changes.
- [19] At a pre-hearing in front of Registrar Cameron on February 10, 2011, the defendants were told that they were out of time for a bill review. The registrar indicated that in order to proceed with a bill review, they would have to make an application to the Supreme Court to demonstrate that special circumstances existed to justify the review proceeding. The registrar stated that he did not have the discretion to do so. Discussion

- [20] The first issue relates to whether a client is barred from a review as a result of the operation of s. 68 of the Act.
- [21] If the answer is no, then the issue to determine is whether the defendants have established special circumstances under s. 70(11) of the Act, permitting them to seek relief of a registrar's review.
- [22] As I understand the first issue, it is the position of Mr. Mickelson that because he entered into a limited services agreement, the applicable provision under the Act is s. 68 and that this provision permits a person who has entered into an agreement with a solicitor to have the agreement examined only if an application is made within three months after the agreement was made. It is pointed out that unlike s. 70, there is no statutory authority allowing the court to permit a review by an application made outside of the three-month period.
- [23] I agree that there is no statutory authority permitting such a review under s. 68. However, there is some question in the authorities as to whether the court under its inherent jurisdiction has the ability to review agreements entered into by officers of the court beyond s. 68 of the Act. The parties did not provide submissions on this point. However, it appears to me that it has been exercised in some limited circumstances. I note that in *Tweten v. Nichols*, [1985] 3 W.W.R. 758 (B.C.S.C.), McLachlin J. (as she then was) stated at 764: These authorities establish that, apart from statute, it is only in circumstances such as deceit, gross misconduct or other matters touching the integrity of the profession that the court will intervene to set aside a contract for fees and order a taxation. [Emphasis Added.]
- [24] I am also aware that reviews are conducted in class action and infant settlement cases. I do not see this case fitting into any of these above-mentioned categories. I also note that the present application is brought under s. 70(11). I am of the view that the case as presented by the Craggs does not warrant the exercise of the courts inherent jurisdiction to permit a review of the agreement.
- [25] In the circumstances, I am of the view that a review of the agreement is barred because of the passage of time.
- [26] In terms of whether a review of the bill under s. 70 is precluded by s. 68, the two do not operate exclusively. Simply because an agreement has been entered into does not preclude a client from seeking a review of fees under s. 70: see the decision of Collver J. in *Coad v. Rizk*, (1999), 68 B.C.L.R. (3d) 340 (S.C.) cited recently by Willcock J. in *Farris & Company v. Strother*, 2010 BCSC 1517. To hold otherwise would be inconsistent with the authorities and the public interest aspect of the Act.
- [27] The registrar can consider a wide range of factors with respect to the fees charged, including whether a rate set in an agreement is reasonable. It may well be that the agreement may be determined by the registrar to be largely dispositive of the case before him.

- [28] Turning then to whether there are special circumstances.
- [29] There is no exhaustive definition of the term "special circumstances" as it is used in s. 70. There can be a single act such as fraud or an accumulation of facts, any one of which would not constitute a "special circumstance" but that in total do: *Doig v. Davidson Muir* (1998), 158 D.L.R. (4th) 1 (B.C.C.A.) at 7.
- [30] The materials before me indicate that the Craggs experienced a substantial reversal in their business. They are, as best as I can tell, experienced business people. It was not contested that the Craggs are sophisticated litigants with extensive experience in litigation. They entered into detailed written agreements for legal services with Mr. Mickelson for pursuing specific claims against lawyers who had acted for them. They were fully aware of the terms of the agreements that governed the parties. It is also submitted that the subject contract is simple, clear and deals with a very specific assignment. It specifies in detail how the settlement funds are to be distributed as between the parties. Mr. McFee, counsel for Mr. Mickelson, submits that there are simply no special circumstances that justify a review. I also sense from the materials that the Craggs were difficult clients with significant expectations. I also recognize that it was the Craggs who rejected the recommendation of settlement of their learned counsel in favour of an advisor who they would not identify to their counsel.
- [31] Alternatively, if there are special circumstances, counsel for Mr. Mickelson submits that it is not necessary for the court to order a review because the evidence shows that the fees were not "out of line". Counsel relies on *Doig and Morriss v. Harper Grey Easton*, [1998] B.C.J. No. 2543 (S.C.). Mr. McFee argues that the Craggs were represented in very complex and highly contentious litigation and that the settlement was consonant with the views of Sigurdson J. following a four-day judicial settlement conference. Furthermore, Mr. Mickelson agreed to substantially reduce his legal fees to make the settlement offer more favourable to the Craggs, including absorbing a share of the reduced amount in the revised settlement.
- [32] However, it is clear that had George Cragg obtained his appointment within the three-month period, there would be no barrier to having a review conducted. It is apparent that Mr. Cragg desired a review and attempted to obtain an appointment within the specified statutory time period. It seems he attempted to obtain a hearing date on the court website on October 21, 2010. It appears that on Friday, October 22, 2010 he attended the court scheduling counter and attempted to file an appointment but was told he had the wrong form or had to do more. He returned again on Monday, October 25, 2010 and was told the documents he had were wrong and could not be accepted for filing, including that he was not the plaintiff but the defendant - thus the style of cause as it presently exists. He was apparently told to go across the street to the Justice Access Centre. He did but when he arrived there it was closing time and he was told that he would have to return the next day. He did so and typed out the required forms, the Appointment and Requisition-General, and filed them in the registry on the same day, October 26, 2010.

- [33] Mr. Cragg submits that had he insisted that the registry staff receive his appointment document on October 22, 2010, he would have successfully met the three-month period as set out in the Act.
- [34] From what I can tell, a relatively significant amount of fees and disbursements were incurred in pursuing the claim. Mr. Mickelson has been paid. My rough estimation of the ratio of fees and disbursement from the outset of the litigation to the settlement obtained is significant, perhaps in the order of 70 percent. I do not make any negative statement of this as there may well be good reasons for this and I also recognize that the fees were discounted; however, the proportion is a factor. I also note that the limited services agreement was reached under difficult circumstances.
- [35] In the circumstances, I am of the view that, on balance, special circumstances have been demonstrated and that the review by the registrar under s. 70 should be ordered. The circumstances include: · the nature of the public interest aspect of the Act; · Mr. Cragg's interactions with court registry staff that affected his efforts to file for an appointment on time; · the fact that Mr. Cragg was only a day or two late in filing his appointment; · the significant size of the fees incurred in pursuing this litigation and the ratio of fees and disbursements charged to settlement obtained; · the absence of real prejudice to Mr. Mickelson, he has been paid; and · the review before the registrar, as I see it, should not consume an inordinate time.
- [36] Subsequent to the hearing that was before me, I received correspondence from Mr. McFee advising that the settlements arrived at contained confidentiality provisions. He requested that, to the extent possible, I refrain from referring to the fact of and terms of the settlements. If I was not able to do so, he requested that these reasons be sealed. He further requested that certain affidavits in the court file be sealed and removed from the file to prevent public access as to the fact of settlements and their terms. Mr. Cragg opposes this request.
- [37] I am of the view that these reasons do not need to be sealed as this ruling makes only general reference to the settlements. However, I do see merit in the request that the specified affidavits be so sealed. While the Craggs do not agree, they did agree to keep confidential the settlements and their terms. There is no real utility in publicizing the private settlements reached between the Craggs and the lawyers for the purpose of this proceeding. There is no term preventing a review of the fees and I do not think such a term would be effective in barring such a review by the court.
- [38] The documents in question, as delineated below, will therefore be ordered sealed and removed from the court file. Obviously, if the registrar wishes to review these documents in conducting the review, the registrar may do so.

## Conclusion

- [39] A review of the bill for legal services provided by Mr. Mickelson is ordered pursuant to s. 70(11) of the Act.
- [40] The following documents that are in the court file are ordered sealed and removed subject to further court order:
- (a) Affidavit of George Philip Cragg sworn March 4, 2011;
  - (b) Affidavit of George Philip Cragg sworn February 8, 2011;
  - (c) Affidavit of Kate Mitchell sworn November 24, 2010;
  - (d) Affidavit of Kate Mitchell sworn November 25, 2010; and
  - (e) Affidavit of Lisa Phillips sworn March 15, 2011. "The Honourable Mr. Justice Masuhara"
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