

CANADA / JUDGMENT

Welder (Re)

2014 BCSC 111

COURT

Supreme Court of British Columbia

DECIDED

24 January 2014

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2014 BCSC 111 Welder (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Welder (Re),

2014 BCSC 111

Date: 20140124

Docket: 97280

Registry: Kelowna

In the Matter of the Legal Profession Act,

S.B.C. 1998, Chapter 9 and Amendments Thereto

And

In the Matter of Douglas W. Welder

And

In the Matter of Bills for Fees, Charges and Disbursements

Delivered to or Sent to Aztek Resource Development Inc. and Nick Sintichakis,

by Douglas W. Welder and Dated April 22, 2012 and October 2, 2012

Before: Master Young

(As Registrar)

Reasons for Decision

Appearing on his own behalf:

D.W. Welder

Representative of Aztek Resource Development Inc.:

B. Peterson

N. Sintichakis

No appearance

Place and Dates of Trial/Hearing:

Kelowna, B.C.

September 2, 9, 16, 24 and

December 4, 2013

Place and Date of Judgment:

Kelowna, B.C.

January 24, 2014

- [1] This is a Legal Professions Act review of three accounts of Douglas W. Welder (the "Solicitor") dated April 22, 2012, and two accounts which were both issued on October 2, 2012. The appointment was taken out by the Solicitor on November 6, 2012.
- [2] The first October 2, 2012 account was sent to Aztek and Nick Sintichakis and covers an earlier time period from September 9, 2011 and November 17, 2011, and is for fees of \$1,870, disbursements of \$1,013.76 and taxes of \$236.97 (the "first account").
- [3] The second October 2, 2012 account was also sent to Aztek and Nick Sintichakis and covers the time period from November 17, 2011 and February 2012. It is for fees of \$6,927.50, disbursements of \$345.20 and taxes of \$863.12 (the "second account").
- [4] The April 22, 2012 account was the first account sent to Nick Sintichakis and Aztek Resource Development Inc. ("Aztek") but covers a later time period from February 27, 2012 to March 20, 2012, and is for fees of \$17,340, disbursements of \$1,868.64 and taxes of \$2,270.72 (the "third account").

Nature of the Legal Work

- [5] Mr. Welder was retained by Brian Peterson to reactivate Aztek and to apply to lift the cease-trading order imposed on Aztek Resource Development Inc. by the Securities Exchange Commission ("SEC").

- [6] After conducting some investigation, Mr. Welder discovered that Aztek had been struck from the company registry for failure to file annual reports. He was instructed to apply to reinstate the company. This task was completed. He was advised that his services were no longer required in or about December 2011 after certain conversations he had with directors or former directors of Aztek, which Mr. Peterson says went far beyond the solicitor's instructions.
- [7] In February 2012, Mr. Welder took instruction from Nick Sintichakis to commence a lawsuit in the name of Aztek against certain former directors of Aztek and against a company named Mahdia Gold Corp. ("Mahdia") and Jayson Schwartz, the solicitor for Mahdia. Nick Sintichakis was one of three directors of Aztek. It was clear that Mr. Welder did not consult with the other two directors nor did Mr. Sintichakis consult with the other two directors. Once the other two directors of Aztek learned of the lawsuit, they retained new counsel to represent Aztek and discontinued the lawsuit.
- [8] Mr. Sintichakis did not appear at this hearing before me. The only evidence I heard was from Mr. Welder and Mr. Peterson.
- [9] The main issue is whether or not Doug Welder was retained by Aztek.
- [10] Aztek also has some criticism of the nature of the work performed by Mr. Welder and the hourly rate charged by Mr. Welder.

Retainer Agreement

- [11] Mr. Welder does not follow the recommended practice of obtaining a written retainer agreement prior to performing legal services. He does so at his peril because the terms of his remuneration are very unclear and he, as a solicitor, was in the best position to communicate clearly the terms of his retainer.
- [12] Mr. Peterson and Mr. Welder had former business dealings with one another and had a long-term friendship, which has clearly ended as a result of this Aztek lawsuit. In former dealings, Mr. Welder had reactivated a company in return for the receipt of shares of that company. Mr. Peterson was happy with the work done by Mr. Welder on that company and approached Mr. Welder to do the same type of work for Aztek. There is no clear evidence as to how Mr. Welder was to be paid to do this work for Aztek. Mr. Peterson was of the view that Mr. Welder would receive shares. Mr. Welder says that he told Nick Sintichakis that he would charge him an hourly rate. Mr. Sintichakis did not give evidence at the hearing, and there are no written documents which corroborate this statement.
- [13] The original instruction came from Mr. Peterson in the spring of 2011. He was not a director of Aztek at that time but Mr. Sintichakis was. In late summer 2011, Mr. Welder discovered that Aztek had been struck for failure to file annual reports, and he was instructed by Mr. Peterson to restore the company. The solicitor says that he was asked how much it would cost to restore a company, and he advised that it would cost about as much as it costs to

incorporate a company. He apparently provided an estimate of between \$1,500 and \$1,800 plus disbursements.

First Account

[14] The work done to restore the company is contained in the first account which is dated October 2, 2012. In that bill, the solicitor charged total fees in the amount of \$1,870. Disbursements charged were in the amount of \$1,013.76 and taxes charged were in the amount of \$236.97 for a total of \$3120.73.

[15] Mr. Peterson does not take issue with this bill, and therefore I will allow it in full at \$3120.73.

Second Account

[16] Once the company was restored, steps had to be taken to reactivate the company so that an application could be made to lift the cease-trade order which had been imposed by the SEC.

[17] During the process of restoring Aztek, Mr. Welder became aware that the minute book of the company was missing, and so he had to search public records to re-create the minute book. In so doing, he became aware that Mr. Peterson, who described himself as president of Aztek, was not a director and was not the president on the public records.

[18] The directors of the company in the fall of 2011 were Mr. Zaakir, Mr. Weingarten, Mr. Sintichakis and Mr. Hopkinson. According to Mr. Welder, he was instructed to get Mr. Zaakir, Mr. Weingarten and Mr. Hopkinson to resign as directors. He said these instructions came from Mr. Sintichakis and that Mr. Peterson was present when these instructions were given. Mr. Peterson has no recollection of that. I question what Mr. Peterson's status would be to give instructions at that point in time in any event.

[19] On further investigation, Mr. Welder learned that Mr. Hopkinson had already resigned. He convinced Mr. Weingarten to resign after some "nasty" (his description) phone calls. After a similar nasty phone call and email exchange with Mr. Zaakir, Mr. Welder received an email confirming that Mr. Zaakir had already resigned as a director.

[20] At page 83 of Exhibit #1, Mr. Welder provided a copy of an email he sent to Alan Zaakir on November 29, 2011, which said as follows:

I forwarded to you a resignation form to confirm that you had resigned in October of last year. To date it has not been faxed back to me. You must understand that while you have been a director of Aztek numerous irregularities have been allowed to occur with Aztek. I have spoken with Nick Sintichakis and he has advised me that I am to proceed to deal with all matters of misconduct, including the securities irregularities, that you, Lawrence Weingarten [sic] and Edward Hopkinson have allowed to occur over the last three years. I will wait until the close of business today to receive your signed resignation otherwise I will proceed with my instructions for Mr. Sintichakis to pursue the company's lawful remedies against all of the directors, including you. Please govern yourself accordingly.

Douglas W. Welder

- [21] Mr. Zaakir and Mr. Weingarten were the majority shareholders at the time this threat was made.
- [22] Mr. Sintichakis authorized Mr. Welder to add Mr. Peterson as a director. There was some discussion about adding a Mr. Kreiper as a director, then those instructions were changed, and Mr. William Gordon was added as a director. It is not clear to me how this was done since there did not appear to be a shareholders' meeting at that time.
- [23] Mr. Welder caused to be filed a notice of change of director on December 6, 2011, the next step to reactivate the company was to obtain audited financial statements. Mr. Peterson wished to use the services of Stephen Fry from Cookson Walker LLP. He advised Mr. Welder to take no further steps as he wished to deal with the auditor directly. After instructing Mr. Welder to take no further steps, Aztek hired a securities lawyer named Mouane Sengsavang to work on the reactivation.
- [24] According to Mr. Peterson, the majority shareholders of Aztek were no longer willing to work with Mr. Welder after the heated conversations he had with them regarding their resignation as directors. Mr. Peterson was instructed to give the work to Mouane Sengsavang and Mr. Zaakir paid for her retainer. As far as Mr. Peterson was concerned, that was the end of Mr. Welder's instruction. He is very clear that Mr. Welder was not instructed to threaten or alienate Aztek's majority shareholders.
- [25] This covers the time period of the second account which was also dated October 2, 2012, but covers the time period from November 17, 2011 to February 27, 2012.
- [26] The total bill is for \$8,135.82. The fees charged for Mr. Welder were for 16.30 hours billed at \$425 per hour.
- [27] Mr. Welder admits that he is not an expert in securities law. In fact, at that time, he had only reactivated one other company. Mr. Peterson led evidence that they retained Ms. Sengsavang, who works exclusively in the area of securities law, and she bills on an hourly rate of \$250 per hour. I therefore find the hourly rate of \$425 per hour for a lawyer learning securities law to be an excessive hourly rate.
- [28] It appears from the emails filed in Exhibit #1 that Mr. Sintichakis and Mr. Zaakir had experienced significant conflict of their relationship prior to this time. Mr. Zaakir accused Mr. Sintichakis of trying to blackmail him in the past. It is quite possible that Mr. Welder was following the instructions of Mr. Sintichakis when he threatened the majority shareholders. Mr. Sintichakis is not here to corroborate that evidence. However, it is also very clear to me that it was not in the company's best interest to alienate the majority shareholders the way Mr. Welder did on November 29 and November 30, 2011. As a result of that conduct, Mr. Welder's relationship with the company ended, and Ms. Sengsavang was hired to work on the reactivation of the company.

- [29] Mr. Welder did not stop working on company matters though. It is not clear to me whom Mr. Welder was acting for after December 23, 2011. While trying to reconstruct a missing minute book using the SEDAR website, he had found some irregularities in the dealings between Aztek and Mahdia and was investigating these irregularities. He met with Mr. Peterson after an office Christmas party and was trying to impress upon Mr. Peterson the importance of correcting these irregularities. Was he doing so on instruction of Nick Sintichakis, was he acting as a friend of Mr. Peterson, or was he just getting too personally involved in the dealings of the company after his legal work had been completed?
- [30] I am reducing the second account by 4.8 hours. The first half hour I am deleting is for all of the threatening communications with Al Zaakir, which I find are not in the best interest of the client company. I have also disallowed all the time after December 23, 2011, as it is apparent to me that Mr. Welder was no longer acting for Aztek. This will be discussed further when I deal with the third account.
- [31] I also find that to charge \$425 per hour is excessive given Mr. Welder's lack of experience in this area, and I will allow his account at the hourly rate of \$225 per hour. I find this to be a reasonable hourly rate for an experienced lawyer who is working in a new field.
- [32] Fees will be allowed at 11.5 hours at \$225 per hour for a total fee of \$2,587.50. Disbursements are allowed in full at \$345.20. HST on disbursements is unchanged. HST on fees is changed to \$310.50.
- [33] The account is reduced from \$8,135.82 to \$3,275.02.

Third Account

- [34] This is by far the most contentious account and requires some explanation of the background leading to this work.
- [35] In order to reconstruct the missing minute book, Mr. Welder obtained previously filed documents from the SEDAR website. The following is a quote from the SEDAR web site explaining what SEDAR is:

www.sedar.com is the official site that provides access to most public securities documents and information filed by public companies and investment funds with the ("Canadian Securities Administrators" or "CSA") in the SEDAR filing system. The statutory objective in making public this filed information is to enhance investor awareness of the business and affairs of public companies and investment funds and to promote confidence in the transparent operation of capital markets in Canada. Achieving this objective relies heavily on the provision of accurate information on market participants.

- [36] One of the documents he located in his search was a press release from Wintercrest Resources Ltd., which was subsequently renamed Mahdia Gold Inc. The October 16, 2009 press release announces that Wintercrest had purchased mineral claims in Guyana from Aztek Resources Development Inc. for the issuance of 4,500,000 shares of Wintercrest

Resources Ltd. to the shareholders of Aztek. Post issuance of the 4,500,000 shares, Wintercrest announced that it is hereby consolidating securities in one new share for every two shares.

[37] Upon further investigation, it became apparent to Mr. Welder that Wintercrest (now Mahdia) had never issued the shares to the shareholders of Aztek. He advised Mr. Peterson of this, and he says that Mr. Peterson stared blankly at him and walked out of his office saying nothing and giving no instruction. When Mr. Welder left his office shortly thereafter, he found Mr. Peterson standing on the sidewalk outside Mr. Welder's office typing on a handheld device. At the hearing before me, Mr. Peterson acknowledged that the document at page 168 of Exhibit #1 filed in these proceedings was the email Mr. Peterson was preparing that day on his handheld device.

[38] The email dated February 23, 2012 at 3:27 p.m. was addressed to Mouane Sengsavang and was entitled "Aztek Resource Development to be addressed NOW!!!" In it he demanded:

To cleanup Aztek the following MUST be completed by 12 noon PST and delivered to my office our Aztek's legal counsel, Mouane Sengsavang,

1. A share certificate (s) for [sic] totalling 2.25M shares of Mahdia Gold as per your your [sic] meeting held September 28th 2009.

"The board of Wintercrest hereby announces that it has now acted on the matter of purchasing mineral claims in Guyana by entering into a purchase and sale transaction with Aztek Resources Development Inc. As such, Wintercrest will purchase 49% of the mineral claims held [sic] Aztek Resource Development Inc. and will pay for these claims by an issuance of 4,500,000 shares of Wintercrest Resources Ltd. to the shareholders of Aztek. Post the issuance of the 4,500,000 shares, Wintercrest announces that it is hereby consolidating its securities on a one new share for every two shares. The company is serving notification to the appropriate transfer agent, stock exchange and registrar to this regard."

[39] He quoted the above press release and then goes on to say:

2. All documentation consisting but not limited to, minutes, agreements, CONFLICT OF INTEREST Disclosures, options, titles etc. etc.
3. Al, in July of 2011, at a meeting in Vancouver you stated that you would send me a share certificate, THE NEXT DAY, for 250K shares of Mahdia Gold as special compensation for my signing the SEC order on your behalf. I will begin legal proceedings to unwind that consent on Wednesday March 1, 2012.
4. I am owed 5744.32 for airfares and car rental for the trip we took to inspect the properties in Guyana.

These items must be addressed to my satisfaction by 1 PM Wednesday March 1 2012.

Do not respond to me directly on items 1 and 2, address all commentary to Mouane Sengsavang counsel for Aztek.

Items 3 and 4 must be sent to me by courier with tracking number, if you have comments please forward to them [sic] Mr. Doug Welder whom I have an appt with 2 PM Wednesday March 1.

Brian Peterson

- [40] This email was not addressed to Mr. Welder. Mr. Welder was sent a copy of it several hours later by Donald Gordon. Mr. Peterson did not have an appointment with Mr. Welder for March 1st.
- [41] When Mr. Welder and Nick Sintichakis read this email, they became aware that Mr. Peterson was trying to get shares for himself in Mahdia. It appeared to them that this was a breach of fiduciary duty that Mr. Peterson was acting in his personal capacity for his personal benefit.
- [42] On February 27th, Mr. Welder and Mr. Sintichakis called Jayson Schwartz, who was the solicitor for Mahdia. Mr. Welder's evidence was that they barely said hello and Jayson Schwartz started screaming at them. He said that it was a very strange conversation, and he could not believe how much information Jayson Schwartz had about the private business of Aztek.
- [43] It was at that time that Nick Sintichakis authorized Mr. Welder to commence a lawsuit in the name of Aztek against Mahdia Gold Corp., Allan Zaakir, Lawrence Weingarten and Jayson Schwartz, and unnamed defendants.
- [44] Mr. Welder had Nick Sintichakis sign a written authorization (p. 99 of Exhibit #1 in these proceedings) which says as follows:

To Douglas W. Welder

This is your authorization to file in the Supreme Court of British Columbia a Notice of Civil Claim on behalf of Aztek Resource Development Inc. claiming against Alan Zaakir, Lawrence Weingarten, Mahdia Gold Corp., Jayson Schwartz and John Does #1 to #5 without authorization of the remaining two directors of Aztek, Brian Peterson and William Gordon since I believe that they may be involved in the conspiracy or cover up of the true circumstances of the Aztek Resource Development Inc., and Mahdia Gold Corp. deal from the fall of 2009.

Dated this 28th day of February, 2012

Aztek Resource Development Inc.

Per:

Nick Sintichakis - CEO and Director

- [45] This is the only time Mr. Welder received written instructions in this entire matter, and clearly he obtained it because he knew he would be acting against the will of the majority of the directors of Aztek. He also knew that there was no director's meeting to discuss this lawsuit, and in fact the other two directors were not informed until after the lawsuit was served.
- [46] Nick Sintichakis did not have the authority to bind the company to commence this lawsuit. He may have obtained leave of the court to commence a derivative action had he taken that step first, but he did not.
- [47] Mr. Welder was aware of the problem of the lack of proper authority to commence an action. He relied on the case of *Commalert Monitors Inc. v. Maple Ridge Business Centre Ltd.*, [1995] B.C.J. No. 1704 (S.C.), as his authority for commencing a lawsuit in the name of the company and later applying to have the lawsuit converted to a derivative action. In that case, Justice Scarth of the Supreme Court of British Columbia dealt with the issue of whether the plaintiff had the status or standing to bring or maintain the action. He relied on s. 225 of the British Columbia Company Act which was similar to s. 233(1) of the Business Corporations Act, S.B.C. 2002, c. 57, which says:

Powers of court in relation to derivative actions

233 (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

- (a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
 - (b) notice of the application for leave has been given to the company and to any other person the court may order,
 - (c) the complainant is acting in good faith, and
 - (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.
- (2) Nothing in this section prevents the court from making an order that the complainant give security for costs.
- (3) While a legal proceeding prosecuted or defended under this section is pending, the court may,
- (a) on the application of the complainant, authorize any person to control the conduct of the legal proceeding or give any other directions for the conduct of the legal proceeding, and

- (b) on the application of the person controlling the conduct of the legal proceeding, order, on the terms and conditions that the court considers appropriate, that the company pay to the person controlling the conduct of the legal proceeding interim costs in the amount and for the matters, including legal fees and disbursements, that the court considers appropriate.
 - (4) On the final disposition of a legal proceeding prosecuted or defended under this section, the court may make any order it considers appropriate, including an order that
 - (a) a person to whom costs are paid under subsection (3) (b) repay to the company some or all of those costs,
 - (b) the company or any other party to the legal proceeding indemnify
 - (i) the complainant for the costs incurred by the complainant in prosecuting or defending the legal proceeding, or
 - (ii) the person controlling the conduct of the legal proceeding for the costs incurred by the person in controlling the conduct of the legal proceeding, or
 - (c) the complainant or the person controlling the conduct of the legal proceeding indemnify one or more of the company, a director of the company and an officer of the company for expenses, including legal costs, that they incurred as a result of the legal proceeding.
 - (5) No legal proceeding prosecuted or defended under this section may be discontinued, settled or dismissed without the approval of the court.
 - (6) No application made or legal proceeding prosecuted or defended under section 232 or this section may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of the company, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 232 or this section.
- [48] In *Commalert*, the president of the company did not have the approval of the other directors to commence the action. He commenced the action in the name of the company and then attempted to ratify this act after the fact. A directors' meeting was held and the motion to prosecute the action was defeated. The president then applied to court for leave to continue the action as a derivative action.
- [49] Justice Scarth allowed the action to proceed with the action because he found that the following critical requirements had been met that:
- (a) the one director had made reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the action;
 - (b) he was acting in good faith;
 - (c) it is *prima facie* in the interest of the company that the action be brought or defended; and

(d) in the case of an application by a member, he was a member of the company at the time the transaction or other event giving rise to the cause of action.

[50] Justice Scarth found at paragraph 12 that the director met those requirements.

[51] I do not find that Mr. Sintichakis has met the requirements. He made no effort to convince the directors of the company to commence the action or to notify them or seek ratification after the lawsuit was commenced. He added several John Doe defendants, who were to possibly include his other directors who he suspected were acting against the company's interest. It is not clear to me that it was in the interest of the company that the action be brought. Mr. Sintichakis was, however, a member of Aztek at the time of the event.

[52] The company was in no financial position to start a law suit. It had no money. It owned no property.

[53] I am uncertain whether the court would have granted leave to commence a derivative action. When Mr. Welder applied to convert the action to a derivative action, the majority of the directors had already discontinued the action and the judge declined to hear the application.

[54] As it turns out, Aztek was negotiating a settlement with Mahdia for shares in return for the transfer of the mineral claims. No written agreement was ever found to exist between Wintercrest and Aztek, and so the directors negotiated a new arrangement where Mahdia did pay shares to Aztek. Having a lawsuit commence while they were making these negotiations was not in the company's best interest.

Findings

[55] I find that Mr. Welder was not acting for Aztek when he commenced the lawsuit in the name of Aztek. He was acting for Nick Sintichakis. He was aware that the company might not support this action and might not pay his retainer. This is a reason why he received his only written instructions. It is Mr. Welder's evidence that Mr. Sintichakis told him if the company did not pay his fee, then he (Mr. Sintichakis) would pay.

[56] Once the lawsuit was discontinued and the application to convert the lawsuit to a derivative action was dismissed, Mr. Welder asked Mr. Sintichakis if he wished to commence a derivative action claim. He even drafted some pleadings for Mr. Sintichakis to review. By then, Mr. Sintichakis made an agreement with the other directors of Aztek and declined to instruct Mr. Welder to proceed.

- [57] I disallow the entire third account as against Aztek because I find that Mr. Welder did not have instructions from the company to proceed. Given that Mr. Welder's evidence is that Nick Sintichakis would pay the bill in the event that the company refused to do so, I will allow the bill in its entirety against Nick Sintichakis without further review. Since Mr. Sintichakis had the opportunity to attend court and chose not to, I have to conclude from that action that he did not disagree with the amount of the bill.

Costs

Submissions of the Parties:

- [58] In a prehearing conference in this matter, I ordered production of certain documents prior to the assessment. One order was that Aztek was to deliver copies of all directors' resolutions and minutes of directors' meeting of Aztek from January 1, 2011 to March 13, 2013. Mr. Peterson assured me that he had those documents and could comply with the order within seven days. The only resolutions produced were from meetings that took place on January 16, 2012; February 29, 2012; and March 12, 14, 19 and 27, 2012. I highly doubt that these were all the resolutions because I am advised that Aztek sold 500,000 shares of Mahdia Gold Corp. later in 2012 for \$150,000 and spent all that money. I am certain that this could not have been done without a resolution. Prior to this transaction, Aztek did not have a bank account, and so a resolution would be required to give a director signing authority.
- [59] Mr. Welder submits that I should find that the disclosure order was not complied with and I should sanction the respondents with special costs.
- [60] I do believe the order was not complied with, but I do not think that the resolutions being sought would impact my assessment. There appears to be another agenda where Mr. Welder wishes to prove that the directors were not acting in good faith in running the company and in settling the claim with Mahdia Gold. I assume that Mr. Welder is using this assessment as a means of discovery for use in subsequent proceedings, and that is not the purpose of an assessment.
- [61] I have not ruled on whether there was justification for commencing the lawsuit. I have merely decided that Mr. Welder was not acting on behalf of the company when he commenced the lawsuit, and the company is not responsible for paying his fees.
- [62] Mr. Peterson submits that I should award special costs against Mr. Welder because his conduct has fallen far short of the obligations placed on a solicitor to act with the utmost good faith and to uphold his obligations of loyalty and transparency as referenced to in the case of *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 34 quoted in the B.C. Court of Appeal decision of *Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385 at para.48.

- [63] Mr. Welder did not discuss the terms of his retainer with the client. Then he prepared a bill and did not send it to the client but forwarded it to the registered records office of the company which was his own office, knowing full well that Mr. Peterson and Mr. Gordon would not get notice of the account.
- [64] It was just by chance that they became aware of the account. They were not given an opportunity to discuss the accounts with him before Mr. Welder set the matter down for an assessment.
- [65] Mr. Peterson seeks special costs not only for the assessment but for commencing the lawsuit as well. On the basis that Mr. Welder committed egregious acts and persistently failed to comply with the Rules, he asks for a finding that his conduct was reprehensible.
- [66] These submissions should have been made at the hearing before Mr. Justice Betton but they were not addressed. The issue of costs of that action was adjourned and never followed up.
- [67] The complaints about Mr. Welder's conduct falling far below the standards imposed on a lawyer are apparently the subject of a Law Society proceeding, and I do not need to comment on them other than to say that the complete denial of the account addresses those issues, as they relate to the company having a financial obligation to pay an account that they did not receive.
- [68] Neither a review office nor the court has jurisdiction to order special costs of a review. *Aydin & Co. v. Schaber*, 2000 BCSC 925. Madam Justice Smith held that a registrar is not empowered to award costs beyond those on a party-and-party basis. Masters while sitting as registrars have the jurisdiction of registrars and do not fall within the definition of "court".
- [69] Justice Smith went on to conclude that the court does not have jurisdiction to award special costs of an assessment through the reference procedure set out in s. 70(17) of the Legal Profession Act either. She concluded that if there is reprehensible conduct at an assessment before a registrar, it should be regulated by registrars and, in the case of members of the legal profession, by the Law Society, without resorting to the court to impose special or increased costs at review hearings.
- [70] With respect to costs, s. 72 of the Legal Profession Act provides as follows:
- 72 (1) Costs of a review of a lawyer's bill must be paid by the following:
- (a) the lawyer whose bill is reviewed, if 1/6 or more of the total amount of the bill is subtracted from it;
 - (b) the person charged, if less than 1/6 of the total amount of the bill is subtracted from it;
 - (c) a person who applies for a review of a bill and then withdraws the application for a review.
- (2) Despite subsection (1), the registrar has the discretion, in special circumstances, to order the payment of costs other than as provided in that subsection.

Decision on Costs

- [71] I have allowed the first account, reduced the second account, and totally disallowed the third account as against Aztek. As such, the company was successful in this assessment. Absent special circumstances, the company would be entitled to their costs of this review.
- [72] I do, however, find special circumstances. It was clear that Mr. Peterson and Mr. Gordon did not comply with my disclosure order and only produced those resolutions that they chose to produce.
- [73] Mr. Gordon, a director of Aztek, sat with Mr. Peterson at counsel table. I had to remove him from counsel table because of his histrionic responses to Mr. Welder's evidence. I conclude that he meant no disrespect to the court but is a highly reactive individual and could not contain himself. After all the melodramatic reactions, he then declined to take the stand and respond to those aspects of Mr. Welder's evidence with which he so clearly disagreed. He was eager to jump up from the back of the courtroom to make comments, but he refused to take the witness stand.
- [74] Mr. Peterson conducted the hearing on behalf of the Aztek. His conduct at the hearing was courteous and he was well-prepared, but the majority of his submissions related to Mr. Welder's alleged interference with the corporate governance of Aztek and had little to do with his legal account. I said earlier that Mr. Welder appeared to have another agenda. It was clear that the same applies to Mr. Peterson who spent most of his time trying to portray Mr. Welder's conduct as reprehensible, presumably to support his claim for special costs. He was most concerned that Mr. Welder had some of his personal documents from a legal file he gave to Mr. Welder in his capacity as Mr. Peterson's lawyer. Mr. Welder said that he never acted as Mr. Peterson's lawyer and that Mr. Peterson gave him those documents and told him that he could use them. This is a matter for the Law Society and does not impact my assessment of legal fees.
- [75] The special costs claim was doomed from the start. I am advised that complaints have already been made to the Law Society.
- [76] As a result of this other agenda, Mr. Peterson extended the time for this hearing well beyond what it should have taken to review these three accounts. It took three and a half days for the evidence and a half day for submissions. I find this to be a special circumstance. I am exercising my discretion under s. 72(2) of the Legal Profession Act which says:
- (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.
- [77] I deny Aztek's costs of this assessment.

"B.M. Young"

Master Barbara M. Young

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