Court File No: 09-CV-377564

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *SOLICITORS ACT*:

BETWEEN:

KIMBERLY WHALEY

(Solicitor)

- and -

BILL TANDON

(Client)

REASONS

---Heard before Assessment Officer R. ITTLEMAN, at the Courthouse, at 330 University Avenue, Toronto, on: JULY 17, 2009.

APPEARANCES:

THE SOLICITOR In person

AG 0087 (12/94)

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JULY 17, 2009

This is file No. 09-CV-377564, in the matter of the *Solicitors Act*, Kimberly Whaley, solicitor, and Bill Tandon, client.

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This is the continuation of this assessment which has previously been before me on July 3, 6 and 15, 2009. On July 3 and 6, both Ms. Whaley and Mr. Tandon appeared before me. As the matter was not concluded on July 6, it was adjourned over to July 15 at 1.30 p.m. That was a date agreed upon by both parties.

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Mr. Tandon did not appear on July 15 and the matter proceeded in his absence. At the conclusion of the matter on July 15, the matter was adjourned over to this morning at 10:00 a.m. for the delivery of my decision. Mr. Tandon is not in attendance, it is currently 10:27 a.m. To the best of my knowledge, Mr. Tandon has not contacted the assessment office nor myself nor Ms. Whaley regarding the status of this matter.

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This is my decision with respect to this matter, which again was heard over the course of three days, July 3, 6 and 15, 2009. The hearing was conducted pursuant to an order issued by the Registrar on April 22, 2009 upon the requisition of the solicitor for an assessment of her bills pursuant to the *Solicitors Act*.

At the preliminary appointment on May 11, 2009, the matter was scheduled for hearing on September 8 and 9, 2009. However, upon the motion of the solicitor, an order was made by Mr. Justice Aston on June 15, 2009 that the hearing proceed on July 3, 2009, and it did so proceed.

Ms. Whaley represented herself in this assessment and was present throughout. Mr. Tandon was also self-represented. He appeared on July 3 for the entire duration of the hearing on that date.

On July 6, he was present for almost the entire duration, with the exception of a period of about one half-hour when he decided not to participate and to

leave the hearing room after a request for an adjournment was denied. When the hearing had not been concluded by 5:00 p.m. on July 6, it was adjourned to July 15, 2009 at 1:30 p.m., being a date that was agreed upon by both parties.

Mr. Tandon did not attend on July 15. After waiting the requisite 15 minutes, pursuant to Rule 3.03(2), the hearing continued. I reserved my decision at the conclusion of the hearing on July 15, and adjourned the matter over to July 17, 2009 at 10:00 a.m. for this oral decision.

I want to emphasize that Mr. Tandon's non-attendance and his conduct at other parts of the hearing played absolutely no role in my analysis of the evidence and in my formulating this decision. This decision is based solely on the evidence as presented and the application of the relevant law.

There are a total of three accounts which are the subject matter of this assessment, dated February

4, April 4 and May 12, 2009. The totals of these accounts are as follows:

Fees:	$36,987.50
GST on fees:	1,849.38
Disbursements, subject to GST:	2,624.83
GST on those disbursements:	131.24
Total:	$41,592.96

No monies have been paid. There is no cash retainer in trust held by the solicitor. The balance owing pursuant to the bills and subject to this assessment is $41,592.96.

In formulating this decision, I have considered all of the oral and documentary evidence presented during the course of the hearing. This included the oral evidence of Ms. Whaley and that of her law clerk, Bibi Minoo, who answered one question which was posed to the solicitor by the client during his cross-examination of her. Both of these witnesses made affirmations to tell the truth. Mr. Tandon, as noted, was given the

opportunity to conduct a cross-examination, which he commenced, but did not conclude, on July 6.

When Mr. Tandon did not appear on July 15, I considered that he had abandoned his cross-examination. I note that he is not in attendance today either, and to the best of my knowledge, he has not contacted the assessment office to inquire into the status of this proceeding, and Ms. Whaley has advised that he has not contacted her either.

As is my practice with self-represented parties who may not have professional advocacy training, I had Mr. Tandon make an affirmation to tell the truth at the commencement of the hearing, at the same time that Ms. Whaley and Ms. Minoo were affirmed. This was done because in my experience some individuals tend to give evidence while cross-examining witnesses, rather than waiting for the opportunity to present evidence in-chief. This was done without objection from either party.

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Although Mr. Tandon did not appear for the continuation of the hearing on July 15 and therefore did not formally present his evidence in-chief, I have considered his evidence to the extent that it was presented during his cross-examination of Ms. Whaley and Ms. Minoo, as well as in submissions that he made in respect of various procedural issues that arose while he was in attendance during the hearing.

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As I noted earlier, I have considered all of the documents as well which were tendered in evidence and identified in the oral testimony of the witnesses. Some of those documents are contained in a motion record which was filed by the solicitor on the motion before Mr. Justice Aston.

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As I indicated to the parties at the outset, I have only considered those documents contained in the motion record which were identified by a witness during the course of the hearing. Whether or not any particular portion of the evidence is referenced by me in

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my decision, all of the evidence has been considered and given the appropriate weight.

I heard evidence that the solicitor was retained with respect to an application brought in the Superior Court of Justice relating to the guardianship of Mr. Tandon's wife, Amalia Cabelas, as well as for custody of their children. Ms. Cabelas was involved in a motor vehicle accident in 2007, as a result of which she apparently suffered very serious physical and cognitive injuries. Mr. Tandon has acted for his wife pursuant to general and personal care powers of attorney that she executed.

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Her family, represented by her sister, brought an application in or around January 2009, claiming that Mr. Tandon was not acting in his wife's best interests and seeking an order to supplant the authority granted to him in the powers of attorney. The application also sought custody of the client's children.

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A retainer agreement was signed by the client, which particularizes the various fees and disbursements to be charged by the solicitor. It is not within my jurisdiction to enforce contracts or agreements. My authority is to conduct an assessment of the bills and to determine what is fair and reasonable, having regard to a number of factors, including those enumerated by the Court of Appeal in its decision in the case of *Cohen v. Kealey and Blaney* (1988) 3 C.P.C. (2d) 211. 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.

These factors are not listed in any particular order of significance or importance. Further, an assessment officer is entitled to assign to these factors the weight that is deemed appropriate. This is pursuant to a decision of Madam Justice Himel, the name of which escapes me. In so doing, I have given regard to the facts and circumstances of this particular case.

It must be noted that on a *Solicitors Act* assessment such as this, the burden of proof rests on the solicitor to prove her bills. Although I did not hear evidence in-chief nor a closing argument from Mr. Tandon, it appears that the main thrust of his complaint regarding the bills can be summarized as follows:

1. The time spent by the solicitor was excessive.
2. The solicitor did not follow the client's instructions to enter into mediation and to settle the litigation.
3. The solicitor billed the client for services she provided to his wife's solicitor, Mr. Handelman, as his agent.

4. The client does not have the ability to pay the accounts, a fact which he claims was known since early in the guardianship proceeding by the solicitor.

I turn to an analysis of the factors enumerated by the Court of Appeal in *Cohen v. Kealey and Blaney*.

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

Ms. Whaley was called to the Bar or has been practising since 1995 and has been certified by the Law Society as a specialist in the field of estates. Nevertheless, although the matter for which she was retained was not procedurally complex, the issues relating to incapacity were of an above average complexity.

2. The degree of responsibility assumed by the solicitor:

Ms. Whaley assumed carriage of the client's file, even to the point of communicating with her

office and junior counsel and directing activity on the file while on vacation. She delegated work to her law clerk and to her junior as necessary and reasonable, and with a view to keeping the client's costs down. She kept the client apprised of developments in a timely fashion and she responded thoroughly and promptly to the many e-mails sent by the client for updates and information.

She also acted in a manner which was calculated to keep the client's costs down. For example, she delivered a Rule 49 offer to settle to the adverse party within days of being retained. She continually canvassed with opposing counsel the possibility of mediation, and she ultimately brought the litigation to a conclusion, without the necessity of cross-examinations or a lengthy and costly litigation process and trial.

3. The monetary value of the matters in issue:

The litigation did not relate per se to a matter of monetary value. Rather, it related to issues

relating to the estate and well-being of the client's wife, as well as custody of their children.

4. <u>The importance of the matter to the client:</u>

These were extremely important issues for the client. Central to the litigation was the custody of the client's wife and children and control of the care of the client's wife.

5. <u>The degree of skill and competence demonstrated by the solicitor:</u>

The evidence indicates that Ms. Whaley demonstrated well more than a reasonable amount of skill and competence in handling the client's file. She appears to have taken the necessary steps and she took an approach aimed at keeping the client's costs down and bringing the litigation to a conclusion in a very timely fashion.

In accordance with the client's instructions, the solicitor prepared the necessary

material to respond to the application. Prior to doing this, her first task was to seek an adjournment of the return of the application originally scheduled for February 3, 2009. Unfortunately, the applicant's lawyer, Mr. McAlear, was not agreeable. Consequently, Ms. Whaley had her junior, Ms. Dina Stigas, attend at court to seek an adjournment, which was granted. I note that Ms. Stigas' hourly rate was $250.00, whereas Ms. Whaley's was $495.00. I also note that a considerable part of the work on the file was delegated to Ms. Stigas under Ms. Whaley's supervision, and the client was billed at Ms. Stigas' lower rate.

By the March 30 return of the application, Ms. Whaley had put material before the court and had argued successfully that the application should be dismissed. This dismissal was achieved without the necessity and additional expense of a motion for summary judgment.

It should also be noted that Ms. Whaley was able to keep disbursement costs down by combining her

application and motion records into one record, and by combining her factum and brief of authorities into one volume. Had the application not been dismissed, the litigation could have continued for a year or more at obviously much greater expense to the client.

Mr. Tandon argued that Ms. Whaley failed to heed his instructions to mediate and to settle the matter. The evidence does not support this position. Mediation and settlement can not be forced upon a party who is unwilling. Mediation did not take place most significantly because the applicant and her counsel were resistant. Before the time for seeking an order for mandatory mediation arrived, the application had been disposed of. I do note, however, that Ms. Whaley made several settlement overtures and delivered offers to settle, none of which resulted in a settlement agreement.

6. <u>The results achieved:</u>

There is no question that the result achieved was excellent. The application was dismissed

without cross-examinations or a hearing of the evidence, and an order for the payment of costs was obtained. Mr. Tandon has not taken any steps to enforce the costs award and Ms. Whaley is not in a position to do so, as she no longer acts for Mr. Tandon.

7. <u>The client's expectation as to the amount of the fees:</u>

Ms. Whaley's testimony was that from the outset the client understood the potential costs of the litigation, he was billed on a periodic basis, and he was kept apprised of costs throughout. He signed a detailed retainer agreement and the solicitor provided him at the outset with a letter detailing all of the potential costs. The client did not offer any specific evidence on this factor. When the litigation was concluded, he wrote to the solicitor that he had not expected the bill to be so high.

In light of the detailed costs breakdown given to the client at the outset and the constant

communications between solicitor and client during the litigation, the client's position is not tenable.

8. <u>The ability of the client to pay:</u>

It was Mr. Tandon's position that he did not have the ability to pay and that this was known by Ms. Whaley. By signing the retainer agreement, Mr. Tandon represented that he had some ability to pay Ms. Whaley for her services, the potential costs of which were set out in her initial letter to him which accompanied the detailed retainer agreement that he subsequently signed.

I note that Mr. Tandon does not appear to have signed the retainer agreement in haste. He was given the opportunity to review it at his leisure at home and to ask questions before he signed and returned it.

Ms. Whaley agreed at the outset to waive the necessity of a cash retainer to be paid into trust upon Mr. Tandon's representation and agreement that he received funds monthly and that he would thus pay monthly.

This waiver was not in my view an acknowledgement by Ms. Whaley that Mr. Tandon did not possess the ability to pay but, rather, it was an accommodation granted by her at his request and upon his representations. He did subsequently make written requests for the solicitor's indulgence regarding the payment of the accounts, but never advised that he was unable to pay.

Although Ms. Whaley knew that Mr. Tandon was not employed, she had no knowledge as to his assets nor other sources of income. Whether or not Ms. Whaley knew of Mr. Tandon's ability to pay is not the determinative element in my consideration of this factor. What is significant is whether or not the client had the ability to pay when the accounts were rendered and whether he had the ability to pay at the time of the assessment.

In cross-examining Ms. Whaley, Mr. Tandon attempted to challenge her evidence on this issue, suggesting to her that she knew or ought to have known from his failure to pay that he was unable to do so. He was not successful.

The evidence shows, and I find, that, to the contrary, while the litigation was on-going, Mr. Tandon made no mention of an inability to pay. Rather, he continually promised payment and cited other issues, such as the delay in receipt of funds from other sources, as the reason for his delay in payment. It was only after Ms. Whaley had achieved such a positive result with the dismissal of the application and an award of costs in favour of the client, that he mentioned for the first time in an e-mail that he could not afford the amount that he had been billed. He did not indicate what amount he could afford, nor did he provide any particulars in support of this position.

This was repeated at the hearing where Mr. Tandon presented no evidence upon which it could be reasonably concluded that he did not possess the ability to pay. There was evidence that Mr. Tandon was not working, but there was no evidence that he did not have income from other sources, nor assets upon which to draw, in order to satisfy the solicitor's bill.

5 9. The time expended by the solicitor:

There were two timekeepers reflected on the accounts, Ms. Whaley and her junior, Dina Stigas. Ms. Whaley did not bill for the time expended by her law clerk, Bibi Minoo.

Ms. Stigas, a 2002 call, was billed at $250.00 per hour, as I have noted previously. I find this to be a fair and reasonable hourly rate.

Also as noted previously, Ms. Whaley's hourly rate was $495.00. At first glance this may seem high for a solicitor of 15 years' experience. However, Ms. Whaley is certified by the Law Society of Upper Canada as a specialist in estates litigation. This expertise was clearly reflected in the extremely positive outcome achieved in the litigation. I therefore find that Ms. Whaley's hourly rate was reasonable in the circumstances.

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The client submits that the time expended by the solicitor and for which he was billed is excessive. The solicitor maintains that the amount of time was reasonable in the circumstances. She cites, among other things, the multitude of e-mails from the client and the lack of cooperation on the part of opposing counsel.
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A solicitor has an obligation to keep control of the file and to ensure that unnecessary or unreasonable or duplicated work is not being undertaken at the client's expense. More than that, even where the work is reasonably necessary, part of a solicitor's responsibility to a client is to keep the costs down. On the other hand, a solicitor has an obligation to keep the client apprised of developments, to communicate with the client and to be responsive to the client. With a client such as Mr. Tandon who often sent multiple e-mails on the same day, the solicitor and client costs will be impacted.
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Regarding the client's contention that Ms. Whaley billed him for time spent acting as
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Mr. Handelman's agent, that time was minimal, no more than one-tenth or two-tenths of an hour.

In addressing this factor, the time expended by the solicitor, I must give consideration to the endorsement as to costs delivered by Madam Justice D.A. Wilson on the dismissal of the application. While awarding costs to Mr. Tandon payable by the applicant, she found that the time expended by Ms. Whaley was "excessive" given the nature of the application. Madam Justice Wilson rejected Ms. Whaley's bill of costs in the amount of over $36,000.00 and awarded costs of $12,500.00, plus disbursements of $2,060.16, plus GST, which I calculate to total $15,276.71.

Ms. Whaley contended that the costs endorsement of Madam Justice Wilson was flawed in that, for example, it indicates that no factum had been filed, whereas the evidence indicates that in fact a 168 page factum was filed by Ms. Whaley. Had this factor been recognized by Her Honour, Ms. Whaley submitted, the costs award would likely have been greater.

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Ms. Whaley further submitted that the factors considered by Madam Justice Wilson in her decision, under Rule 57.01 and Section 131(1) of the *Courts of Justice Act*, are different from those to be considered by an assessment officer on a *Solicitors Act* assessment.

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There is validity to this submission. The factors considered in fixing party and party costs on a partial indemnity scale, which was the task undertaken by Madam Justice Wilson, include those factors in Rule 57.01 and the principle enunciated by the Court of Appeal in *Boucher and Public Accountants Council for the Province of Ontario* (2002) 71 O.R. (3d) 291. The basic principle in that case is that, in fixing costs, the court should fix an amount that is fair and reasonable for the unsuccessful party to pay, rather than an amount fixed by the actual costs incurred by the successful litigant.

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While there is some commonality when comparing the factors, and while it cannot be said that the findings of Madam Justice Wilson are of no value, the

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overall factors and principles to be considered by an assessment officer in assessing a lawyer's bill pursuant to the *Solicitors Act* are quite different and distinctive from those considered by the court in fixing the costs of a successful party in a civil proceeding. Quite simply, Her Honour was dealing with the fixing of costs on a partial indemnity scale as between adverse parties involved in litigation, meaning fixing a fair and reasonable amount to represent that portion of Mr. Tandon's legal costs for which the unsuccessful applicant was expected to reimburse him.

On the other hand, I am charged with the task of assessing the bill delivered by the solicitor to her client for the totality of the work performed by her with respect to that litigation. This is an assessment of what might be called a full indemnity basis, having regard to the relevant factors and proper law. In other words, for example, Madam Justice Wilson would not have considered nor should she have considered the time spent by Ms. Whaley in dealing with her client and his excessive number of communications to her.

I also note that Madam Justice Wilson's findings related only to the services performed up to the date of the court hearing on March 30. The solicitor's third account which is before me incorporates work performed after that court appearance. A small portion of that work involved communications with the client regarding the amount of the bill. This time cannot be allowed on an assessment. Further, an adjustment will be made for travel time of about one half-hour, which should not have been billed at the solicitor's full hourly rate.

Having regard to all of the above, I find that the time billed is slightly excessive, and the bill will be reduced accordingly.

Disbursements

I find the disbursements billed to the client to be reasonable, with the following exceptions. The disbursements of $144.00, $25.00 and $97.77, all appearing on the third account, relate to this assessment and as such are not properly chargeable to the client.

They are part of the solicitor's overhead in the nature of collection costs. They will not be allowed, although the solicitor is at liberty to raise them in any submissions she wishes to make regarding the costs of this assessment, if she feels it appropriate to do so.

There is another discrepancy on the bills regarding disbursements. GST should not have been charged on those disbursements which were paid to the court, namely the following:

$102.00 for filing a notice of appearance.

$127.00 for filing a notice of motion.

$144.00 for filing the requisition for assessment.

The bill will be adjusted accordingly.

Conclusion

I find that a fair and reasonable amount for this bill is $36,064.51, calculated as follows:

Fee:	$32,000.00
GST on the fee at 5%:	1,600.00
Disbursements, not subject to GST:	229.00
Disbursements, subject to GST:	2,129.06
GST on disbursements:	106.45
Total:	$36,064.51

Each of the accounts delivered by the solicitor contains a provision that interest will accrue from a date that is 30 days after the date of each bill, at the rate of 3.3% per year, pursuant to the *Solicitors Act*.

I am satisfied that this provision is in substantial compliance with the requirements of Section 33 of the *Solicitors Act*, notwithstanding that the Act provides for interest from a date that is one month after the date of delivery of the bill, and not 30 days thereafter.

However, the rate recited in each account is not in compliance with Section 128 of the *Courts of Justice Act*. Pursuant to that Act, the applicable rate of interest for the account dated February 4, 2009 is 2.5%, and the applicable rate of interest on the other two accounts is 1.3% per year.

Having said that, I am going to exercise the discretion granted to me by Section 33(5) of the *Solicitors Act* to fix interest on the amount owing as assessed at the rate of 1.3% per year, payable from June 12, 2009, being one month after the last account. Up to and including today's date, July 17, 2009, interest equals $44.96, calculated as follows:

$36,064.51 at 1.3% times 35 days = $44.96

---Submissions follow re costs by the solicitor.

---Upon continuing:

I want to note that, while Mr. Tandon was present, this hearing moved along still at a fairly good

5 pace, and I attribute that to the preparation that Ms. Whaley and her office had apparently undertaken. Unlike some counsel who appear before assessment officers, Ms. Whaley was extremely organized, her documents were bundled and presented in an orderly fashion, and that
10 assisted the court greatly.

I am going to award costs to the solicitor of $3,500.00, plus GST, plus disbursements of $266.77, and
15 GST on those where applicable.

I have calculated total costs payable by the client to the solicitor at $3,947.90.
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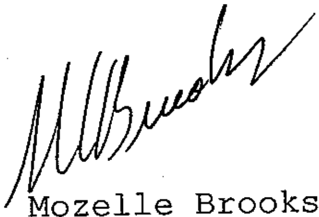
In summary, the bill is assessed at $36,064.51. Interest to today's date is $44.96. Costs payable by the client of $3,947.90. The total is
25 $40,057.37, and I will be issuing my Report and Certificate in that amount.

I just wanted to add with respect to the
30 costs that I fixed at $3,947.90, that notwithstanding that

the bill as assessed by me reflects a reduction of about 12% or 13%, I find that the bill was patently reasonable. The solicitor is entitled to the costs that I have awarded, having regard to all of the circumstances and to the applicable law, including but not limited to the principles enunciated by the Court of Appeal in *Boucher v. Public Accountants Council of Ontario*. I fix the costs in the aforesaid amount of $3,947.90, inclusive of fees, disbursements and GST.

Certified to the best
of my ability



Mozelle Brooks
Court Monitor

Released: August 21, 2009