

ONTARIO SUPERIOR COURT OF JUSTICE

In the Matter of the Solicitors Act

BETWEEN: Christopher David CLIENT
- and -
Benmor Family Law Group SOLICITOR

Costs Reasons

1. On May 31, 2024, I released my decision in writing on this solicitor and client assessment due to the late conclusion of the matter the day the hearing was heard by ZOOM. As a result, the solicitor's accounts were substantially upheld, therefore, requiring the client to remunerate the solicitor for the remaining balance of \$10,071.47, inclusive of fees, disbursements, and HST.

Solicitor's Submissions

2. The solicitor has provided a Bill of Costs and Offer to Settle for consideration. Within the Bill of Costs, the solicitor is seeking costs as follows and detailed below:¹

¹ Solicitors Submissions on interest and costs

Lawyer or staff	Hourly Rate	Experience
Steven D. Benmor (SDB), Lawyer	\$750	Called to the Bar in 1994 Certified Specialist in Family Law Masters of Law in Family Law
Cris Lam (CL), Senior Family Law Clerk	\$375	Senior Family Law Clerk

Activities	By	Time	Fees
1. To respond to Client's Requisition & Order for Assessment, reviewed entire file including all correspondence with client, correspondence with opposing counsel, correspondence with court, all pleadings, motion material, court filings and accounts	SDB	5.0	\$3,750.00
2. Prepared Solicitor's Compendium for Assessment	SDB	8.0	\$6,000.00
3. Assembled and served Solicitor's Compendium for Assessment	CL	5.0	\$1,875.00
4. Prepared for Pre-Assessment Hearing	SDB	1.0	\$750.00
5. Attended for Pre-Assessment Hearing	SDB	1.0	\$750.00
6. Prepared for Assessment Hearing	SDB	3.0	\$2,250.00
7. Attended for Assessment Hearing (6.5 + 1 = 7.5)	SDB	7.5	\$5,625.00
TOTAL			\$21,000.00

Fees: \$21,000.00
HST: \$ 2,730.00
Total: \$23,730.00

Analysis

3. The costs of the assessment according to section 6(3) of the *Solicitors Act*² "are unless otherwise directed, in the discretion of the officer, subject to appeal, and shall be assessed by him or her when and as allowed." Here, it has not been "otherwise directed" and so the costs of the assessment are in my discretion as the Assessment Officer.
4. In, *Re Solicitor [1969] 2 O.R. 823-828 (S.C. Taxing Office) [QL]*, Taxing Officer McBride held that the exercise of discretion on an assessment of costs should be distinguished from the exercise of discretion by a trial judge as to matters coming before him or her in an action. This is primarily because the onus is always on the solicitor to prove and justify the amount of his or her bill, which situates the solicitor in the similar position to that of a plaintiff.
5. For this and other reasons Master McBride considered it unfair to adopt a procedure of awarding costs of the assessment to an applicant, who has achieved complete or partial success, on the similarity of a plaintiff in an action and held that the costs of the assessment would normally be awarded on the following basis:

² Solicitor's Act 1990, R.S.O. 1990 c. S. 15

If the bill is patently excessive - payable by the solicitor
If excessive but patently so - payable by the solicitor
If reasonable but apparently excessive - no costs
If patently reasonable - payable by the client

This example has been affirmed in the Superior Courts³. This approach has been restated in Orkin on the Law of Costs (2nd ed.), Mark M. Orkin and Robert G. Schipper (Thomson Reuters, 2022), at para. 6:71

6. Based on the determination of the quantum of the accounts, I find the bill of costs to be reasonable but apparently excessive. However, due to the Rule 49 Offer as presented by the Solicitor, costs shall be in favour of the Solicitor.
7. There are certain factors which are unique to assessments conducted under the *Solicitor's Act* which must be considered, over and above the basic principles relating to the fixing of costs. Master McBride's analysis is certainly informative and can be used as a "general guideline", however, is not the only consideration when fixing costs.
8. In exercising the discretion to award costs, an Assessment Officer must be mindful of the provisions of Rule 57.01⁴, which sets out the factors to be considered in the fixing of costs, as well as section 6(3) of the *Solicitor's Act* and section 131(1) of the *Courts of Justice Act*, which provides that, "*subject to the provisions of an Act or rules of the court, the costs of and incidental to a proceeding or a step in the proceeding are in the discretion of the court, and the court may determine why and to what extent the costs shall be paid.*" In this regard, consideration must be given to all the circumstances of the assessment.
9. Furthermore, the court must take into consideration whether any Rule 49 offers were delivered to warrant costs consequences.

Offer to Settle

1. Rule 49.13 of the *Rules of Civil Procedure, R.R.O 1990* is the overriding principle that allows me to exercise my discretion in awarding costs when considering offers to settle in writing, the date of the offer and the terms. Rule 49.10 (1) & (2) applies to indemnity costs as follows:

49.10 (1) Where an offer to settle,

- (a) is made by a plaintiff at least seven days before the commencement of the hearing.
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial

³ See *Fogler Rubinoff LLP v. Houle* 2021 ONSC 5626 & *Starkman Barristers v. Marino Estate* 2021 ONSC 5530

⁴ Rules of Civil Procedure – R.R.O 1994 - Rule 57.01(1(a-i))

indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (1); O. Reg. 284/01, s. 11 (1).

10. The further purpose of this rule is to entice the parties to make genuine efforts to resolve the matter prior to prohibitively expensive litigation⁵. Justice Lemay stipulated that “a *pre-litigation offer is relevant to the consideration of costs as it demonstrates whether a party was prepared to be reasonable from the outset.*” I agree with this principle unequivocally.

11. The only offer to settle that was provided to the court was made by the solicitor on September 12, 2023, and delivered to the client by email. The client rejected this offer in its entirety and did not propose or present a counteroffer to the solicitor.⁶

The terms of the offer were as follows:

- a) The Respondent solicitor would accept the amount of \$9,000 towards the outstanding balance owing of \$ 11,071.47 plus interest of \$553.55 effectively offering a \$2,625.02 reduction to the overall account.
- b) The parties fully and finally release one another from all claims.
- c) The Offer to Settle was open for acceptance until September 15, 2023

12. Although it is patently clear that the solicitor was successful in this matter, the solicitor has not satisfied rule 49.10 with regards to the offer to settle as the offer was only open for acceptance for a period of 3 days. To trigger cost consequences under r. 49.10. the above noted requirements must be met.

13. Additionally, it is evident that the solicitor demonstrated a genuine and continuing effort to settle this matter by being amenable to mediation at the pre-assessment hearings, providing a written offer to settle and being available to continue negotiations prior to the commencement of the assessment hearing.

Therefore, the solicitor would be entitled to his partial indemnity costs.

14 Upon review of the written Offer to Settle, it is evident that the solicitor was the only party to present an Offers, written or otherwise, that represented their respective positions. The Solicitor surmised that the work produced was reasonable and competent, while the Clients position was contemplated in the lack of professional conduct shown by the Solicitor, allegations of duplicate/unnecessary work. The client surmised that the solicitor did not act in the best interest of the client. For that, this Court is of the position that the solicitor was negotiating in good faith.

Solicitor's Bill of Costs

15 Rule 57.01 of the *Rules of Civil Procedure R.R.O 1990* outlines the relevant factors for considering costs, among them is the complexity, amount claimed, the amount sought, and rates

⁵ Brough and Whicher Ltd. V. Lebeznick, 2017 ONSC 1392

⁶ Solicitors' Submissions on costs and interest – Paragraph 14 copy of emailed offer

requested. Although we will not evaluate each factor individually, it is again evident that the solicitor has satisfied the factors considered under this rule with the result that was achieved at the assessment.

Rule 57.01

16 There are various factors to extrapolate from the submissions of the parties. First, are the considerations within rule 57.01 which are as follows:

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged, and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
 - (a) the amount claimed, and the amount recovered in the proceeding;
 - (b) the apportionment of liability;
 - (c) the complexity of the proceeding;
 - (d) the importance of the issues;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
 - (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
 - (g) a party's denial of or refusal to admit anything that should have been admitted;
 - (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
- (i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

13 Rule 57 has a broad scope of factors that I can consider when exercising my discretion in awarding costs. As per my *Reasons*, it was found that the litigation process was relatively complex, and the outcome was significantly important to the client. In both circumstances, the solicitor upheld their accounts for these factors based on the work produced and performed. The assessment process followed the usual course, and the conduct of the parties was reasonable.

14 The bulk of the hours involved in the hearing were performed by the Solicitor, which includes the preparation of documents and attendances at the respective hearings. In reviewing the Bill of Costs, it's evident that the administrative work could have been performed by a law clerk or a timekeeper of a reduced hourly rate. Additionally, 25.5 hours for a single day assessment hearing, a pre-assessment with mediation, and document preparation appears excessive on a balance of probabilities. Thus, this Court must reduce the overall quantum allowed to the Solicitor.

The solicitor outlines his Bill of Costs as shown above:

Solicitor – 25.5 hours @ \$750/hour

Senior Law Clerk – 18.75 hours @ \$375/hour

16. Multiple times during the Assessment hearing the applicant surmised that he felt that many of the tasks were duplicated, unnecessary revisions of his material were completed and that multiple timekeepers were utilized when conducting work on his file. It was explained by Mr. Benmor that this was done to reduce the cost to Mr. David and was fully explained to him at the time she was retained. It was further outlined in the extensive retainer the applicant signed at the outset⁷

**When a client retains Benmor Family Law Group, the client retains the entire team to work on the case. Group consultation and joint work occurs in most cases. At times, this results in fees being charged to the client for each team member who is working on the case even if it is simultaneous.*

Conclusion

- 17 The fixing of costs of a hearing is more than a mathematical exercise of multiplying the number of hours by the appropriate hourly rate. Each case must be considered on its own merits and regarding its circumstances. In addition, the Court of Appeal has provided that the objective of a determination on costs is to fix an amount that the unsuccessful party is required to pay that is fair and reasonable rather than an amount reflecting the actual costs of the successful party. See *Boucher v Public Accountants Council for the Province of Ontario (2004) 71 O.R. (3d) 291 (C.A.)*; *Zesta Engineering v Cloutier (2002), 164 O.A.C. 234 (C.A.)*; *Moon v Sher (2004), 246 D.L.R. (4th) 440 (C.A)*

- 18 The question arises as to whether the quantum sought is reasonable? The principle of proportionality under rule 1.04(1.1) of the *Rules of Civil Procedure R.R.O. 1990* states:

In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

- 18 In ORKIN's, "The Law of Costs", at para. 6:71 stipulates that, although the costs of an assessment are within the discretion of the Assessment Officer, the Officer's approach is not the same as that of a Judge presiding at a trial or other proceeding, since, unlike an adversarial process such as a trial, an assessment is a reference which is "commonly considered to be an inquiry into the matters referred." The authors conclude that the Assessment Officer should fix costs of an assessment at a lower level than if it were a trial.

⁷ Solicitors Compendium – Tab B – retainer agreement

- 19 It has been determined that there should be a reduction to the overall quantum due to work completed by the solicitor that could have and should have been performed by administrative staff, and the quantum of hours expended for a single day assessment hearing was deemed excessive.
- 20 As outlined above, costs are in my discretion as per the *Solicitor's Act*, specifically section 6(3). Having considered the factors above and performing an extensive review of the Bill of Costs provided, I find that a fair and reasonable cost award for the time expended by the solicitor in relation to this assessment is \$9,492 inclusive of HST and disbursements.
- 21
The solicitor is seeking costs of \$23,730.00 inclusive of HST on a full indemnity basis, The concept of proportionality speaks to the reasonableness of the unsuccessful party to pay costs in addition to the result achieved. In this instance, I find that it would be inconceivable that the self-represented client be expected to have to compensate the solicitor for costs associated with this assessment hearing more than the judgment as is indicated in the bill of costs.
- 22 Costs are not intended to be punitive unless warranted, however, are meant to make a party whole again for a percentage of their time expended. In reviewing the Bill of Costs, I am inclined to reduce the time attributed to the preparation time for this assessment for both counsel and his senior clerk as this is a task that could have been undertaken by the Law Student assigned to the case, while also realizing that Mr. Benmor spent more than 8 hours in the actual hearing. As outlined above, costs are in my discretion as per the *Solicitor's Act*, specifically section 6(3).
- 23 Having considered the factors above and performing an extensive review of the Bill of Costs provided and considering the quantum and proportionality of this assessment, I find that a fair and reasonable cost award for the time expended by the solicitor in relation to this assessment is \$9,492 inclusive of HST.

Dated at Oshawa this 7th day of August 2024



Ms. T Jenkinson
Assessment Officer