



Civil Resolution Tribunal

Date Issued: July 14, 2020

File: SC-2019-009613

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Waterman v. Wightman*, 2020 BCCRT 782

BETWEEN:

LARRY WILLIAM WATERMAN

APPLICANT

AND:

TIFFANY MARGARET WIGHTMAN

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about non-payment for services rendered. The applicant, Larry William Waterman (Dr. Waterman), is a registered psychologist. He says that the respondent, Tiffany Margaret Wightman, failed to pay for services he provided as an expert witness. He claims \$2,428.33 for an unpaid invoice.

2. Ms. Wightman says that Dr. Waterman's invoice is unreasonable, and in any event, the CRT does not have jurisdiction to decide this matter because it is before the Provincial Court.
3. Dr. Waterman is self-represented. Ms. Wightman is represented by her lawyer, Jesse Stamm.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
6. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUES

8. The issues in this dispute are:

- a. Does the CRT have jurisdiction to decide this dispute?
- b. If so, does Ms. Wightman owe Dr. Waterman for his services?

BACKGROUND, EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant Dr. Waterman bears the burden of proof on a balance of probabilities. I have only referenced the evidence and arguments to the extent necessary to explain my decision. I note that while Ms. Wightman filed a Dispute Response and made submissions, she chose not to submit any evidence, despite being provided with the opportunity to do so.
10. It is undisputed that Ms. Wightman and her former husband jointly retained Dr. Waterman to conduct an assessment and prepare a report for their Provincial Court family law action, and each agreed to pay half the cost. Ms. Wightman signed an “Informed Consent Agreement” acknowledging she was hiring Dr. Waterman for his services on a “retainer basis” and that his services were considered part of the litigation process. It is undisputed that Dr. Waterman completed the assessment and was paid in full for his report, which was dated April 1, 2019.
11. Ms. Wightman’s legal counsel, Mr. Stamm, advised Dr. Waterman by email on June 28, 2019 that the court had granted leave to call Dr. Waterman as a witness at a hearing scheduled for August 21 and 22, 2019. The email advised Dr. Waterman that Ms. Wightman and her former husband did not agree on who would bear the costs of Dr. Waterman’s attendance and asked Dr. Waterman if he required a subpoena.
12. Dr. Waterman replied to the email advising that a subpoena would not be necessary, so long as his retainer was paid 2 weeks before his scheduled court attendance. In the email he set out the amounts he charges for a half-day and a full-day attendance, including preparation, travel time, and other associated expenses.
13. On July 8, 2019, Mr. Stamm served Dr. Waterman with a subpoena to attend the hearing on August 21, 2019, along with \$500 for conduct money in accordance with

the court rules for issuing a valid subpoena. Mr. Stamm later advised Dr. Waterman by email that did not intend to provide Dr. Waterman with a further retainer and said he trusted that Dr. Waterman would “honor the subpoena”.

14. Dr. Waterman complied with the subpoena and attended court on August 21, 2019. He says that he waited for “most of the morning” and was then informed that he would not be testifying that day and was required to return the following day. Dr. Waterman returned on August 22, 2019 to testify. Ms. Wightman submits that Dr. Waterman’s testimony was just under 3 hours in length.
15. Dr. Waterman issued an invoice dated August 26, 2019 for his court attendances. The total invoice was \$4,856.67, for the following:
 - a. 3 hours of preparation time - \$300 per hour (\$900),
 - b. Travel time charges for 3.5-hour return trips to Victoria from Nanaimo - \$200 per hour (\$700 x2),
 - c. 2 half-day testimony charges - \$1,000 flat rate (\$1,000 x2);
 - d. Mileage charges for 2 days of travel - \$0.58 per kilometre (\$139.20 x2),
 - e. 2 lunch charges (\$20 x2), and
 - f. Parking (\$7.00).
16. It is undisputed that Ms. Wightman’s former husband paid half of Dr. Waterman’s invoice. Dr. Waterman’s claim is for Ms. Wightman’s \$2,428.33 share.

Does the CRT have jurisdiction to decide this matter?

17. Ms. Wightman argues that the CRT does not have jurisdiction to hear this matter because the question of who should pay the cost of Dr. Waterman’s court attendance is currently before the Provincial Court. Ms. Wightman says she applied for an order that her former husband pay Dr. Waterman’s costs. She says because

the court has not yet ruled on that application, the CRT cannot order her to pay for Dr. Waterman's services. I disagree for the following reasons.

18. The issue currently before me is an alleged contractual issue between Ms. Wightman and Dr. Waterman, and to what extent Ms. Wightman owes Dr. Waterman for services he provided. The order made in this dispute as to Ms. Wightman's obligation to Dr. Waterman has no bearing on the issue Ms. Wightman has asked the court to rule on, which is whether the other party in that action should bear an expense in the context of that litigation. I have no evidence before me to suggest that the amount of Dr. Waterman's invoice for services is before the court.
19. If I order Ms. Wightman to pay Dr. Waterman for his services, it does not interfere with any order the court makes about who should bear the cost of Dr. Waterman's court attendance. If Ms. Wightman's former husband is ordered to pay the full amount of Dr. Waterman's cost, he can simply reimburse Ms. Wightman the amount the CRT orders her to pay, if anything.
20. Therefore, I find the CRT has jurisdiction to decide this dispute under its small claims jurisdiction in section 118 of the CRTA.

Does Ms. Wightman owe Dr. Waterman for his services?

21. In her Dispute Response, Ms. Wightman says she had no contractual obligation or agreement to pay Dr. Waterman for his court attendance. However, in her submissions, Ms. Wightman acknowledges that Dr. Waterman testified as an expert witness and he is entitled to be compensated as such for his testimony on August 22, 2019. It is the reasonableness of several items on Dr. Waterman's invoice that Ms. Wightman disputes. Therefore, I find that the issue to be determined is whether Ms. Wightman must pay the full amount of Dr. Waterman's invoice or whether some lesser amount is warranted.
22. While the Informed Consent Agreement in evidence acknowledges that Ms. Wightman hired Dr. Waterman on a "retainer basis", there is no separate retainer agreement in evidence for Dr. Waterman's services. I find from the contents of the

Informed Consent Agreement and the parties' submissions that when Dr. Waterman was hired, he charged \$295 per hour, plus GST, and that Ms. Wightman agreed to pay the estimated cost of his services up front in advance of Dr. Waterman providing the service.

23. The Informed Consent Agreement does not specifically address the potential for Dr. Waterman to be called as a witness at a court proceeding or the anticipated cost of that service. Dr. Waterman's evidence suggests that it is his practice for he or his staff to advise clients verbally about how reports and related legal matters will be conducted in terms of the retainer arrangement, which I accept was done in this case. Further, I find that in hiring Dr. Waterman in the context of the litigation process, Ms. Wightman was aware when she hired him of the potential that his services would include testifying as an expert witness about his report.
24. I also note that the *Provincial Court (Family) Rules* contemplate that someone who prepares the type of report Ms. Wightman hired Dr. Waterman to prepare can be called as a witness at trial, with leave of the court. I infer from the evidence and submissions that it was Ms. Wightman who applied for the order that Dr. Waterman appear in court for cross-examination. I find that she did so, knowing that Dr. Waterman would charge a fee for his attendance and that the terms of their agreement were that he would be paid in advance.
25. However, when Dr. Waterman advised Ms. Wightman, through Mr. Stamm, of his fees to attend court, rather than trying to come to an agreement about the amount, Ms. Wightman simply refused to pay him anything and issued a subpoena to compel his attendance. The power of a subpoena compels a witness, even an expert witness, to attend court or face potential arrest. Under other circumstances, given his agreement with Ms. Wightman, Dr. Waterman could have chosen not to provide his services until after he was paid.
26. Although Ms. Wightman might not have been aware of the specific amounts Dr. Waterman would charge for his court attendance, I find that the terms of their agreement were that Ms. Wightman would pay Dr. Waterman's reasonable invoice

for this service, bearing in mind his hourly rate of \$295, plus GST. In refusing to pay Dr. Waterman for his court attendance on a retainer basis, I find that Ms. Wightman breached her contract with Dr. Waterman.

27. Damages for breach of contract are generally intended to place an applicant in the position they would have been in if the contract had been carried out as agreed: *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at paragraph 39. This does not necessarily mean that Ms. Wightman was obliged to pay whatever Dr. Waterman invoiced. As I noted above, I find that Ms. Wightman agreed to pay Dr. Waterman's reasonable invoices.
28. Ms. Wightman raises several arguments about the reasonableness of Dr. Waterman's invoice. I will address my findings on the reasonableness of each item on Dr. Waterman's invoice below.

Preparation Time

29. Ms. Wightman argues that 3 hours of preparation time is unreasonable. She says that 1 hour should have been sufficient, since only 4 months had elapsed since Dr. Waterman had finalized his report. She also says she agreed to Dr. Waterman's \$295 hourly rate, but that he charged \$300 per hour for his preparation time.
30. Dr. Waterman says that he raised his rate to \$300 per hour by the time he was asked to testify. This was set out in his June 28, 2019 email, describing his testimony charges. I find that Ms. Wightman did not agree to an increase in Dr. Waterman's hourly rate and no new agreement was signed reflecting the new rate. Therefore, I find that Dr. Waterman was entitled to only charge \$295 per hour for his preparation time.
31. Dr. Waterman estimated he would require 3 hours of preparation time in his June 28, 2019 email, and that was what he charged in his invoice. He did not provide any evidence about what was involved in his court preparation or about the volume or complexity of his report. In the absence of further evidence, I find that 1 hour of preparation time at \$295 per hour, plus GST, was reasonable.

Travel time

32. Ms. Wightman says that charging for travel at a rate of \$200 per hour is excessive, especially given that Dr. Waterman also charged for mileage. Ms. Wightman says she should not have to pay anything for Dr. Waterman's travel time.
33. I find that travel time and mileage are separate expenses and that Dr. Waterman was entitled to charge for both. Further, I find that given Dr. Waterman's profession and his hourly rate for services, \$200 per hour, plus GST for travel time is not excessive.
34. Ms. Wightman also says that Dr. Waterman estimated 2.5 hours per round trip in his June 28, 2019 email, but that he charged 3.5 hours roundtrip on his invoice. She does not otherwise say why 3.5 hours roundtrip is unreasonable. I find that charging for 3.5 hours roundtrip between Nanaimo, BC and Victoria, BC is reasonable.
35. Given that Dr. Waterman travelled roundtrip on both August 21 and 22, 2019, I find that his \$1,400 charge for travel time, plus GST, is reasonable.

Testimony

36. Ms. Wightman argues that Dr. Waterman only testified on August 22, 2019 and, therefore, his charge for testimony on August 21, 2019 is "completely inappropriate". I disagree. Ms. Wightman subpoenaed Dr. Waterman to attend court at 9:30 a.m. on August 21, 2019. He arranged his schedule accordingly and was prepared to testify that morning.
37. The Court of Appeal in *Luis v. Marchiori*, 2018 BCCA 317, referring to *Webb v. Page* (1843), 174 E.R. 695, said that factual witnesses are bound as a matter of public duty to relay their relevant observations to the court and need only be paid the prescribed witness fee according to the rules of court. However, expert witnesses have no civic duty to bestow their skill and professional experience gratuitously and, therefore, must be paid for their testimony.

38. Further, the need to pay expert opinion witnesses is recognized by Rule 11-5(9) of the *Supreme Court Civil Rules*, which expressly provides for the remuneration of an expert opinion witness appointed by the court, including “an appropriate sum for each day that the expert’s attendance in court is required”. Although there is no corresponding rule in the *Provincial Court (Family) Rule*, I find that the principle applies in this case.
39. Witness scheduling can be unpredictable, and I accept Ms. Wightman’s submission that the court ruled on August 21 that other testimony would be heard before Dr. Waterman. However, that does not relieve Ms. Wightman of the obligation to pay Dr. Waterman for his attendance, and I find that he is entitled to be paid for his August 21 attendance, even though he did not testify that day.
40. Ms. Wightman also argues that there was no contractual agreement she would pay Dr. Waterman a flat rate for a half-day or full-day court attendance, rather than his hourly rate. She says Dr. Waterman testified for just under 3 hours, so she should only have to pay for 3 hours at \$295 per hour.
41. I find it is common for experts to charge a flat half-day or a full-day rate for court testimony. Again, I find that Ms. Wightman agreed to pay Dr. Waterman’s reasonable invoice for his court testimony. I find that charging a \$1,000 flat rate, plus GST for each of his half-day attendances was reasonable.

Lunch

42. Ms. Wightman says that Dr. Waterman likely would have arrived back in Nanaimo on August 21, 2019 sometime around lunch time, so charging for lunch that day is inappropriate. Dr. Waterman did not make any submissions or reply submissions about the timing of his return to Nanaimo on August 21.
43. Therefore, in the absence of evidence that Dr. Waterman was travelling during the lunch hour on August 21, 2019, I find the reasonableness of that charge is not proven. It is undisputed that Dr. Waterman testified into the lunch hour on August 22

and then faced his return trip to Nanaimo. Therefore, I find his \$20 lunch charge, plus GST for August 22 was reasonable.

Conclusion

44. In summary, I find that Dr. Waterman's charge for preparation time should be reduced and the lunch charge on August 21 was unsubstantiated. Ms. Wightman does not dispute the reasonableness of the mileage charges or the parking amount and I agree they are reasonable charges. Therefore, I find Dr. Waterman's reasonable invoice should be in the amount of \$4,000.40, plus GST, for a total of \$4,200.42.
45. As noted above, the other party in Ms. Wightman's court matter already paid Dr. Waterman \$2,428.33. Therefore, Ms. Wightman must pay the difference, which equals \$1,772.09.
46. What about the \$500 conduct money paid to Dr. Waterman? Dr. Waterman says that it was applied to a previously outstanding balance. However, there was no evidence before me about an outstanding balance or any previous invoices. The conduct money was paid specifically for travel expenses relating to Dr. Waterman's court testimony and overlaps with the charges on Dr. Waterman's invoice. Therefore, the \$500 in conduct money will be applied to reduce the amount owing in this dispute. I order Ms. Wightman to reimburse Dr. Waterman a total of \$1,272.09 for his court attendance and related expenses.
47. I note that my assessment of the reasonableness of Dr. Waterman's invoice in this decision is not binding on the court in the context of determining the extent that one party or the other in Ms. Wightman's family law action must pay for Dr. Waterman's court attendance.

INTEREST, CRT FEES, AND DISPUTE-RELATED EXPENSES

48. The *Court Order Interest Act* applies to the CRT. Dr. Waterman is entitled to pre-judgment interest on the \$1,272.09 from August 26, 2019, the date of the invoice, to the date of this decision. This equals \$21.29.
49. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find Dr. Waterman was the successful party and is entitled to reimbursement of \$150.00 in CRT fees. He did not claim any dispute-related expenses.

ORDERS

50. Within 45 days of the date of this order, I order Ms. Wightman to pay Dr. Waterman a total of \$1,443.38, broken down as follows:
- a. \$1,272.09 for services rendered,
 - b. \$21.29 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$150 for CRT fees.
51. Dr. Waterman is entitled to post-judgment interest, as applicable.
52. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision. The Minister of Public Safety and Solicitor General has issued a Ministerial Order under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The CRT can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the CRT will not have this ability. A party should contact the CRT as soon as possible if they want to ask the CRT to

consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

53. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Kristin Gardner, Tribunal Member