



# Civil Resolution Tribunal

Date Issued: October 6, 2021

File: SC-2021-001424

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mitchell v. McCrae*, 2021 BCCRT 1070

BETWEEN:

JAMES MITCHELL

**APPLICANT**

AND:

BRYAN MCCRAE

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Micah Carmody

## INTRODUCTION

1. The applicant, James Mitchell, hired the respondent, Bryan McCrae, to provide layout and design for Mr. Mitchell's technical book. Mr. McCrae provided an estimate of \$5,535.

2. Before the book's design work was finished, Mr. McCrae stopped work, taking the position that Mr. Mitchell was making changes beyond the scope of the parties' agreement. Mr. McCrae asked to be paid on an hourly basis from that point on. Mr. Mitchell was not interested in renegotiating payment terms and asked Mr. McCrae to turn over the work completed to that point. Mr. McCrae refused.
3. Mr. Mitchell says Mr. McCrae breached the parties' contract by not delivering what he promised. Mr. Mitchell says he received nothing of value, so he wants a full refund of the \$3,597.75 he undisputedly paid Mr. McCrae. He originally asked for an order that Mr. McCrae prove all design work completed to date and return any reference material provided, but later withdrew that claim, leaving only the claim for a refund.
4. Mr. McCrae maintains that Mr. Mitchell made several design changes after previously approving the designs. He says he has completed the work for several chapters with Mr. Mitchell's approval, and those chapters were made available to Mr. Mitchell in printable form. I infer Mr. McCrae says I should dismiss the claim.
5. Both parties are self-represented. For the reasons that follow, I find Mr. McCrae did not breach the parties' contract and Mr. Mitchell is not entitled to a refund or damages.

## **JURISDICTION AND PROCEDURE**

6. 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). Section 2 of the CRTA states that 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 the dispute's parties that will likely continue after the CRT process has ended.
7. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, the parties in this dispute call into question each other's

credibility. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.

8. Section 42 of the CRTA says 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.
9. 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**

10. The issues in this dispute are:
  - a. Did Mr. McCrae breach the contract by doing substandard work?
  - b. Which party caused the contract to come to an end, and what liability, if any, flows from that?

## **EVIDENCE AND ANALYSIS**

11. As the applicant in this civil dispute, Mr. Mitchell must prove his claim on a balance of probabilities, meaning more likely than not. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

12. The parties met in September 2018 and began discussing, by email and in person, Mr. Mitchell's book project. Mr. Mitchell had already published a related book in 2011, and this new book was to be a companion book.
13. Mr. McCrae provided a written estimate in February 2019. The estimate provided for:
  - a. 5 hours of style setup for \$325,
  - b. 300 pages of page layout, based on 300 pages at 15 minutes per page (75 hours), including figure edits, indexing and table of contents, for \$4,950, to be recalculated if the page count was different
  - c. 4 hours of cover design for \$260.
14. The estimated total was \$5,535. Mr. Mitchell accepted the estimate on March 8, 2019 when he paid a deposit of \$1,660.50. In May 2019, he made a further payment of \$1,937.25, so in total he paid \$3,597.75, which is what he claims in this dispute.
15. The parties agree that they did not specify a completion date. When Mr. McCrae provided the estimate, Mr. Mitchell was still drafting sections of the book and working with an artist to develop drawings for it. From the parties' emails I find that between March 2019 and November 2020, work progressed intermittently on both the book's content and the book's design.
16. In February 2021, Mr. Mitchell indicated a desire to change the book's main font. Mr. McCrae advised that a font change at that point would be a major change to the layout and would require a "re-float" of each chapter, with time and cost. The book was nowhere near finished but some chapters had been finalized or nearly finalized. A disagreement ensued by email. The parties' positions as stated in those emails are largely consistent with their positions in this dispute, which I consider below.
17. Eventually, Mr. McCrae advised that he already worked more hours than anticipated in the estimate and would not continue working under the existing contract's terms. Mr. Mitchell demanded the InDesign files and Mr. McCrae's work to date. I understand

Mr. McCrae has not turned over any InDesign files and Mr. Mitchell has not paid the balance of the contract.

### ***Breach of Contract***

18. Mr. Mitchell alleges that Mr. McCrae did not have the skill to complete the agreed work in the time allotted. The burden to prove a breach of contract for substandard work is on the party who alleges the breach: see *Absolute Industries Ltd. v. Harris*, 2014 BCSC 287. A claim that work quality fell below the required professional standard often requires expert evidence to prove if the subject matter is outside ordinary knowledge: see *Bergen v. Guliker*, 2015 BCCA 283.
19. I find it was an implied term in the parties' contract that Mr. McCrae would perform his services with reasonable professional skill and diligent consistent with industry standards. However, Mr. Mitchell provided no acceptable evidence that Mr. McCrae's work fell below the standard of a reasonably competent graphic designer. For example, there is no opinion from another graphic designer that the book should have been completed in fewer hours in the circumstances.
20. Both parties submitted letters from Matt Warburton, National Ethics Chair for Graphic Designers of Canada, in support of their respective positions. Mr. Mitchell approached Mr. Warburton first. Mr. McCrae, having read Mr. Warburton's letter Mr. Mitchell produced as evidence in this dispute, provided Mr. Warburton with additional information that changed Mr. Warburton's opinion somewhat. Intending no disrespect to Mr. Warburton, I find that his letters do not meet the requirements of expert evidence set out in the CRT's rules. I say this because there is no evidence of his qualifications, other than his position title, and because it is not entirely clear what information Mr. Warburton had and did not have when forming his opinions. As well, Mr. Warburton's opinion letters are primarily about whether Mr. McCrae was justified in asking for additional compensation. The role of an expert is to provide opinions on technical matters outside of the decision-maker's expertise, not to argue the case or provide conclusions on the ultimate issue to be decided, which is for the court or CRT

to decide: see *Brough v. Richmond*, 2003 BCSC 512. For these reasons, I give no weight to Mr. Warburton's evidence for either party.

21. I find Mr. Mitchell has not met his burden of proving that Mr. McCrae provided substandard work or was not qualified to do the work. As will be explained below, Mr. Mitchell cannot be blamed for his failure to complete the design work as required by the contract.

***Which party ended the contract?***

22. Mr. McCrae gave unchallenged evidence about his work process, which I accept and set out here for context. Mr. McCrae says the first part of his work was the design the book's "style" (the headers, tables, figure notation, bullets, and text blocks), the layout, and the fonts, columns, and figure boxes to build a template that could be applied to each page. For ease of reference I will call this the "style". The second part of Mr. McCrae's work was to separate the manuscript (a Word document Mr. Mitchell supplied containing the book's text) into separate chapters and then "float" the chapters into the style template, adding photos and figures and adjusting as necessary. Mr. McCrae says after that point, additional changes to any style element may necessitate re-floating all the text, images and figures in each chapter, and may require rebuilding the template. For these reasons, he says it is important that the style is determined early. I accept this evidence, which Mr. Mitchell does not dispute.
23. Mr. Mitchell says he requested from the beginning that the new book match his 2011 book in style, and that his requested changes were consistent with that initial direction. I find the parties emails contradict this and show that Mr. Mitchell wished to return to the 2011 book style only after encouraging and accepting numerous style changes. In making this finding, I rely in particular on:
  - a. A March 4, 2019 email in which Mr. Mitchell said the 2011 book would be revised and therefore "not the best template" for the new book.
  - b. Mr. Mitchell paid the May 2019 milestone payment of \$1,937.25, which was undisputedly for design and style approval.

- c. On August 13, 2020, Mr. Mitchell said “it looks like you’re mirroring the [2011 book], which is fine,” but added that he was “open to layouts that are different than the [2011 book] as” it was his “intention to tweak that book down the road.”
  - d. On August 15, 2020, Mr. Mitchell said that there were some characteristics of the 2011 layout that worked well but he was open to other layouts and asked if Mr. McCrae had any samples.
  - e. In early November 2020, Mr. Mitchell asked for a return to the look of the 2011 book. Mr. McCrae said they had agreed at their last meeting to move forward with the more contemporary style he presented. Mr. Mitchell conceded that he did “pretty much approve the design” at their last meeting but reiterated that he now wanted to return to a style similar to the 2011 book.
  - f. On November 27, 2020, after further style changes, Mr. Mitchell indicated that he was “very happy” with the layout. In January 2021, after looking at chapters 2 and 4, Mr. Mitchell further indicated his approval of the style. Mr. McCrae had floated text up to chapter 6. Despite this, on February 1, 2021, Mr. Mitchell requested to change the main font.
24. The font change request was the catalyst in the relationship breakdown. Mr. McCrae advised by email that fonts were confirmed at the last in-person meeting and that he cautioned Mr. Mitchell then that changes would be more difficult after that point. He said the font change request was after-approval and outside the contract’s scope, but he was willing to make the changes if Mr. Mitchell was “ok” with the time it would take, which at that point was unknown. At that point Mr. Mitchell began to take the position that the 2011 book’s style was what he had wanted all along and Mr. McCrae was responsible for any deviations from that template. I find that position is not supported by the evidence in this dispute, as summarized above.
25. When Mr. McCrae refused to do further work on the project, did he “repudiate” the contract? In other words, did he show an intention not to be bound by the agreement? To find a repudiation, there must be conduct that amounts to a total rejection of the

contract's obligations, a lack of justification for that conduct, and the repudiation must be accepted by the innocent party who treats the contract as ended: see *Folia v. Trelinski*, 1997 CanLII 469 (BC SC).

26. I find that throughout the process, Mr. McCrae was frank that changes to the style after approval would mean unanticipated time and costs that would need to be addressed. In particular, he raised the issue in emails on August 14 and 18, 2020, November 4, 2020, and February 1, 2021.
27. The parties' contract contemplated 84 hours of work. It was undisputedly an estimate, expected to be revised up or down, not a fixed price contract. On February 13, 2021, Mr. McCrae set out a detailed account of his time, totalling 87.75 hours. I find Mr. McCrae had fulfilled his obligations under the contract to that point. He had done more than 5 hours of style set up, and had completed page layout up to at least chapter 6. However, the new book was not close to being finished and Mr. Mitchell was requesting a font change that would require Mr. McCrae to redo substantial portions of the work he had already completed.
28. I am satisfied that the number of style changes, and the timing of the style changes after previous approvals, was not contemplated by the parties' contract and pushed the work beyond the contract's scope. As well, the manuscript and the digital drawings and photos were frequently edited, or their position within the chapter changed, requiring adjustments to the text in those chapters. While some of those changes on their own may have been accommodated by the parties' contract, the cumulative effect of these changes together with the ongoing style changes was to significantly exceed the estimate of 5 hours of style setup and 15 minutes of work per page.
29. Although Mr. Mitchell is correct that Mr. McCrae did not complete 2/3 of the book despite having been paid roughly 2/3 of the contract price, I find based on the parties' emails that Mr. McCrae kept up with the work that Mr. Mitchell provided. In his February 2021 emails, Mr. McCrae said he was open to discussion about how to proceed in a way that reflected the additional work he had done and was being asked



to do. So, I find that Mr. McCrae's conduct did not amount to a total rejection of his obligations. Rather, it was a withdrawal of services that were not within the contract's scope: see *Key Resort Builders Inc. v. Tremblay*, 2009 BCPC 376.

30. I also find Mr. McCrae's withdrawal of services was justified, since Mr. Mitchell's ongoing style change requests had the effect of depriving Mr. McCrae of substantially all the benefit of the contract. So, I find Mr. McCrae did not repudiate the contract. It follows that I dismiss Mr. Mitchell's damages claim.

31. Mr. McCrae says he went beyond reasonable expectations and wants "compensation for 32 hours of unpaid work (\$2,106)." The parties' agreement was not that Mr. McCrae would be paid by the hour. In any event, Mr. McCrae did not file a counterclaim, so I make no order.

32. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to recover their CRT fees and reasonable dispute-related expenses. Mr. McCrae was successful but did not pay fees. I dismiss Mr. Mitchell's claim for reimbursement of CRT fees. Both parties mentioned claiming their time spent on the dispute without detail or evidence. Consistent with CRT rule 9.5(5), as this was not an extraordinary dispute I decline to order compensation for time spent on the CRT proceeding.

## **ORDER**

33. I dismiss Mr. Mitchell's claims and this dispute.

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Micah Carmody, Tribunal Member