Court File No. CV-10-413639
Date: 2012 06 04

ONTARIO
SUPERIOR COURT OF JUSTICE

In the matter of the *Solicitors Act*

B E T W E E N :

JEAN-PIERRE BOMBARDIER

Applicant/Client

and

SHELL LAWYERS

Respondent/Solicitors

BEFORE: R. Ittleman, Assessment Officer

COUNSEL: Tanya Walker, for the Applicant/Client
Brian Shell and Christopher Donovan, for the Respondent/Solicitors

HEARD: July 18, 19, 20, 21, 22, and 26, 2011

DECISION AND REASONS

Nature of Proceedings

[1] The hearing was conducted pursuant to an Order made by the Registrar on November 5, 2010, upon the requisition of the Client pursuant to section 3 of the *Solicitors Act*, R.S.O. 1990. C. s-15, as amended.

[2] At the conclusion of the hearing, which was conducted on July 18 – 22, 2011, and the closing submissions presented on July 26, 2011, I reserved my decision. Unfortunately, due to operational difficulties, the delivery of this decision was postponed for a number of months.

[3] Annexed to the Registrar's Order are fifteen accounts rendered by Shell Lawyers (the "Solicitors") to Jean-Pierre Bombardier (the "Client"). As I will discuss, a sixteenth account, dated May 1, 2008, was not annexed to the Order.

The Accounts

[4] The sixteen accounts, which describe services rendered during the period of April 20, 2007 to September 30, 2010, can be summarized as follows:

Date	Invoice #	Fees	G.S.T.	Disbs	G.S.T.	Total
May 31/07	2830	$ 3,134.50	$ 188.07	$ 68.25	$ 4.10	$ 3,394.92
Aug 1/07	2878	4,806.00	288.36	591.64	27.83	5,713.83
Sep 21/07	2893	4,220.00	253.20	611.55	27.11	5,111.86
Dec 31/07	3002	4,179.50	250.77	215.25	12.92	4,658.44
May 9/08	3074	1,231.00	61.55	82.75	4.14	1,379.44
Sep 23/08	3190	7,160.50	358.03	561.75	28.09	8,108.37
Oct 20/08	3194	703.50	35.18	234.02	11.70	984.40
Feb 5/09	3280	1,506.00	75.30	24.30	1.22	1,606.82
May 1/09	3367	1,915.00	95.75	334.30	10.37	2,355.42
Jun 19/09	3415	4,316.00	215.80	-5.72	5.94	4,532.02
Aug 31/09	3472	1,566.00	78.30	338.24	16.78	1,999.32
Oct 31/09	3512	3,600.00	180.00	736.83	36.79	4,553.62
Dec 31/09	3550	3,271.50	163.58	251.51	12.50	3,699.09
Mar 31/10	3606	1,228.50	61.43	111.00	5.55	1,406.48
May 31/10	3634	2,940.00	147.00	461.65	13.88	3,562.53
Sep 30/10	3680	1,242.00	155.70	42.10	4.33	1,444.13
		$47,020.00	$2,608.02	$4,659.42	$223.25	$54,510.69

[5] Invoice No. 3074, dated May 9, 2008, was not attached to the Registrar's Order. However, this invoice was referenced on the Trust Statements that were attached to subsequent accounts delivered to the Client. In addition, this account is included in the summary of billings provided by the Solicitors.[1] Accordingly, it is included in this assessment.

[6] The Trust Statements disclose that a total of $44,689.75 was paid into trust to the Client's credit, and that all of these monies were paid to the Solicitors on account of the billings, leaving a balance owing, subject to assessment, of $9,820.94. The monies paid into trust came from the following three sources:

Source of Monies Paid Into Trust	Amount
Jean-Pierre Bombardier	$40,798.50
Howard E. Warren – Costs payable to Client pursuant to Court Order	3,000.00
Gestalt Institute of Toronto – co-defendant's contribution to Client	891.25
	$44,689.75

[1] Exhibit 16

Background

[7] On April 2, 2011, a Statement of Claim[2] was issued in the Superior Court of Justice by DM, naming five defendants – the Client; Gestalt Institute of Toronto ("GIT"), a school that the Client and the plaintiff had attended; two employees of GIT, JG and JT; and a classmate of the Client's, MP. The claim against the Client alone was for damages of $1,000,000.00 for defamation and punitive damages of $1,000,000.00. The claims against the other defendants totalled $14,000,000.00[3].

[8] In the Statement of Claim, the DM alleged, *inter alia*, that the Client had "falsely and maliciously" given certain information about DM to the school and its employees, leading to DM's expulsion from GIT.

[9] The Client retained the Solicitors pursuant to a written Retainer Agreement, dated April 20, 2007.[4]

[10] The Solicitors acted for the Client until on or about October 27, 2010, when the retainer was terminated by the Client. The Client filed a Notice of Change of Solicitors on or about November 2, 2010.

Authority to Conduct Assessment

[11] My authority under the *Solicitors Act* is to conduct an assessment of the bills, and to determine what is fair and reasonable, having regard to a number of factors, including the credibility of the witnesses and the factors enumerated by the Court of Appeal in its decision in the case of *Cohen v. Kealey & Blaney*[5]. These factors are:

1. The time expended by the solicitor.
2. The legal complexity of the matter to be dealt with.
3. The degree of responsibility assumed by the solicitor.
4. The monetary value of the matters in issue.
5. The importance of the matter to the client.
6. The degree of skill and competence demonstrated by the solicitor.
7. The results achieved.
8. The ability of the client to pay.
9. The client's expectation as to the amount of the fee.

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[2] Exhibit 2

[3] This sum was reduced slightly in DM's Amended Statement of Claim, dated October 18, 2007. This reduction did not impact upon the amount of the claim against the Client.

[4] Exhibit 1

[5] *Cohen v. Kealey & Blaney*, (1985), 3 C.P.C. (2d) 211 (Ont. C.A.)

[12] These factors are not listed in any particular order of significance or importance. Further, in *Regan v. Petryshyn* (2007)[6], Madam Justice Himel held that an Assessment Officer is entitled to assign to these factors the weight that is deemed appropriate. In so doing, I have given regard to the facts and circumstances of this particular case. In addition, I have assessed and considered the credibility of the witnesses.

[13] In formulating this decision, I have considered all of the oral and documentary evidence presented during the course of the hearing, the closing submissions, and the case law provided by the parties. I heard the oral evidence of both solicitors, Brian Shell and Christopher Donovan, and of the Client.

The Burden of Proof

[14] On an assessment under the *Solicitors Act*, the solicitor has the burden of proving, on a balance of probabilities, that the bill delivered to the client is fair and reasonable.[7] The burden is the same whether it is the solicitor or the client who has requisitioned the Order for assessment. It is up to the solicitors to determine the most effective means of meeting the burden imposed upon them. While all persons who have worked on a file need not be called to prove the account[8], an Assessment Officer must give less weight to any hearsay evidence which is given regarding work undertaken by another member of the firm unless notice is given under section 35 of the *Evidence Act*, R.S.O. 1990, C. E.23, as amended, that relevant business records will be submitted. Business records, including time dockets, do not in and of themselves establish that the legal fees as billed are fair and reasonable. It is the role of the Assessment Officer to make that determination.

Analysis of the *Cohen v. Kealey & Blaney* Factors

[15] I turn to an analysis of the factors enumerated by the Court of Appeal in *Cohen v. Kealey & Blaney.* Although I will address each of the factors, it must be noted that it is difficult to "pigeon-hole" a review of the evidence under specific headings without there being some overlap.

Factor 1. The legal complexity of the matter to be dealt with.

[16] The parties have conflicting views of the complexity of the litigation. The Solicitors portrayed it as being both factually and procedurally complex. From a procedural perspective, they highlighted the number of defendants in the action, the

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[6] *Regan v. Petryshyn* (2007), 161 A.C.W.S. (3d) 26 (S.C.J.)

[7] *MacLean v. Van Duinen* (1994), 30 C.P.C. (3d) 191 (N.S.S.C.), applied in *Schwisberg v. Kennedy*, [2004] O.J. No. 3478 (S.C.J.), aff'd 146 A.C.W.S. (3d) 1080 (Div. Ct.).

[8] *Foster v. Kempster,* (2000} O.J. No. 5222 (S.C.J.)

various interlocutory proceedings, and the plaintiff's refusal to continue with examinations for discovery, ultimately having to seek an Order to permit same. Regarding the fact situation, the Solicitors pointed out that the action was complicated by emotion that seemed to have motivated the plaintiff as a result of his perception of the personal relationship that he had with the Client.

[17] The Client acknowledged that the action dealt with the plaintiff's allegedly hurt feelings, but submitted that this did not render it factually complex. His counsel also emphasized that the action should not have been procedurally complex for a lawyer of Mr. Shell's litigation experience.

[18] I quite agree with this latter point. Mr. Shell was called to the Bar in 1980 and, after seventeen years as in-house counsel for a trade union, he has operated what he calls a "custom boutique litigation and administrative law firm" since 1997. His clients include unions, employees, persons with disabilities and other individuals whose need for legal representation is consistent with the firm's values and commitment to access to justice.

[19] On the other hand, the large number of defendants and the emotional background of the claim did add to the complexity of the litigation. This was corroborated by GIT's lawyer, Deborah Berlach, in an affidavit that she swore on January 19, 2009, in support of a Motion[9], in which she described the complexity of the litigation at paragraph 40:

> *The issues involved in this matter are complex and will require a large amount of preparation on the part of the defendants' solicitors. The trial is likely to last for 4 to 5 weeks. The parties will be calling a minimum of 9 to 10 witnesses. Full documentary disclosure will have to occur. The plaintiff and defendants have produced Affidavits of Documents, listing over 300 related items.*

[20] Mr. Shell characterized the plaintiff as an "obsessive, extremely difficult, extremely pugnacious, irrational person." Mr. Bombardier did not disagree nor challenge this depiction. No doubt the plaintiff's personality complicated the litigation, increased the time spent, and impacted upon costs. For example, the plaintiff changed lawyers, then fired and later re-hired his lawyer, and was not co-operative in providing dates nor in moving his action along.

Factor 2. The time expended by the Solicitors

[21] The amount of time spent and billed was a contentious issue in this assessment. In formulating my findings, I reviewed and analyzed the accounts, the oral testimony, and the documentary evidence, including but not limited to the charts and analyses provided by the Client.

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[9] The Affidavit of Deborah Berlach, sworn January 19, 2009, is found at Tab 3 of the Client's Motion Record which is dated March 26, 2009 and which is marked as Exhibit 26 to this assessment hearing

[22] As I have previously noted, there were complexities in the litigation relating to the conduct of the plaintiff. Unfortunately, this added to the amount of time that was spent by the Solicitors in their representation of Mr. Bombardier. When the action was commenced in April 2007, the plaintiff was represented by Mr. David Brooker. In or around August 2007, Mr. Brooker was replaced by Mr. Howard Warren, who acted until in or around August 2008, when the plaintiff delivered a Notice of Intention to Act in Person. In or around October 2008, the plaintiff once again retained Mr. Warren. In or around August 2010, the plaintiff once again became a self-represented litigant. In addition to protracting the action, these numerous changes also increased the amount of time spent on the file. For example, while self-represented, the plaintiff was unco-operative in the scheduling of examinations, ultimately leading to a motion. In her aforementioned Affidavit[10], Deborah Berlach deposed on the issue of the plaintiff's conduct causing delay and additional time to be expended, at paragraph 46:

> *The plaintiff has displayed a tendency to fire his lawyers at crucial points in the litigation, i.e. when pleadings are being amended and when discoveries are scheduled. The plaintiff is ordinarily absent from the jurisdiction and has attempted to unilaterally cancel Examinations for Discovery based on this fact. Thus, the plaintiff has taken steps that amount to chronic and substantial obstruction of the action, justifying a transfer to case management.*

[23] Typically, it is the plaintiff who drives the litigation and, although there are certain options and procedures available to a defendant, there was little that could be done to mitigate the impact of the plaintiff's conduct. The evidence shows that the Solicitors desired to bring the litigation to an early conclusion, but the plaintiff and his lawyers were not receptive to exploring this and, in fact, took the litigation in the opposite direction.

[24] This was evident shortly after the Client first engaged the Solicitors after having been served with a Statement of Claim. Notwithstanding that an undertaking was received from the plaintiff's lawyer to extend the time for service of a Statement of Defence to June 25, 2007, the plaintiff's lawyer proceeded to note the Client in default on June 22, 2007. It was necessary for the Solicitors to bring a Motion, returnable on August 3, 2007, to set aside the default. In his decision, Master Dash characterized the actions of the plaintiff and his lawyer as "most improper." Costs of the successful motion, which ultimately proceeded on consent, were awarded to the Client in the amount of $3,000 on a substantial indemnity basis. However, it should be noted that Master Dash opined in his endorsement that the costs outline presented by Mr. Shell was "somewhat excessive" and that the "motion itself was not complex and did not warrant the time spent." The Costs Outline[11] showed total Solicitors' time of 11.8 hours, for total fees of $3,468.00, plus counsel fee for attendance on the motion and disbursements of $722.14. The fees billed to the Client for the period June 22 to August 3, 2007, were $6,564.00, representing 21.4 hours. Most of this time related to the Motion. Having regard to the finding of Master Dash, in the

[10] See Footnote 9.
[11] Exhibit 25

circumstances, I am of the view that the time expended with respect to the Motion was excessive.

[25] On the other hand, I cannot accept the Client's contention that Ms Mallia, the junior lawyer, should not have billed her time for attending at the Entry Office to wait for the Order to be entered as it could merely have been left for entry. Having regard to the typical processing time for Orders that are left for entry, this attendance by Ms Mallia was reasonable.

[26] The Statement of Claim that was served upon the Client was a 22-page document, containing 56 paragraphs of allegations. The Solicitors expended about 14.9 hours from the commencement of the retainer to the completion of the Statement of Defence on June 22, 2007, with a corresponding fee billing of about $4,046.50. The Client asserted that too much time was spent on the Statement of Defence, particularly as in comparison to the Statement of Defence prepared by the lawyers for the co-defendant MP, and further because the Statement of Defence contained too much personal information. However, in the many months since the end of Mr. Shell's retainer, Mr. Bombardier has not taken steps to amend his pleading. I also note that the particular circumstances of each defendant and the unique allegations made against each would have dictated the course for their respective lawyers to take in preparing a Statement of Defence. I find that the docketed time and fee billing were both reasonable.

[27] A considerable amount of time was spent in dealing with productions and Affidavits of Documents. The plaintiff's Affidavit of Documents contained some 226 Schedule A documents, the Client's contained thirteen, and the Affidavit of Documents of the co-defendant GIT listed 71 documents. The Client assisted the Solicitors by providing a summary of his documentary productions, but it was still necessary for the Solicitors to devote time and attention to this task. Furthermore, in order to provide competent legal representation, it was necessary for the Solicitors to review all of the productions in preparation for examinations for discovery and also to assist the Solicitors' assessment of the Client's chances of success as well as with respect to the possible formulation of a settlement position. I have no problem with the amount of time spent and the corresponding fee billings, particularly in light of the courtesy discount of $3,600.00 regarding Mr. Shell's time that was given to the Client on the bill that followed the examination of September 2, 2008.

[28] This was one of a number of such discounts, totalling $8,694.50, that were given to Mr. Bombardier. In addition, I heard evidence, which I find to be credible, that a number of docket entries were removed from the bills before they were delivered. Some of the courtesy discounts were provided by the Solicitors due to the Client's financial situation. For example, on the September 23, 2008, bill, there is a discount equivalent to 10.0 hours of Mr. Shell's time. On the other hand, some of the discounts appear to have been extended due to some duplication of services. By way of example, on that same September 23, 2008, bill, there are docket entries for September 2 of 8.0 hours for each of Mr. Shell and Ms Craig for attending the examination for discovery of the plaintiff, and, at

the bottom of the bill, there is a courtesy discount equivalent to 8.0 hours of Ms Craig's time.

[29] Just as review of productions can set the table for the conduct of a case moving forward, so too can effective preparation and conduct of examinations for discovery assist counsel in facilitating a favourable settlement position and in creating the foundation for trial preparation. The examination for discovery of the plaintiff took place over a period of three days, two of which were attended by the Solicitors. After the first day, in September 2008, the plaintiff advised that he would not return for the second day. Both Mr. Shell and a junior, Marianne Craig, attended on the first day; however, as noted previously, the bill of September 23, 2008, reflects a discount equal to Ms Craig's time, as well as a discount equivalent to ten hours of Mr. Shell's time. The examinations of the Client were held in December 2009. Mr. Donovan attended those examinations, billing at his rate of $225.00 per hour, in place of Mr. Shell, who would have billed $360.00 per hour. Thereafter, Mr. Donovan worked with the Client in order to satisfy his undertakings.

[30] Subsequent to that examination, the Client expressed his concern with the costs of the litigation, reminded the Solicitors of his modest means, and instructed them not to do more work on his behalf. By e-mail dated October 29, 2008[12], the Client gave identical instructions, but subsequently gave the Solicitors the green light to proceed with his defence. Although given the option of terminating the Solicitors' services, the Client did not do so. Nevertheless, moving forward from that time, the Solicitors only worked on the file in accordance with instructions obtained from the Client from time to time. I note that they delivered nine additional bills to the Client after that date, and received no complaints from him that they were working on his file without his instructions.

[31] One example of the Client making an informed decision and instructing the Solicitors occurred in early 2009. In or around January, the defendant GIT provided the Solicitors with a draft Motion seeking an Order for the plaintiff to pay security for costs and relating to outstanding undertakings. By letter dated February 20, 2009[13], Mr. Shell provided Mr. Bombardier with a detailed explanation of the planned motion and the various options available to him. On March 4, 2009, the Client gave the Solicitors limited instructions to participate in the Motion. As things transpired, an agreement was reached on a case management timetable, and the security for costs motion did not proceed. The Client submits that the security for costs motion ought not to have been brought because the plaintiff owned land in Hamilton. However, the Solicitors correctly argued that, under Rule 56.01, there were other factors that potentially supported such a motion, including the plaintiff apparently being resident outside of Ontario. They further pointed out that they were "piggy-backing" on GIT's motion and that there was little additional cost to the Client. This appears to be supported by the time docket entries on the bill of May 1, 2009.

[12] Exhibit 23

[13] Exhibit 29

[32] A Status Hearing was held on August 20, 2009, at which time a timetable was set by the court for the security for costs motion, and the matter was adjourned to December. That Status Hearing was cancelled as a result of a motion that the plaintiff brought in or around October 2009, seeking Court approval of his right to discoveries. As a result of the plaintiff cancelling the examinations in September 2008, GIT had taken the position that the plaintiff had waived his right to further examinations. The Client instructed the Solicitors to oppose the plaintiff's motion, notwithstanding Mr. Shell's advice that the plaintiff would likely succeed. The plaintiff did succeed, and a revised Case Management timetable was ordered. Mr. Donovan attended on the Client's behalf in order to keep costs down.

[33] At the assessment hearing, the Client submitted that the plaintiff's Motion should not have been opposed and that the Solicitors should not have taken the position that the plaintiff had waived his rights to discovery. In his endorsement dated October 21, 2009[14], on the one hand Master Dash found that it *was "understandable that the Defendants thought at that time that the Plaintiff was waiving his right to discovery,"* but, on the other hand, he held that the defendants' position was "untenable." No costs were ordered. I cannot conclude that the Motion should not have been opposed. Although not successful on that point, there appears to have been some success in that there was no order as to costs and a timetable was set. This was significant in order to prevent further delay by the plaintiff.

[34] The examinations for discovery of the Client and other defendants were conducted pursuant to the schedule ordered by Master Dash. The Client expressed upset at the hearing that his examination took place prior to January 2010, when amendments to the Rules imposed time limitations on the duration of examinations. I find this argument to lack merit. Not only did Master Dash set the date of December 8 and 10, 2009, for the examinations of the Client and the defendant MP, but, even had the examinations been scheduled for 2010, the plaintiff could have moved for an Order allowing longer examinations.

[35] In accordance with the ordered timetable, it was necessary to prepare for and attend mandatory mediation. With a view to keeping costs down, the Solicitors arranged for this to be conducted by a roster mediator rather than by the originally agreed-upon mediator, Mr. Banach, whose fees exceeded the tariff. Subsequent to the mediation, there was some discussion between the Solicitors and the Client about the propriety of making an offer to settle, which would have been a strategic move having regard to Rule 49. Shortly thereafter, the relationship came to an end.

[36] The Client relied on the decision of the Assessment Officer in *Sinicropi Estate (Re)*[15], where excessive time resulted in a bill being reduced on assessment. A similar

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[14] Case Brief of the Client, Tab 17

[15] *Sinicropi Estate (Re)*, [2003] O.J. No. 538 (Asst. Officer)

result is reflected in *Wotherspoon v. Canadian Pacific Ltd.*[16], where a bill was reduced due to *"clear instances of duplications, such as several meetings where several solicitors attended ... [and] elements of duplication occasioned by solicitors reviewing and revising one another's work."* The principles highlighted by the Client's lawyer are correct. It is the Assessment Officer's role to consider the evidence and determine whether any reduction is warranted on these grounds. A review of the accounts and evidence does lead to a conclusion that there were some excesses in the amount of time spent and docketed, particularly in respect of intra-office meetings, office conferences and consultations[17]. This time was excessive and reflective of Mr. Shell mentoring the juniors and students, and of the juniors and students furthering their education, at the expense of the Client.

[37] Ms Walker also cited my decision in *Cozzi v. Johnson*[18], where one of the factors in a bill being reduced on assessment was that *"the description of services on the docket is seriously lacking in detail in that each of the 109 services recorded is described in no more than four words."* In *Cozzi*, not only were the bills lacking in detail, but there was a lack of evidence from the Solicitors regarding the nature of the work undertaken for the Client. Such is not the case here, nor are the bills lacking in particularity as there is sufficient information on the accounts to enable a reasonable client to understand what steps were being taken on his behalf and what he was being billed for.

[38] Among the issues raised by the Client at the hearing was that of travel time and waiting time. I agree with the Client's submission in reliance on *Macamid Holdings Ltd. v. 1013799 Ontario Ltd.*[19], where the Assessment Officer assessed such time at one-half of the regular hourly rate.

[39] I have provided the foregoing analysis, with examples, of the time expended by the Solicitors and billed to the Client in light of the considerable evidence presented at the hearing on this issue. On a review of that evidence, I am of the view that, in some instances, too much time was billed to the Client, but certainly not to the extent that he asserts. In any event, it must be noted that an assessment is much more than a mere mathematical exercise of multiplying an hourly rate by a number of hours as there are, as discussed, several factors to be considered.

Factor 3. The degree of responsibility assumed by the solicitor.

[40] This factor encompasses a number of responsibilities, including but not limited to:
(a) Ensuring that the Client understands the terms of the retainer agreement;

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[16] *Wotherspoon v. Canadian Pacific Ltd.*, [1988] O.J. No. 1827 (Asst. Officer)

[17] Exhibit 54

[18] *Cozzi v. Johnson*, [2009} O.J. No. 6111 (Asst. Officer), at paragraph 21

[19] *Macamid Holdings Ltd. V. 1013799 Ontario Ltd.*, [2000] O.J. No. 5042 (Asst. Officer), para. 42

(b) Keeping the Client apprised of the status of the litigation and the costs thereof, and maintaining control of the costs;
(c) Providing the client with sufficient information in order to enable the client to make informed decisions;
(d) Obtaining the Client's instructions on the various steps; and
(e) Delegating work to the least expensive timekeeper who possesses the necessary skills and competence.

[41] The Client did not possess a legal background and this was his first litigation experience. Therefore, it was incumbent on the Solicitors to communicate to him at all stages in a timely and effective manner that was appropriate to his abilities.[20] In this regard, it was not enough for the Solicitors to merely follow instructions. It was necessary to provide all options to the Client with cost estimates, and to inform the Client when the cost estimates had been exceeded, in order to enable the Client to make informed decisions.

[42] Ms Walker pointed out that a solicitor has the burden of proving the terms of the retainer and of proving that the client understood its terms.[21] On the evidence, however, I cannot accept the Client's contention that the billing of disbursements was not explained to him. At the outset, Mr. Shell explained the terms of the retainer agreement to Mr. Bombardier and was satisfied that the Client understood.

[43] At the same time and at the Client's request, the initial retainer amount was reduced. Mr. Shell also explained the litigation and its risks to the Client at the outset and throughout the various stages of the action. This is demonstrated by the correspondence between the parties. The correspondence also discloses that the Solicitors were keeping the Client apprised of the status and developments of his case and were giving the Client options in order to allow him to make informed decisions. As I have previously noted, during the approximately three and one-half years of the retainer, from April 2007 until September 2010, the Solicitors delivered sixteen accounts, each one accompanied by a detailed reporting letter. The fee billings range from $703.50[22] to $7,160.50[23], and the average fee billing was less than $3,000.00. This is reflective of Mr. Shell acceding to the Client's request to be mindful of costs and of his keeping Mr. Bombardier up-to-date on costs and the litigation status. Similarly, having regard Mr. Bombardier's finances, Mr. Shell worked with his Client and made a number of proposals during the course of the retainer for the payment of accounts on an instalment basis. These proposals were made in order to enable Mr. Bombardier to continue to have legal representation notwithstanding

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[20] *Goodmans LLP v. Keuroghlian*, [2009] O.J. No. 4960 (Asst. Officer)

[21] *Epstein Wood v. Ho* (2001), 18 C.P.C. (5th) 357 (B.C.S.C.)

[22] Invoice 3194, dated October 20, 2008

[23] Invoice 3190, dated September 23, 2008

that the Solicitors could have terminated their services when payments from the Client were not forthcoming.

[44] In the same vein, when Mr. Donovan was called to the Bar as of June 18, 2009, his hourly rate was increased from the student rate of $125.00 per hour to $260.00 per hour. However, Mr. Shell agreed that Mr. Donovan's time would be billed out at $200.00 per hour until the end of. 2009. Again, this demonstrates a concern by the Solicitors for the Client's financial situation and for the increasing costs of the litigation. In error, Mr. Donovan's time (totalling 27.1 hours) was billed at the rate of $225.00 per hour on the bills of August 31, 2009, October 31, 2009, and January 22, 2010[24], resulting in an overcharge of $677.50 plus G.S.T.

[45] Ms Walker submitted that "tasks ought, in general, to be delegated to the lowest cost level commensurate with ability to do the job."[25] I agree with this proposition. However, I cannot conclude, as the Client asserted, that this was not done. Not only was Mr. Shell's hourly rate of $360.00 quite modest for a lawyer of his experience, but his goal was to download work to the least expensive timekeeper, including juniors, students and law clerks, who possessed the requisite skill. Mr. Shell directed and oversaw all of the work. To have done less would have been indicative of a lack of responsibility to the Client. In such circumstances, it is not unreasonable for there to be in-office consultations from time to time among Mr. Shell and the other timekeepers. On the other hand, the time spent mentoring and teaching students and juniors should not be an expense borne by the Client. I accept Mr. Shell's evidence that much of that mentoring time was not docketed or billed to the Client. Further, a number of the accounts include discounts which reflect time spent which did not have a value to the Client. Nevertheless, my analysis of the accounts and evidence leads to a conclusion that the amount of time billed by Mr. Shell's juniors consulting with him was slightly excessive.

[46] The Client also suggested that he was not provided with cost estimates regarding much of the litigation and, when estimates were provided, they were exceeded without notice to him. For example, an estimate of $11,000.00[26] was given for examinations for discovery of all parties, whereas the Client was billed $11,742.00 for the examination of only the plaintiff. That early estimate, on August 23, 2007, provided the following warning to the Client:

> *"Note that the times and costs listed below are an estimate only. ... Should unanticipated complications arise, then the time required and costs incurred will be higher. We are usually loathe to provide such estimates for these very reasons – the progress of an action is often very unpredictable."*

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[24] Exhibit 4, Tabs 11, 12 and 13

[25] Ontex Resources Ltd. v. Metalore Resources Ltd., [1996] O.J. No. 3338 (Master), at paragraph 18

[26] Letter to Client, dated August 23, 2007 - Exhibit 21

[47] This was a message that was repeated as the litigation proceeded. For example, in providing an updated estimate on November 7, 2008, the Solicitors warned:

> *"I have set out a very rough estimate only. ...This estimate is now based on our experience with the Plaintiff and with his counsel and the extent to which they appear committed to drag this matter out ... estimates of this nature can be way off centre, as matters develop. This information and the information below should be considered nothing more than a very rough idea of what can be anticipated."*

[48] I find that the Client understood or ought to have understood that the costs of litigation cannot be accurately estimated due to the many variables involved. For example, right at the commencement of the retainer, there was a need to bring a Motion to set aside a noting in default which had not been anticipated due to the undertaking of Mr. Bombardier's then solicitor. This unanticipated event and accompanying expense should have painted a picture for Mr. Bombardier that, notwithstanding a lawyer's best efforts, costs sometimes exceed estimates and cannot be predicted.

Factor 4. The monetary value of the matters in issue.

[49] As noted above, the claim against the Client was in the amount of $2,000,000. As with many actions, it is likely that this quantum was excessive even in the event that the plaintiff was successful in establishing the Client's liability. Nevertheless, the financial risk to the Client, in the event of a successful claim against him, was considerable.

Factor 5. The importance of the matter to the client.

[50] Ms Walker characterized the litigation as "somewhat important" to the Client. I must disagree, based on the evidence. The litigation was very important to Mr. Bombardier. Not only was the action brought by someone with whom the Client had had a personal relationship, but the plaintiff made serious allegations about the Client's conduct and character.

Factor 6. The degree of skill and competence demonstrated by the solicitor. And

Factor 7. The results achieved.

[51] I am satisfied on the evidence that the Solicitors demonstrated a more than reasonable degree of skill and competence. They defended the Client vigorously against what were characterized as vexatious yet serious allegations, and they advanced the Client's interests from the commencement of the retainer until it came to an end.

[52] No doubt, in litigation, there are often twists and turns and unexpected developments that occur and that do not always go a client's way, so one must be careful to examine the overall picture. Here, in the face of a very difficult plaintiff, Shell Lawyers took the action from the Motion to set aside the noting in default and the delivery of a Statement of Defence up to a point where all that remained was a Pre-Trial and a Trial. Granted the only costs award made in the Client's favour was on the set aside Motion, but, on the facts, the Solicitors cannot be taken to task for this.

Factor 8. The client's expectation as to the amount of the fee.

[53] The best evidence regarding a client's expectation is typically found in a detailed written retainer agreement, such as the one that the Client signed in April, 2007[27]. The retainer agreement sets out the hourly rates of the timekeepers and contains the Client's agreement to make payment for fees and reasonable disbursements. Prior to signing the retainer agreement, its contents were explained to Mr. Bombardier by Mr. Shell, and I find that Mr. Bombardier understood its terms.

[54] A major factor for Mr. Bombardier was cost. Therefore, prior to retaining Shell Lawyers, he did his due diligence by seeking out other lawyers. As such, he ought to have been aware of the costs of litigation and of the difficulty in providing accurate estimates regarding cost. The Client retained Shell Lawyers because he trusted Mr. Shell and wanted access to justice and cost effectiveness, a term found on the Solicitors' website, and he felt that he could best achieve this through Shell Lawyers.

[55] I have reviewed the issue of fee estimates under the heading *"The Degree of Responsibility Assumed by the Solicitor,"* so I will attempt not to be redundant. By letter dated August 23, 2007[28], Lisa Mallia of Shell Lawyers provided Mr. Bombardier with an estimate of times and costs for the various steps in the proceedings that were anticipated at that time. The estimated fees for the Affidavit of Documents, Examinations for Discovery and Mediation were $14,800.00. At that time, the Solicitors had already delivered their first two bills, dated May 31 and August 1, 2007, relating primarily to pleadings and the set aside motion, wherein the fees billed total $7,940.50. Thus, the fees for the set aside Motion, the Statement of Defence, productions and discoveries were estimated at that time to total $22,740.50[29]. Ms Mallia further advised in the letter that disbursements and taxes would be extra. As I have discussed, there were a number of unanticipated developments in the action which resulted in more work being required on behalf of the Client. I earlier quoted Ms Mallia's warning to the Client that, unanticipated complications would lead to increased costs and that the progress of an action is unpredictable. This warning of unpredictability proved to be accurate, as the litigation subsequently involved a number of

[27] Exhibit 1

[28] Exhibit 21

[29] $7,940.50 billed plus $14,800.00 estimated totals $22,740.50

unanticipated developments which protracted the litigation through no fault of the Client nor of the Solicitors. These included an unco-operative plaintiff who changed legal representation several times, and the plaintiff refusing to participate in examinations for discovery and then later bringing a motion to confirm his right to conduct examinations. Not only was it necessary to bill the Client for the motion, but it was also necessary to prepare twice for the examinations, prior to the initial appointment in September 2008 and then again in 2009. Further, the Solicitors encountered the plaintiff's refusal to answer proper questions asked at his examination for discovery and his failure to provide answers to undertakings.

[56] A further "very rough estimate" of costs was provided by Mr. Shell by e-mail, dated November 7, 2008[30], provided at the Client's request. Mr. Shell advised that the estimate was being provided *"based on our experience with the Plaintiff and with his counsel and the extent to which they appear committed to draft the matter out."* This estimate included the following[31]:

Examination of plaintiff	$ 4,000.00 - $5,000.00
Motion for Security for Costs	$2,500.00 - $3,000.00
Mandatory Mediation	$2,000.00 - $3,000.00
Other unforeseeable work	$7,000.00
Total	$15,500.00 - $18,000.00

[57] At that time, the Solicitors had already billed the Client fees of $25,435.00. Thus, the total estimated fees were about $41,000 - $43,500. As detailed above, the total fees billed to the Client were $47,020.00.

[58] The material prepared by the Solicitors in March 2009 for the Motion for security for costs, originally returnable on April 30, 2009, also provides some insight into anticipated costs as of that date, in the form of a draft Bill of Costs.[32] That Bill sets out the following breakdown of incurred and anticipated fees, which relates to work actually undertaken by the Solicitors:

Pleadings	$ 4,046.50
Motion to Set Aside Noting in Default	6,064.00
Discovery of Documents	7,408.00
Discoveries	7,916.50
Motion for Security for Costs and Transfer to Case Management	3,057.50
Total	$28,492.50

[30] Exhibit 22

[31] The estimate also included estimates for other services that were not undertaken by the Solicitors, such as Pre-Trial and Trial and certain motions.

[32] The draft Bill of Costs is marked as Exhibit "G" to the Affidavit of Ashleigh Searles, sworn March 26, 2009, which is found in the Motion Record marked as Exhibit 26 in this assessment.

[59] At that time, the Solicitors had continued to bill the Client regularly and in a timely fashion, so that the Client was also being kept apprised of costs via the billing practices of Shell Lawyers. The fees billed to the Client, up to and including the account of May 1, 2009, were $28,856.00.

[60] I also note that the Bill of Costs filed on the Motion by the defendant GIT disclosed anticipated fees up to that stage of the proceedings in the amount of $22,912.00[33]. Although it is virtually impossible to compare the details of the services rendered by one party's lawyer with that of another party, and this is not an assessment of the bills delivered by GIT's solicitors, it is interesting that both Bills of Costs disclose fees in the same range.

[61] The relationship between Solicitor and Client came to an end before the matter got to trial. The fees billed after May 1, 2009, until the end of the retainer were $18,164.00.

[62] The Solicitors rely on the Court of Appeal decision in *Sullivan, Mahoney LLP v. Gasprich*[34] as standing for the proposition that consideration should be given on this assessment to the fact that the Client made payments on account without complaint regarding the legal services provided. At paragraph 3, the Court stated:

> *Perhaps more importantly, and contrary to the appellant's submission before this court, the trial judge found that the appellant made no complaint about the quality of the solicitors' work or the amount of their accounts until many months after the settlement of the action. He also found that: (i) the solicitors delivered regular interim accounts, most of which were paid; (ii) the solicitors voluntarily discounted many of their accounts having regard to the appellant's financial circumstances; (iii) the solicitors took the appellant's ability to pay into consideration; and (iv) the appellant acquiesced in the amount of the solicitors' fees as evidenced by her ongoing partial payment of the accounts for many months after the resolution of the litigation and her failure to object to the quantum of the accounts until she ran into financial difficulties.*

[63] The Solicitors submit that the assessment before me is analogous in that the Client made payments, he made no complaints until after the fact, discounts were given to him having regard to his finances, and he was offered payment plans.

[64] To some degree, the Solicitors are correct in their comparison with the *Gasprich* decision. However, some of the discounts given to Mr. Bombardier related not to the

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[33] The Bill of Costs of GIT's lawyers, Stieber Berlach LLP, is marked as Exhibit KK to the Affidavit of Deborah Berlach, sworn January 19, 2009, and found at Tab 3 of the Client's Motion Record which is dated March 26, 2009 and which is marked as Exhibit 26 to this assessment hearing.

[34] *Sullivan, Mahoney LLP v. Gasprich*, 2007 ONCA 886, at para. 3

Client's financial circumstances but rather to time spent by juniors which was determined by Mr. Shell to be excessive or was for time spent by him mentoring the juniors.

[65] Ms Walker highlighted in her closing submissions that the evidence showed that the initial fee estimate given to Mr. Bombardier was $40,000.00, including trial. Having regard to the various unanticipated developments in the litigation during the term of the retainer, I find that the actual billings to Mr. Bombardier were consistent with this estimate. He knew throughout what the legal representation was costing him and, although he was not happy with this expense, he maintained his relationship with the Solicitors until late 2010.

Factor 9 Ability of the Client to Pay

[66] When a client retains a lawyer, there is an implicit representation by the client that there is an ability to pay the lawyer's reasonable fees. Notwithstanding, I must consider the Client's ability to pay in assessing the Solicitors' accounts.

[67] Mr. Bombardier was employed during all but a six-month period of the retainer, with an annual salary of at least $45,000.00 and as much as $62,000.00 since early 2010. Nevertheless, the financial cost of the litigation was difficult for him. In this regard, he was provided some discounts related to his financial situation, docket entries were removed by Mr. Shell before billing, and the Solicitors were willing to work with and carry the litigation while payments were made in instalments.

[68] I am satisfied that the Client's ability to pay should not result in a reduction of the accounts.

Disbursements

[69] Ms Walker relied on *A.J. Wing & Sons Construction Limited v. Marten Falls First Nation*[35] in submitting that laser printing and photocopying should have been billed at $0.10 per page rather than $0.25 per page. Costs have increased considerably since 1993. I am satisfied that the rate charged was reasonable.

[70] With the exception of a $5.40 charge for food, I am also satisfied that the other disbursements were reasonable. There were multiple parties and hundreds of pages of productions, resulting in substantial laser printing and facsimile expense.

[35] *A.J. Wing & Sons Construction Limited v. Marten Falls First Nation,* [1993] O.J. 3195 (Gen. Div.)

Conclusion

[71] As I advised the parties at the outset of the hearing, and as I have noted above, the burden of proof rested on the Solicitors to prove on a balance of probabilities that the bills were fair and reasonable. The purpose of an assessment is to determine on a *quantum meruit* basis the value of services billed to a client. Having regard to the foregoing analysis, I assess the bills as delivered in the amount of $44,608.66, calculated as follows:

Fees	$37,642.50
GST (average rate 5.55%)	$ 2,089.16
Disbursements	$ 4,654.02
GST	$ 222.98
Total	$44,608.66

R. Ittleman, Assessment Officer

Released: June 5, 2012