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