# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bernard LLP v. Michael Wilson & Partners, Ltd.,* 2026 BCSC 59

Date: 20260119
Docket: S1910615
Registry: Vancouver

Between:

**Bernard LLP**

Solicitor

And

**Michael Wilson & Partners, Ltd.**

Client

Before: Associate Judge Muir
(As Registrar)

## Reasons for Decision

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|---|---|
| Counsel for the Solicitor: | D.S. Jarrett<br>H.P. Swanson<br>(November 24 and 25, 2025) |
| The Client: | M. Wilson<br>(As Representative for the Client)<br>J. Schachter<br>(As Counsel for the Client on November 25, 2025) |
| Place and Dates of Hearing: | Vancouver, B.C.<br>November 24–26, 2025 |
| Place and Date of Judgment: | Vancouver, B.C.<br>January 19, 2026 |

# TABLE OF CONTENTS

## Introduction

[1] These reasons address the appointment of the solicitor, Bernard LLP ("Bernard"), filed September 23, 2019, to review its bill dated October 11, 2018. The bill is for $12,421.05 in fees, $3,315.15 in disbursements, $44.70 for scanning, and $907.06 in taxes, for a total of $16,687.96.

[2] The work covered by the bill was performed between August 16, 2018 and October 4, 2018.

[3] Two counsel worked on the file during that period, David Jarrett, a partner with the law firm, and Anne Amos-Stewart, an associate.

## Background

[4] Both the background to the retainer and the underlying litigation, as well as the background to the hearing before me, are important to an understanding of the circumstances.

[5] As is noted in Mr. Jarrett's affidavit sworn September 27, 2019 and filed in support of the appointment, a retainer agreement was entered into between the client, Michael Wilson & Partners Ltd. ("MWP") and Bernard dated October 23, 2013 (the "retainer agreement").

[6] Michael Wilson attended this hearing (via audio conference only) as a representative of MWP. He was the instructing mind for MWP and the main contact with Bernard throughout the underlying litigation.

[7] The retainer agreement relates to proceedings described as: Collection Proceedings against Desiree Resources Inc. ("Desiree") and Robin Dow ("Dow") for unpaid fees amounting to USD $584.399.31 plus contractual interest. I gathered during the hearing, however, that the amount claimed by MWP was significantly greater.

[8] At this hearing, I was provided by Mr. Jarrett with the body of an affidavit sworn by Mr. Wilson on February 8, 2021 (the "Wilson Affidavit"). It was sworn in

support of MWP's adjournment application for the registrar's hearing scheduled to proceed on that date. I do not have the documents exhibited to the Wilson Affidavit, but it sets out some of the background to the underlying litigation, which was not in dispute. This is the only affidavit I have on behalf of MWP.

[9] The Wilson Affidavit indicates that MWP is a "significant law firm of substance and repute". Mr. Wilson stated in submissions that he is called to the bars of the United Kingdom and two states in Australia There is, however, no evidence in support of that assertion.

[10] The Wilson Affidavit, in very simple terms, deposes that MWP was engaged by a hedge fund in relation to a large hydrocarbon block located in South Kazakhstan. The hedge fund withdrew and Desiree and Dow, who were in Vancouver, took over and engaged MWP to further the development and financing of the hydrocarbon block. Desiree and Dow allegedly defaulted on their obligations to MWP and Bernard was retained and sued Desiree and Dow on behalf of MWP.

[11] The retainer agreement is by way of a letter addressed from Peter Swanson, also a partner at Bernard, to Mr. Wilson. According to the retainer agreement, Mr. Swanson is said to be the lawyer primarily responsible for seeing the legal work is carried out.

[12] In the Wilson Affidavit, Mr. Wilson deposed that Bernard failed to make any progress on the matter and that the strategies recommended by Bernard, including for MWP to stand on its contractual lien, to seek summary judgement, to attend mediation, and to obtain proper document disclosure, all failed. In addition, Mr. Wilson deposed that Bernard, "were always in effect retained as MWP's local agents, with MWP doing most of the work itself, [Bernard] wrongly staffed and overbilled throughout, wasting much time and costs". These allegations were put to Mr. Jarrett in cross-examination, and they were denied.

[13] A notice of intention to act in person was filed by MWP on September 23, 2019.

[14] As noted, Bernard filed its appointment on September 23, 2019. It was scheduled to be heard on October 10, 2019.

[15] MWP then filed an appointment on October 3, 2019 to review all the bills of Bernard and to examine the agreement between MWP and Bernard. That was scheduled for October 31, 2019.

[16] Bernard's appointment was adjourned to October 31, 2019 for a pre-hearing conference.

[17] On October 31, 2019, Master Baker ordered, amongst other things:

a) that the two appointments were to be scheduled at the same time;

b) that the appointments were adjourned to a four-day hearing to be set;

c) that any hearing date would be peremptory on MWP;

d) that any affidavits to be relied upon by MWP were to be served at least one month in advance of the hearing; and

e) that the parties were to exchange indexes to their respective books of documents they intended to rely on at the hearing, thirty days in advance.

[18] The appointments were rescheduled for February 8 to 11, 2021.

[19] As noted above, MWP provided the Wilson Affidavit in support of an adjournment of those dates, despite them being peremptory on MWP, so that Mr. Wilson would be able to attend the fee assessments in person. Something that was precluded by the COVID-19 pandemic travel restrictions. By order of Master Vos (now Associate Judge Vos) made that day, the hearing was adjourned to a date when it could be held in person.

[20] I note that in his submissions before me, Mr. Wilson repeatedly said that he had at all times sought to appear remotely for this assessment. That is clearly not the case. Had he been willing to appear remotely, the assessment would have

proceeded on the February 2021 dates and would not have been delayed to more than four-and-a-half years later.

[21] At a pre-hearing conference held September 16, 2024, Registrar Gaily ordered the appointments to be set for four days commencing November 25, 2024. That date was again made peremptory on MWP. In addition, MWP was to file and serve any affidavits it intended to rely on at the hearing by October 31, 2024, and the parties were to exchange indexes to their books of documents by October 31, 2024.

[22] The November 25, 2024 hearing dates were adjourned to March 24, 2025 for four days, I gather, due to Mr. Wilson having been afflicted with pneumonia.

[23] On January 9, 2025, a consent order was entered that provided for the adjournment, and included that the March 24 to 27, 2025 dates were peremptory on MWP, and for costs of $1,000 to be forthwith payable to Bernard by MWP, in any event of the cause.

[24] Although Mr. Wilson travelled to Vancouver for the March 24 to 27, 2025 hearing dates, no registrar was available. A pre-hearing conference was convened March 24, 2025 and Associate Judge Robertson made orders, including that the hearing be adjourned to November 24, 2025 for four days, that the hearing was peremptory on MWP, that MWP could appear at that hearing by MS Teams, and that MWP would serve any “additional” affidavits and documents along with an index for same by October 31, 2025. In addition, the costs and disbursements for that hearing were adjourned to be determined at the November 24, 2025 hearing.

[25] Both appointments were set before me on November 24, 2025.

[26] Mr. Wilson appeared by MS Teams from Kazakhstan. However, for some reason, he was unable to engage his video and thus he was appearing by audio only.

[27] Unfortunately, despite the Wilson Affidavit identifying that MWP has considerable experience in having lawyer’s bills assessed in the United Kingdom,

the Bahamas, and Sidney and Canberra in Australia, and despite the various orders and prior appearances on these appointments, MWP did not file a hearing record for its appointment as is required by Rule 23-6(3.1) of the *Supreme Court Civil Rules*, nor did it serve the required index on Bernard by October 31, 2025 as required by the order of Robertson A.J.

[28] As a result, I had no materials from MWP for their appointment and Bernard had no notice of any additional materials that might be relied upon.

[29] Mr. Wilson appeared to be under the mistaken impression that he had “filed” a record with the court, consisting of several bundles or binders of documents, on previous hearings and that he expected the court to retain those bundles as part of the court record. He submitted, without evidence, that the court had “lost” these important records previously and that he had had to resubmit them.

[30] That is not how the BC Supreme Court registry works. Hearing records and other documents are returned to the party at the end of a hearing. If the materials are not retrieved by the party, they are destroyed. The documents are not “filed” and do not become a part of the court “record”.

[31] In addition, the court registry does not accept bundles of documents for filing. For a document to be filed or retained by the court, it would have to be attached to a pleading, as an exhibit to an affidavit, or be made an exhibit on a hearing.

[32] I was quite unable to convince Mr. Wilson of those facts. He insisted that the documents had been filed and formed a part of the court record and hence he was entitled to rely on them at this hearing.

[33] Out of an abundance of caution, I did call up the court file to ensure that these materials had not somehow been filed. I was correct. They had not.

[34] Mr. Wilson said that this “record” could be duplicated by a law firm that he uses in Vancouver in short order and, hence, I stood the matters down until 2 p.m. so that his materials could be provided.

[35] Four binders of materials were provided to me at 2 p.m. They were entitled "MWP's Bundle of Updated Documents for the Hearing on 241125". They did include the appointment and the bills to be reviewed and a bundle of correspondence in one binder, and three additional binders of documents.

[36] There were no affidavits and hence no evidence from MWP in support of its position on the appointment.

[37] Bernard objected to the appointment being heard based on this "record". On a review, I saw the binders included a bundle of 180 pages of documents identified only as "correspondence" and three binders containing an additional 339 tabs of documents.

[38] Bernard also pointed out that the documents from tab no. 123 on were all dated after the termination of the retainer. At least two were said to be without prejudice.

[39] Bernard submitted that the materials provided did not comply with the rule, they were essentially a document dump and that although particulars of the various issues MWP had with the accounts had been provided, they were not in the binders and there was no way for Bernard to have had notice of the evidence in support of the MWP issues. Bernard argued that this was an attempt at hearing by ambush and, as such, they were prejudiced and that the appointment should be dismissed. Bernard pointed out that the hearing and all previous hearings were peremptory on MWP and that they had an obligation to be ready to proceed based on proper material.

[40] Mr. Wilson submitted that there was no basis for the appointment to dismissed, as they had now "filed" this record three times. Again, there was no evidence in that regard. He also argued, without evidence, that MWP was prejudiced by the fact that Bernard had their file and retained possession of it, but he asserted that the record MWP had produced was an accurate and faithful record of the history of the retainer. He argued that the materials in the bundles fully supported MWP's

position regarding the retainer and their objections to the accounts and the fee agreement.

[41] After a review of the materials provided by MWP, I agreed with the submissions of Bernard and concluded that the matter could not proceed fairly or expeditiously.

[42] I agreed there was prejudice to Bernard in not knowing the case they had to meet and being able to properly prepare.

[43] Curing that prejudice would have required a further adjournment. I concluded proceeding in that manner and the additional delay in an assessment that was already more than six years old would be very prejudicial to Bernard.

[44] As the hearing was peremptory on MWP, I dismissed its appointment.

[45] Mr. Wilson then asked for the hearing to be adjourned until the next morning, so that he could have counsel attend. I agreed to adjourn until the following morning.

[46] The morning of November 25, 2025, Mr. Schachter appeared as counsel for MWP to seek an adjournment of the Bernard appointment, which I refused. Mr. Schachter then sought to be excused, and we proceeded again with Mr. Wilson appearing on behalf of MWP.

[47] As the proceeding would be solely about the Bernard appointment, Mr. Jarrett asked, and I directed, that Mr. Swanson, who had appeared with Mr. Jarrett on November 24, the first day of the hearing, not be required to attend further.

## The Bernard Appointment

### Procedural objections

[48] There were some, what I will refer to as “procedural objections”, taken during the proceedings.

[49] Mr. Wilson objected that MWP had not been served with the Bernard hearing record. Upon a review of the service made and the orders regarding service, I concluded that Mr. Wilson had been accorded proper service. Indeed, as the hearing progressed, he had no apparent difficulty following along with references to various pages in the record.

[50] Mr. Jarrett handed up written submissions in support of the Bernard appointment. MWP objected. Mr. Wilson argued that he should have been given notice of the submissions. I determined that I would not use them. That was not sufficient for Mr. Wilson, and he insisted that they be returned to Mr. Jarrett and "stricken from the record". I pointed out that they did not form part of the record, they had not been filed, and I returned the submissions to Mr. Jarrett.

[51] Mr. Wilson later objected that Mr. Jarrett was subverting that order by reading parts of the written submission. I overruled that objection.

[52] MWP objected that there were materials included in the Bernard affidavits that were privileged and confidential and related to the ongoing action by MWP against Desiree and Dow. As the filed affidavits are available to the public and hence potentially to counsel for Desiree and Dow, Mr. Wilson argued that Bernard was acting in breach of its fiduciary obligations to MWP. I resolved that issue by ordering the file be sealed.

[53] There was also objection taken by MWP to Mr. Jarrett speaking to his own affidavit. I informed Mr. Wilson that that was common and accepted practice at fee assessment hearings.

[54] Bernard objected to Mr. Wilson's stated intention of cross-examining Mr. Jarrett on his affidavit, as Bernard had not been provided notice of that intention. I allowed cross-examination to proceed, and Mr. Swanson returned to the hearing to act as counsel for Bernard during the cross-examination.

### Legal Framework

[55] The framework for a fee assessment is set in the *Legal Profession Act*, S.B.C. 1998, Ch. 9 [*Act*]. Section 71 of that *Act* outlines the matters to be considered as follows:

> **Matters to be considered by the registrar on a review**
>
> 71 (1) This section applies to a review or examination under section 68 (7), 70, 77 (3), 78 (2) or 79 (3).
>
> (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:
>
> (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
>
> (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
>
> (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
>
> (a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;
>
> (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
>
> (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including
>
> (a) the complexity, difficulty or novelty of the issues involved,
>
> (b) the skill, specialized knowledge and responsibility required of the lawyer,
>
> (c) the lawyer's character and standing in the profession,
>
> (d) the amount involved,
>
> (e) the time reasonably spent,
>
> (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
>
> (g) the importance of the matter to the client whose bill is being reviewed, and
>
> (h) the result obtained.
>
> (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

[56] Section 73 deals with the remedies that are available to the registrar:

> **Remedies that may be ordered by the registrar**
>
> 73 (1) On the application of a party to a review under this Part, the registrar may order that a party
>
> (a) be permitted to pay money in instalments on the terms the registrar considers appropriate, or
>
> (b) not be permitted to collect money on the certificate for a period the registrar specifies.
>
> (2) On a review under this Part, the registrar may
>
> (a) give a certificate for the amount the registrar has allowed the lawyer for fees, charges and disbursements, and
>
> (b) summarily determine the amount of the costs of the review and add it to or subtract it from the amount shown on the certificate.
>
> (3) If a registrar gives a certificate under subsection (2), the registrar must add to the amount certified an amount of interest calculated
>
> (a) on the amount the registrar has allowed the lawyer for fees, charges and disbursements, exclusive of the costs of the review,
>
> (b) from the date the lawyer delivered the bill to the date on which the certificate is given, and
>
> (c) at the rate agreed to by the parties at the time the lawyer was retained or, if there was no agreement, at the same rate the registrar would allow under the Court Order Interest Act on an order obtained by default.
>
> (4) If a registrar gives a certificate under subsection (2) that requires that the lawyer refund money to another person, the registrar must add to the amount to be refunded an amount of interest calculated
>
> (a) on the amount the lawyer is required to refund to the other person,
>
> (b) from the date the money to be refunded was paid to the lawyer to the date on which the certificate is given, and
>
> (c) at the same rate the registrar would allow under the Court Order *Interest Act* on an order obtained by default.

**MWP's Position**

[57] I will deal first with the position of MWP, as the Bernard evidence and Mr. Wilson's cross-examination of Mr. Jarrett are directed both in support of Bernard's account and in answer to those issues raised by MWP.

[58] I note that Mr. Wilson referenced the particulars provided of the issues taken with the Bernard accounts in his submissions. I had to ask him to read the ones he was referring to, as they were not in the Bernard hearing record and they were not included in MWP's bundles of documents.

[59] As noted above, MWP took the position that the retainer of Bernard was a limited one, that they were retained as local agents only to deal with issues arising in the jurisdiction, such as proper formatting of documents, filings, and other things and that MWP itself would do the legal work required.

[60] In submissions, Mr. Wilson argued, without evidence, that MWP was trying to keep costs to a minimum and that it was always clear to Bernard that MWP wanted minimal service, not the full service that Bernard seeks to recover from August 18 through October 4, 2018 on the invoice in question.

[61] Mr. Wilson argued, without evidence, that MWP did not ask for the work covered on the invoice to be performed. He argued that the work was of no value, that it was unnecessary, that the mediation failed, and that the document application revealed no new documents. He indicated, again without evidence, that MWP had all the documents from the defendants in the underlying application previously and only got proper disclosure by efforts of new counsel recently.

[62] Mr. Wilson also argued that the engagement letter was clear that Mr. Swanson was to be the responsible partner with Mr. Paul Mooney doing the work.

[63] MWP's position was that it did not ask Mr. Jarrett to replace Mr. Swanson or approve of Mr. Jarrett acting. Further, that MWP did not approve of two partners from Bernard being involved, nor did it agree to the involvement of Ms. Amos-Stewart.

[64] Mr. Wilson argued that the invoice for the period in question had inadequate narrative, that what was included was short, cryptic, and meaningless, and that the invoice provided no meaningful information to the client of the work done.

[65] MWP's position was that the time entries on the invoice in question show great duplication. That there were multiple time entries for the same day and a duplication of tasks between Mr. Jarrett and Ms. Amos-Stewart.

[66] Mr. Wilson argued that the amount claimed on the invoice in question, of 37.1 partner hours and 30.4 associate hours in one month was grossly excessive, should not have been racked up, and was not necessary. He argued, without evidence, that the mediation was primarily between Dow and him. Thus, implying that the preparation done by Mr. Jarrett and included in the invoice in question was unnecessary. He argued that Mr. Jarrett suggested the mediation to churn fees and increase costs and then have Bernard sue MWP for recovery in a jurisdiction that would be partial to Bernard.

[67] Mr. Wilson argued that the work performed was not necessary, was not instructed, and was not proportionate.

[68] Mr. Wilson further argued that MWP could have drafted all the documents, but that Mr. Jarrett wanted to take over, increase his scope, and increase his fees. He said that Mr. Jarrett knew he could easily sue here and the court would ignore the MWP appointment and Bernard would get its bill rubber stamped.

[69] Mr. Wilson did admit that MWP went along with the mediation but argued that it failed and the document disclosure application failed. He said that MWP only got the required disclosure recently.

[70] Many of Mr. Wilson's submissions were directed to the entire retainer of Bernard by MWP. He argued that the underlying action was for recovery of a $600,000 legal bill from the defendants and that MWP had spent $200,000 on Bernard and a further $200,000 on new counsel. Further, that all the strategies of Bernard had failed throughout the retainer.

[71] MWP also took the position that it should be credited for interest on $50,000 being held in trust by Bernard. I note, however, that only $20,000 of that was a retainer and the balance was ordered as security for costs of the Desiree and Dow

defendants in the underlying action pursuant to a 2014 order of Madam Justice Fleming, as she then was. The latter, of course, is not before me.

[72] Mr. Wilson pointed out that Mr. Jarrett admitted on cross-examination that the retainer funds were in an interest-bearing account but said that MWP was not entitled to interest as it was to go to some “unidentified” entity, which I note Mr. Jarrett correctly referred to as the “Law Foundation”.

[73] Mr. Wilson correctly points out that there is no reference to interest being dealt with in this fashion in the fee agreement.

[74] Mr. Wilson argued that the money was MWP’s and should have been placed on deposit for MWP. That interest should have accrued at 5% and argues MWP is entitled to 5% of $50,000 = $2,500 per year for 13 years.

[75] Mr. Wilson argued that the fee agreement provided for a retainer of $10,000 but that Bernard had wrongly insisted on an additional $10,000.

[76] Further, Mr. Wilson argued that, based on the terms of the retainer agreement, Bernard was required to return the unapplied portion of the retainer to MWP upon termination of the engagement.

[77] He submitted that the failure to return the unapplied portion should not have occurred and was due to personal avarice and an intent to fund Bernard.

[78] Mr. Wilson also argued that Bernard was not entitled to interest on the unpaid account, as the retainer agreement provides that Bernard is only entitled to interest upon the account being due and payable and that the account is not due and payable until the result of this assessment is known.

[79] It was also MWP’s position that the disbursements charged were excessive, although the only disbursement Mr. Wilson referenced particularly was that for scanning in the amount of $44.70.

[80] In sum, MWP sought that the account of Bernard be reduced by two-thirds and that interest be credited to MWP on the $50,000 being held by Bernard in trust.

**Bernard's Position**

[81] Mr. Jarrett pointed out, as a preliminary point, that the hourly rates charged on the account in question (and, indeed, on the entire retainer) were significantly discounted from normal rates. Ms. Amos-Stewart charged MWP $200 per hour when her normal rate at the relevant time was $260 per hour. Mr. Jarrett charged $230 per hour when his normal rate was $335 per hour.

[82] Mr. Jarrett also noted that a further 15% reduction was applied to each account.

[83] He noted that there was time spent on the file after the period covered by this invoice, up to the termination of the retainer in September 2019, but that Bernard had not billed, and would not bill, MWP for this work. A pre-bill for this work was produced, which indicated that the substantive work done was by Mr. Jarrett and Ms. Amos-Stewart up to January 17, 2019, and resulted in Work In Progress of $2,291.00, less a 15% discount of $343.65, plus taxes and disbursements for a total of $2,102.36.

[84] As to the counsel involved in the file, Mr. Jarrett pointed out that s. 2 of the retainer agreement permits the involvement of others:

> 2. Lawyers Assigned
>
> Peter Swanson will be the lawyer primarily responsible to see that the legal work in this matter is carried out. Paul Mooney an associate with our firm will also be working on this matter. Other lawyers in our firm will be assigned if in our judgment that becomes necessary or desirable. Some of the work, including any necessary legal research, may be delegated where appropriate in our judgment to one or more other lawyers, articled students and legal assistants.

[85] Mr. Jarrett said that Mr. Wilson understood both he and Ms. Amos-Stewart were involved in this matter and took no objection. Mr. Jarrett advised that

Ms. Amos-Stewart was involved due to Mr. Jarrett having limited availability in July and August 2018.

[86] In support, Mr. Jarrett pointed to an email chain, commencing with Mr. Wilson's email of July 20, 2018 to Mr. Jarrett entitled "Compelling Dow & Desiree to Disclose and Produce":

> Dave,
>
> Have you filed this Motion yet as you promised you would and ASAP?
>
> If so send me a copy, if not why not?

[87] Mr. Jarrett responded on July 23, 2018, as follows:

> Michael,
>
> My associate, Anne (copied on this email) has prepared the necessary materials to apply for production of the sought after records. I have reviewed the same and expect that the package will be ready for filing and service tomorrow afternoon. As the application is based on my letter to opposing counsel of May 16, 2018 (copy attached) we don't feel that it is necessary for you to review the application materials before filing but please let me know if you would like to do so. We will send you filed copies in any event.
>
> We have not canvassed dates for the application with opposing counsel and we intend to initially unilaterally set the application for August 2. As is the normal practice between counsel, if opposing counsel is unavailable that day we will agree to move the application to a mutually convenient date that still allows for production in advance of my August 22 examination for discovery of Mr. Dow.
>
> In light of the fact that Anne has prepared the application and is familiar with the evidence to be argued and based on my limited availability in early August, she will argue the application with my input and feedback as necessary.
>
> Yours truly
>
> Dave

[88] This was followed by a further email from Mr. Jarrett to Mr. Wilson on July 24, 2018:

> Michael,
>
> As per my email from yesterday, we have now filed and served the attached application to compel production of the documents sought in my May 16, 2018 demand. The application will be heard on August 8 as that is the first date we are available and that complies with the court Rules for clear service

> days in advance of an application. We will keep you posted on opposing counsel's response.
>
> Yours truly,
>
> David S. Jarrett

[89] Mr. Jarrett also noted that no objection to the involvement of a "second fee earner" was raised until Mr. Wilson's email of January 25, 2019, where he stated:

> […]
>
> With reference to attached draft Bill, we did not approve or authorise a second fee earner being brought into, deployed and involved in our matters, and did not authorize the additional cost thereof.

[90] In response to the general assertion that the work done by Bernard was ill-founded, failed, and generally took an inordinate amount of time with no result, Mr. Jarrett testified on cross-examination that, in 2017 and 2018, there was a year when MWP failed to pay Bernard's invoices and Bernard did little or no work. Further, Mr. Jarrett testified that a year was taken up because MWP instructed, against Bernard's advice, that leave to appeal be sought regarding an interim application in the underlying litigation and, again, against Bernard's advice, because MWP instructed that it seek a review of that appeal decision.

[91] Mr. Jarrett argued that it did not lie in the mouth of MWP to complain of delays when they were due either to non-payment of Bernard accounts or to MWP's instructions. He testified that it was the non-payment of Bernard accounts that resulted in the additional $10,000 retainer being required by Bernard.

[92] Mr. Wilson cross-examined Mr. Jarrett as to why there was no mention of this non-payment of accounts in Mr. Jarrett's affidavit. Mr. Jarrett pointed out that those events preceded the issues that the appointment and, thus, the affidavit, addressed.

[93] Mr. Jarrett agreed that the mediation was an idea put forward by Bernard, but that it did so because of concern that the defendants might bring an application for dismissal for want of prosecution. His evidence was that the idea of a mediation was discussed with Mr. Wilson and Bernard was instructed to proceed.

[94] As to the suggestion that the mediation failed, Mr. Jarrett pointed out that mediations are not always successful but, regardless, they are useful.

[95] On cross-examination, Mr. Jarrett was asked to accept that both the document production application and the examination for discovery for which fees were charged on the invoice in question were both unsuccessful.

[96] Mr. Jarrett pointed out that the defendants brought a cross-application for document discovery. He said that the examination for discovery was terminated on objection by the defendants that the document applications should be completed first. Subsequently, the document applications were adjourned and could not be completed prior to MWP terminating the retainer.

[97] Two email chains are referenced in support.

[98] First, there is a lengthy email of Ms. Amos-Stewart dated September 27, 2018, regarding the adjournment of the MWP application, seeking documents from MWP responding to the defendants' document application, and a request that MWP produce its entire file to Bernard.

[99] Ms. Amos-Stewart followed up by an email of October 1, 2018. Mr. Wilson responded on October 1, 2018 as follows:

> Thanks we will try and have a look and check our files this week amidst our other deadlines and commitments, it will not be easy, and we are pretty sure we produced all so this is just a smoke screen and try on by Dow.

[100] Next is an email from Ms. Amos-Stewart dated January 14, 2019, apparently in response to an email from MWP enclosing documents. The subject line is "Re: MWP Further Disclosure: General and Privileged".

[101] This was followed by an email from Mr. Wilson dated January 17, 2019, which states:

> Dear Anne,
>
> Thanks for the email, have you finished uploading the files from the Drop Box into your system?

> Obviously, whilst we recognize the delay has been at our end since October, for which we apologise, we are anxious to pile [the] pressure on Dow and Desiree to pay, as they easily can, if they are so minded, or forced, as you know. So far they have got away scot free with not paying us since 2012, which is appalling.
>
> Kind regards
>
> Michael E. Wilson
>
> Director

[102] Mr. Jarrett then responded by email of January 17, 2019:

> Michael,
>
> We will review the new documents once our outstanding invoice from October 2018 is paid in full. The invoice as emailed to you on October 12 is attached.
>
> Yours truly
>
> David S. Jarrett

[103] That was followed by the email from Mr. Wilson, referenced above, taking issue with the invoice and the second fee earner.

[104] Mr. Jarrett also dealt with the question of interest on the $20,000 MWP retainer. He pointed out that interest earned on trust accounts is, by law, paid to the Law Foundation of BC.

[105] As to the alleged task duplication on the invoices, Mr. Jarrett denied any such duplication and his evidence was that his billing was mainly for preparation and attendance at the examination for discovery and that Ms. Amos-Stewart mainly billed for dealing with the document disclosure applications.

[106] He also took the position that Mr. Wilson was aware of and, indeed, instructed the work done.

## Analysis

### The complexity, difficulty, or novelty of the issues involved

[107] The matters covered by this invoice were not complex, difficult, or novel. They were common steps in litigation proceedings.

**The skill, specialized knowledge and responsibility required of the lawyer**

[108] Similarly, there was no specialized knowledge required for these procedures.

**The lawyer's character and standing in the profession**

[109] Other than vague allegations made by MWP, unsupported by any evidence, there was no suggestion that either Mr. Jarrett or Ms. Amos-Stewart were anything other than members of the bar with a standing consonant with their years of experience.

[110] I reject the assertion that Mr. Jarrett or others at Bernard were driven by avarice or personal considerations to overbill, take work from MWP for themselves, or otherwise attempt to churn fees. The suggestion that they did so knowing that the courts in this jurisdiction would be biased in their favour is simply unfounded.

**The amount involved**

[111] The amount involved was significant. Whether that is taken from the face amount on the retainer agreement or the amount referenced in submissions, it was clearly significant to MWP.

**The time reasonably spent**

[112] I have carefully reviewed the account and the evidence of the work done. In my view and based on my experience as a registrar on fee reviews, the time spent was reasonable.

[113] MWP alleged significant duplication of effort. In my view, that allegation is not borne out on a review of the account. Even if there was some duplication, that would be captured by the reduction in hourly rates by both counsel and the overall fee reduction of 15%.

[114] Although Mr. Wilson argued that the work done was neither instructed by MWP nor required, that is clearly not the case. Examinations for discovery are required in virtually any litigation and would certainly be expected in litigation of this

sort. Document disclosure applications are often required and certainly, here, were instructed by MWP, as evidenced by Mr. Wilson's email. Mr. Wilson admitted that the disclosure efforts continued with new counsel. The evidence clearly shows that MWP produced further documents to Bernard in response to the defendants' cross-application.



**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**

[115] The hourly rates charged by both counsel on this account were well below acceptable rates, and below the hourly rate generally charged by both counsel. The rates were clearly reasonable.

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

[116] As noted above, I concluded that the matter was of considerable importance to MWP.

**The result obtained**

[117] MWP complains that all activities undertaken by Bernard on its behalf failed. That, of course, is in reference to the entire retainer and not before me. The activities reflected in this account were an unsuccessful mediation, an examination for discovery that could not be completed due to the defendants' document application, and a document application that could not be completed due to the defendants' cross-application requiring an adjournment.

[118] I am satisfied that the mediation was brought, at least partially, for tactical reasons. That it was unsuccessful does not reflect on the quality of the work done.

[119] The failure to complete the latter two tasks was due to two factors: Delay on the part of MWP in producing documents, as admitted in Mr. Wilson's email of January 17, 2019, and the refusal of MWP to pay Bernard's account rendered in October 2018, which is the subject of this assessment.

### Other issues

[120] MWP asserts that Bernard was retained on a limited scope retainer to provide local agent assistance and not substantive legal work, which would be done by MWP itself.

[121] That is not reflected in the retainer agreement, nor was any such written instruction provided to me. Had Bernard understood that its retainer was limited, it would have had obligations imposed by the *Code of Professional Conduct for British Columbia,* which provides:

> **Limited scope retainers**
>
> 3.2-1.1 Before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

[122] Turning to the work done as reflected in the account being assessed, there is clear evidence in the emails from Mr. Wilson that substantive legal work was required by MWP and understood by him to be being undertaken.

[123] I accept the evidence of Mr. Jarrett and Ms. Amos-Stewart as to the work performed. It is confirmed in important details by the emails referenced. The work product is attached to the affidavits in support, and it is competently prepared.

[124] As a result, I conclude that the work performed by Bernard was reasonably necessary and proper to conduct the proceeding, and that all such work was explicitly or implicitly authorized or approved by the client, MWP.

[125] In all of the circumstances, I see no reason to reduce the fees presented, as sought, or at all.

[126] As to the disbursements, they are largely backed by invoices attached to the affidavit of Mr. Jarrett and his evidence with respect to them. The only disbursement for which I have no support, for which I would expect to see some evidence regarding its calculation, is that of the scanning. I will therefore order that the

scanning expense of $44.70 plus $5.37 (as 12% taxes) be deducted from the account.

[127] MWP argued that the invoice in question was overly cryptic. I have reviewed the invoice and conclude that it is reasonably descriptive of the work undertaken and the time spent.

[128] MWP argued that Bernard should have returned any excess of the retainer deposit when its services were terminated. Bernard was entitled to hold the retainer as security for the account as it would ultimately be assessed, including interest and costs. Given the pending assessments, there was no entitlement to a return of any "excess" as the amount remained to be determined and thus the retainer could not be "applied".

[129] MWP argues that Bernard is not entitled to interest on this account as the account never became due and payable. That is answered by s. 73(3) of the *Act,* set out above. The registrar must include interest at the 12% rate agreed to in the retainer agreement, as noted in that section.

[130] MWP raises an issue as to interest on the funds in trust. The *Act* deals with interest on trust funds:

> **Trust account — interest rate and related matters**
>
> 62 (1) A lawyer or law firm must deposit money received or held in trust in an interest bearing trust account
>
> (a) at a savings institution designated under section 33 (3) (b), and
>
> (b) that is in compliance with subsection (1.1) of this section.
>
> (1.1) A trust account referred to in subsection (1) must bear interest at a rate approved by the board and any charges or fees charged to the foundation in respect of the account must be charged at an amount approved by the board.
>
> (2) Subject to subsection (5), a lawyer or law firm who is credited by a savings institution with interest on money received or held in trust,
>
> (a) holds the interest in trust for the foundation, and
>
> (b) must remit the interest to the foundation in accordance with the rules.
>
> (3) The benchers may make rules

> (a) permitting a lawyer or law firm to hold money in trust for more than one beneficiary in the same trust account, and
>
> (b) respecting payment to the foundation of interest on trust accounts.
>
> (4) A relationship between a lawyer or law firm and client or a trust relationship between a lawyer or law firm, as trustee, and the beneficiary of the trust does not make the lawyer or law firm liable to account to the client or beneficiary for interest received by the lawyer or law firm on money received or held in an account established under subsection (1).
>
> (5) On instruction from a client, a lawyer or law firm may place money held on behalf of the client in a separate trust account, in which case
>
> (a) this section and the rules made under it do not apply, and
>
> (b) interest paid on money in the account is the property of the client.



[131] There does not appear to have been any discussion between MWP and Bernard or advice from Bernard to MWP about placing the retainer trust funds in a separate trust account, as provided for in s. 62(5) of the *Act*.

[132] I do consider that a law firm has an obligation to a client, where funds are held in trust for any length of time, to advise the client of the availability of a segregated account.

[133] I do not accept that placing the $20,000 at issue in a segregated account would have resulted in interest in anything like the percentage rate pressed by MWP. No evidence was provided in support of its assertion regarding interest.

[134] I will order, however, that MWP be credited with interest at the pre-judgement interest rate as provided for in, and calculated in accordance with, the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, from the date of deposit of those retainer funds to the date of this judgement.

[135] The issue of interest on the $30,000 being held by Bernard as security for costs in the underlying action is not before me and I make no order about those funds.

## Conclusion

[136] Bernard will have costs certified in accordance with the account being assessed, with a deduction of $44.70 plus 12% taxes of $5.37 for the scanning charge. Bernard will have interest on the outstanding amount from the date of the invoice to the date of these reasons at the rate of 12% per annum.

[137] MWP is to be credited with pre-judgement interest on the $20,000 retainer from the date of each payment of $10,000 to the date of these reasons, as provided for in, and calculated in accordance with, the *Court Order Interest Act*.

## Costs

[138] The parties indicated that they would want to make submissions regarding costs after receiving these reasons and that written submissions would not suffice.

[139] Hence, there is liberty to seek a date from Supreme Court Scheduling to have a hearing on the costs matter set before me. I expect that the hearing date to be set promptly. If that is not arranged within 30 days of the date of these reasons, the parties have leave to seek to appear before me to resolve any issues that have arisen.

[140] For the assistance of the parties, I am guided on costs by s. 72 of the *Act*, which provides:

> **Costs of a review of a lawyer's bill**
>
> 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.

[141] The parties should provide draft bills of costs for the costs hearing so that costs can hopefully be determined without a further sitting. I also remind MWP that a hearing record is to be provided in accordance with the *Rules*.

"Muir. A.J."