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Law Society program: 14th Annual Estates and Trusts Summit

(Day 1 - November 9, 2011)

PROTECTING YOUR ACCOUNT: ASSESSING SOLICITORS' ACCOUNTS IN ESTATE AND RELATED PROCEEDINGS

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PART I: SOLICITOR AND CLIENT ASSESSMENTS

"Assessment." To most lawyers, it's a dirty word. After all, a lawyer sells time, time can be expensive; but when a client contracts to pay and has received services, payment must be forthcoming. The reason for this is that, although both solicitors and clients alike may obtain an order for the assessment of a solicitors' bill, assessments from clients tend to come in rashes particularly when economic times are tight. The further difficulty with assessments is that, should a lawyer choose to represent him or herself in the matter, they lose time out of their practice, and after all "time is money." With forecasts of continued economic hardship on the horizon, it is our hope that this paper will provide much needed guidance for those hoping to stave off the sometimes frustrating process of solicitor and client assessments.

Facing an Assessment? The Process and Procedure

Jurisdiction

The court's jurisdiction to oversee solicitors' accounts is found both in the inherent jurisdiction of the court to supervise the conduct of lawyers,[1] they being officers of the court, but also governing legislation. Section 90 of the *Courts of Justice Act*[2] provides

[1] *Price v. Sonsini* (2002), 60 O.R. 3rd 257 (Ont. C.A.).
[2] R.S.O. 1990, c. C.43.

that the Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint assessment officers and that "[e]very assessment officer has jurisdiction to assess costs in a proceeding in any court."[3] Section 3 of the *Solicitors Act*[4] provides as follows:

> 3. Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,
>
> (a) by the client, for the delivery and assessment of the solicitor's bill;
>
> (b) by the client, for the assessment of a bill already delivered, within one month from its delivery;
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> (c) by the solicitor, for the assessment of a bill already delivered, at any time after the expiration of one month from its delivery, if no order for its assessment has been previously made.

Limitation on Jurisdiction: Dispute Regarding Retainer

It is thus clear that the absence of a dispute as to the retainer is a condition precedent to the registrar's authority to issue an order for an assessment.[5] Once there is a dispute with respect to the solicitor's retainer, the assessment officer has no jurisdiction to proceed (or continue), and the matter must proceed before a judge by way of action or application.[6]

Deadlines to Assess

Pursuant to the provisions of section 3 of the *Solicitors* Act, both the client and the lawyer must adhere to a one-month deadline for commencing the assessment process. Absent special circumstances, the client has one month from the date a bill is delivered to obtain an Order for Assessment. If no bill has been delivered, the client may obtain an order for the delivery of the bill and the assessment of it, in which case the lawyer will need to deliver the bill within fourteen (14) days from the service of the order.[7]

The lawyer who seeks an Order for Assessment must wait one month from the delivery of a bill to commence the assessment process.

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[3] R.S.O. 1990, c. C.43, s. 90(3).
[4] R.S.O. 1990, c. S.15, s. 36. [hereinafter *Solicitors Act*]
[5] *Nicholas C. Tibollo Professional Corp. v. Wasserman Associates Inc.*, 2011 CarswellOnt 8148 (Ont. S.C.J.) at par. 48, citing to: *Paoletti v. Gibson*, [2009] O.J. No. 301 (Ont. C.A.)
[6] *Ibid.*
[7] R.S.O. 1990, c. S.15, s. 6(1).

Extension for "Special Circumstances"

The wording of section 3 is clear that a client will have thirty (30) days from delivery of their solicitors' bill to apply to a judge for permission to start the assessment process, provided there are no special circumstances. Subsection 4(1) of the Act provides direction in situations where special circumstances may merit the extension of the thirty day limitation period:

> 4. (1) No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, *or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances to be proved to the satisfaction of the court or judge to whom the application for the reference is made*.

Although section 4 of the *Solicitors Act* extends the deadline for the client to bring an assessment from one month to 12 months from delivery of a final bill—whether paid or not—the client must apply to have a court direct a reference for an assessment.[8] In order to have those accounts assessed, however, the client must be able to demonstrate "special circumstances" to the satisfaction of the court to whom the application for the reference is made,[9] and demonstrate facts that rebut the common sense inference or presumption that payment of a bill constitutes implied acceptance of its reasonableness, particularly when, as in this case, the bills were rendered on a regular basis and paid over the course of several years.[10]

If the judge grants the assessment, counsel and client will have to appear back before the Assessment Office to complete the process.

Preliminary Step: Obtain a Notice of Appointment

There are three main steps in the assessment process: the client must obtain a date for the assessment; serve the lawyer with the Notice of Appointment; and attend at the hearing.

A client will obtain a Notice of Appointment by attending at the Assessment Office with the original copy of the lawyer's bill (plus four extra copies) and paying the currently ascribed fee of $75.00. If the client fails to assess a bill in advance of the thirty day deadline, the late fee for having the bill assessed is $181. The clerk at the counter will then give the client an appointment for a hearing.

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[8] *Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP*, 2010 CarswellOnt 28, at para. 31. [hereinafter *Echo Energy*]
[9] *Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson*, 1998 CarswellOnt 707, at para. 8.
[10] *Ibid.* at paragraph 19 and *Echo Energy, supra* note 8 at para. 54

Service of the Notice of Appointment

The client must serve the Notice of Appointment by attending at the Assessment Office (including the Order for Assessment) at least ten (10) calendar days before the assessment hearing day and provide proof of service. The Law Society recommends that the client deliver it to the lawyer in-person and ask someone in the office to sign and date the documents for proof of delivery, or, if no one will sign copies of the documents, for the client to prepare a sworn affidavit of service stating whom was left with the documents, the date and location.[11] Blank forms are included in the materials received by the client from the Assessment Office when a Notice of Appointment is obtained.

Consider Retaining Counsel

The rarified world of assessments has its own rules and, as such, consulting with or retaining experienced counsel to represent you could mean the difference between obtaining a successful result or taking a huge cut in a hard-earned account. When one's livelihood is on the line, it is sometimes cumbersome for lawyers representing themselves to keep their emotions in check and to respond appropriately in an assessment. Retaining counsel can assist with this. Likewise, by retaining counsel (preferably at a lower hourly rate then one's own), one does not necessarily need to take time out of practice (and away from billing), which would otherwise make an assessment double its cost. The topic of recovery of costs is discussed in more detail below.

The downside of retaining counsel is that since the solicitor must prove his or her account, he or she is in the best position of doing so, and as a result the need for representation is often difficult to reconcile or justify. Costs awards are not automatic and therefore the process can be quite costly.

Preliminary Appointment or "First Appearance"

At the First Appearance appointment, preliminary matters will be discussed, such as who the parties are, the timelines of the retainer, the amounts at issue, whether there is any interest in settling the matter in advance of a hearing, and whether the parties would like to avail themselves of the mediation services offered by the Court Office and conducted by experienced Assessment Officers. The date(s) for the hearing will be set at this first appointment.

[11] http://www.lsuc.on.ca/with.aspx?id=640.

Although mediations may obviate the cost associated with attending a lengthy hearing, they can take place at any stage of the assessment hearing process. No additional court fees are charged for this service.

Consider Settlement

The cost consequences of failing to accept a reasonable offer to settle as set out in Rule 49 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, apply to assessment hearings in the same manner as other civil proceedings, subject to certain exceptions. For instance, while it is generally the case in civil litigation that the plaintiff, when successful, is awarded some costs when there are no offers to settle, the nature of an assessment distinguishes it from general civil litigation. As stated by Taxing Officer McBride in the leading case of *Re Solicitor*.[12]

> 6 Let me say at the outset that I do not think that the applicant for the order referring a bill for taxation occupies in any material sense a position similar to that of a plaintiff in an action. For this reason, it is not my practice always to award the costs of the reference to the applicant should he achieve partial success. […] Strictly speaking […] there are no adversaries in a reference proceeding, […] There is also the fact that during the period of 30 days after delivery of his bill, a solicitor cannot apply for an order of reference for taxation, and after that period has elapsed, a client cannot do so on praecipe. Accordingly, as a matter of procedure, neither the solicitor nor the client is as free to assume the role of applicant in a taxation reference as the parties to a dispute are to assume the position of plaintiff in an action. *For these reasons it would be unfair to adopt the procedure of awarding costs generally to the applicant where he has achieved complete or partial success, as an analogy to the position of the plaintiff in an action*. I might also mention that I have held firmly to the view that at the opening of the reference hearing the onus is always on the solicitor to justify his bill, quite irrespective of which party took out the order of reference. In this sense, the solicitor always occupies a position analogous to that of a plaintiff.

Thus, whether at the First Appearance/Preliminary Appointment, during the mediation (if one is agreed to), or before the evidence is called at the hearing, solicitors and clients would be wise to try to take efforts to settle the matter. As the lawyer stands to lose more on the assessment (either by time away from practice, money spent in retaining counsel, or the reduction of an account and interest payable to the client on monies paid), it is in the interest of the lawyer to at the very least attempt to settle the matter as soon as possible, preferably before attendance is required at the hearing.

[12] 1969 CarswellOnt 1001 (Ontario Assessment Officer) at par. 6. [hereinafter *Re. Solicitors*]

Although there is a dearth of case law on the issue of the percentage of reduction that will entitle a lawyer or client to costs, the practice that has evolved is that if the client is unsuccessful in getting the account reduced, or the account is reduced by less than 15% and if there are no offers to settle, the lawyer will often recover the legal costs incurred in retaining counsel.[13]

Carefully Review and Prepare your File

Counsel should review their file and be ready to justify each and every one of their dockets, and, in particular, those tasks or assignments that took significant time. If, in reviewing your accounts, errors are found, these should be corrected right away. Transparency has a more positive impact than errors discovered through cross-examination.

You may wish to prepare a summary or chronology that recounts any communications had with the client regarding their fees and any/all issues taken by the client with respect to fees and your response thereto. To the extent that the client never indicated any concerns with their bills in advance of the Notice of Assessment/Assessment, it may be prudent to write to the client and have them particularize their various complaints. As there are no pleadings in assessments, this will help you to justify your costs during the assessment.

Prepare a Brief of Documents or "Assessment Brief"

To assist counsel with their case, it is helpful to present a brief of documents or "Assessment Brief" for the assessment officer's reference. This, of course, must be provided to the client and if possible in advance of the hearing but at least at the same time as provided to the Court.

Although an Assessment Brief may contain as much of a lawyer's file as the lawyer would like, in some cases, less is more, is the effective route. The Assessment Brief may have more of an impact if it is limited to critical documents such as the following:

1. The Order for Assessment;
2. A summary of the lawyer's accounts;
3. All of the lawyer's accounts;
4. All of the lawyer's detailed dockets and disbursement entries (and any disbursement backup vouchers);

[13] Edwin G. Upenieks, "You have been Served with an Assessment of Costs Notice … Now What" at page 3.

5. A chronology of the retainer, highlighting any correspondence about fees, complaints about fees, and when those complaints were addressed by counsel;

6. The retainer agreement;

7. Any/all reporting letters sent throughout the course of the retainer;

8. Pleadings or other documents, particularly those that were labour-intensive and time consuming to prepare;

9. Any final bills and covering letters closing the retainer;

10. All correspondence about fees, complaints about fees, and how those complaints were addressed by counsel;

11. Any/all complimentary correspondence or notes indicating the client was happy with the work performed;

12. Any/all documents/correspondence showing efforts made by the lawyer to resolve the dispute in advance of the assessment; and

13. Lawyer's C.V., evincing the experience of the solicitor as it fits into the criteria employed by the assessment officer when making their assessment. It is likewise helpful to include the C.V.s of all other lawyers, including associates, who worked on the file and whose time is represented in the account. Where law clerk time is docketed, an indication of the clerk's years of qualification is also relevant.

Notably, if counsel intends to rely on "business records," they should serve notice under section 35 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23, within seven days in advance of the assessment hearing. This would include business records that are required to support the solicitor's account. Subsections 35(2) and (3) of the *Evidence Act* provide as follows:

> 35.(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> 35.(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all of the parties in the action, and any party to the action is entitled to obtain from the person who has

possession thereof production for inspection of the writing or record within five days after giving notice to produce same.

The Assessment Hearing

An assessment hearing is similar to a trial, in that it involves sworn testimony (although not pleadings), may involve witness evidence, and possibly cross-examination (although not examinations for discovery), etc. In some cases, it may be wise to invite witnesses, such as other staff (associates and clerks) who assisted with the file as their work/time may be challenged as well.

The parties to an assessment under the *Solicitors Act* are the solicitor and the client. The onus is on the solicitor to prove that their account is fair and reasonable,[14] in light of the criteria identified in the seminal case of *Cohen v. Kealey & Blaney*[15] (set out below). Both the solicitor and the client can retain counsel to represent them on the assessment. The solicitor (or their counsel) must make out his or her case first, using witnesses where needed, and is then subject to cross-examination by the client. The client may then present his or her case in respect of the assessment, although the client is not required to give evidence. The client may be cross-examined too.

If the matter is ongoing in court, that is the client has continued the matter with another solicitor, one can request that the assessment officer seal the file of the assessment, such that the client is not prejudiced by any evidence that is adduced at the hearing.

Assessment of the Bill

In reviewing the lawyer's bill, the Assessment Officer will consider a number of factors in determining the appropriateness of a fee, such as the following extracted from *Cohen v. Kealey & Blaney*:[16]

1. The time expended by the solicitor;
2. The legal complexity of the matters 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;

[14] *Cohen v. Kealey & Blaney,* 1969 CarswellOnt 1001 (Ontario Assessment Officer) at para. 6. [hereinafter *Cohen v. Kealey & Blaney*]
[15] [1985] 26 C.P.C. (2d) 211 (Ont. C.A.) [*Cohen v. Kealey*].
[16] *Ibid.*

7. The results achieved;

8. The ability of the client to pay; and

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

Issues of credibility also come into play in an assessment.[17]

Counsel should keep these factors in mind not only for the purpose of preparing closing submissions, but throughout the duration of their retainer with the client so as to conduct oneself in a way that hopefully staves off any possibility of assessment.

In making his or her decision as to whether the solicitor's bill is fair or not, the Assessment Officer should also have reference to the *Solicitors Act*, the Rules of Civil Procedure and the relevant case law. If the Assessment Officer is of the view that the bill is too high, he or she can reduce it.

Protecting and Defending your Solicitor Account(s)

Practice Management to Avoid Assessments

The first step to ensure that legal fees are protected is to be wary of who is taken on as a client in the first place. If you are one of a series of lawyers retained by a prospective client (and if those previous lawyers' accounts are outstanding or in dispute), you may want to consider avoiding the retainer. Similarly, you may wish to be cautious of clients who have outstanding complaints with the Law Society of Upper Canada, or who have indicated an interest in bringing a complaint against their former counsel.

Always Obtain a (Signed) Retainer and Keep the Client Apprised of Fees by Regular Billing Practices

It is crucial that a retainer agreement be obtained and signed in each and every file. It is likewise extremely important to ensure that that the retainer agreement set out the manner in which the lawyer dockets and bills as well as their hourly rate, and that of any other lawyers, clerks, or consultants that will be working on the file.

Rule 2.08 of the Rules of Professional Conduct (the "RPC") which governs fees and disbursements ought to guide counsel and should be referred to when preparing a retainer agreement and when addressing any changes regarding the lawyer's fees at a later date. The commentary to subrules 2.08(1) and (2) of the RPC is quite helpful in this regard. It states:

[17] Edwin G. Upenieks, "Solicitor and Client Assessments: How to Avoid Them, How to Maximize Recovery," Presentation for Lincoln County Law Association (Friday September 25, 2009) at page 10

> Where possible to do so, a lawyer should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should forestall misunderstandings or disputes by giving the client and immediate explanation.

For instance, subrule 2.08(1) mandates that fees and disbursements be fair and reasonable and expressly prohibits a lawyer from charging an amount *unless it has been disclosed in a timely fashion*.[18] Thus, any known uncertainties in a matter (and the impact on costs) should be addressed by the lawyer immediately and, if possible in the retainer letter. However, should something unusual or unforeseen occur (such as, in the litigation context, unexpected intransigence on the part of an opposing lawyer, or the unexpected addition of more parties to a proceeding), the impact of such on costs should be immediately put in writing, so as to prevent any disputes at a later date. If counsel self-censors and reduces time spent on a particular task or assignment, they should indicate so in their dockets as well.

If a trust account is set up for your fees, counsel should explain the way in which their fees will be deducted and replenished throughout the duration of the retainer. It is important to ensure that clients are given appropriate notice of any increases counsel intend to make to its office's hourly rates. Counsel may also wish to notify clients of its right to charge interest on overdue accounts and, pursuant to Subrule 2.09(3) of the RPC, and its right to get off the record on the basis of non-payment of fees. Subrule 2.09(3) of the RPC provides that "Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result."

Ensure Fees are Paid on Time

Counsel would be wise to ensure that their fees are paid on a timely basis. If, at some point during the retainer, a particular client is unable to pay their bill, but promises payment out of a settlement or successful law suit, counsel is cautioned against banking on such an occurrence at the end of the day. A long-outstanding bill can cause significant hardship in the interim, particularly on a small firm, and, despite the courtesy of permitting a bill to run unpaid (and without interest) there is no guarantee that a client will not still assess their account at the end of the day. An assessment means further

[18] *Rules of Professional Conduct*, subrule 2.08(1).

delay in payment until the assessment process is settled or concluded, and counsel's courtesy will not likely bear much weight in the assessment process.

When an Account is Proven

If a solicitor's account is reasonable, it will often be upheld by an Assessment Officer and an Order of payment will issue in favour of the solicitor. That Order can then be enforced through garnishment, writ or other enforcement measures.

Recovering Costs of an Assessment When Self-represented

There is little dispute that assessments can be a costly process for lawyers yet sometimes a necessary one regardless. The time taken out of one's practice to prove one's account amounts to possible revenue lost. Retaining counsel to represent you also comes with a cost. The question that arises then is: is that time recoverable?

Before that question is answered, it is important to note that, pursuant to section 6(3) of the *Solicitors Act*, the costs of an assessment are fully in the discretion of the assessment officer, unless the order directing the reference provides otherwise. The costs are also subject to appeal.[19]

The case often referred to on the issue of costs incurred in preparing for/attending an assessment is *Re Solicitor* (1969).[20] Here, Taxing Officer McBride sought to record his views as to the proper method of determining to which party the costs of the assessment should be awarded, but prefacing his views with the observation that "nothing [he says] is intended to influence [..] any local Taxing Officer, in the exercise of their discretion in similar cases"[21] as it "is perfectly obvious that [he has] no status or jurisdiction to attempt to do that."[22] He stated as follows:

> 7 It seems to me that the bill a solicitor delivers to his client will usually fall into one of four categories — patently excessive; excessive, but not obviously so; apparently, but only apparently, excessive; and patently reasonable. One might reasonably expect that those bills that are patently excessive, and they are not as rare as might be supposed, will be suitably adjusted in the taxing office. I should think it would be beyond argument that the client would be entitled to the costs of the taxation of such a bill. The same disposition of costs should be made on the taxation of the second category of bill, one that is excessive in fact, but not obviously so. With respect to the third category, a bill that is

[19] Subsection 6(3) of the *Solicitors Act* provides: "The costs of the reference 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."
[20] *Supra*, note 12
[21] *Ibid*. at para. 5.
[22] *Ibid*.

> reasonable but appears on its face to be excessive, there would generally be no award of costs to either party. If the bill is apparently excessive, the client would be justified in refusing to pay it and in taking out an order for taxation or waiting for the solicitor to do so, but on the other hand, if it were in fact reasonable, the solicitor would be justified in expecting it to be paid. The fact that the bill appeared to be excessive would almost invariably have arisen because of some defect in or omission from the bill through the fault or neglect of the solicitor. The taxation of a bill in the fourth category, one that is on its face reasonable, would generally warrant the award of costs to the solicitor.
>
> 8 […] In my view, a solicitor whose bill has been substantially reduced on taxation is not, under any circumstances, entitled to the costs of the taxation reference.

That said, there is a growing body of case law endorsing the proposition that the question of costs is still a matter for the discretion of the taxing officer, and that the comments of Taxing Officer McBride were not intended to influence the decisions of any other taxing officers.[23] Furthermore, there are now precedents for the notion that case solicitors ought to recover the costs they incur in preparing for and attending at solicitor-and-client assessments.

Indeed, in the case of *Holzman v. Laue*,[24] the Ontario Assessment Officer, Heighington Assess. O. granted the self-represented solicitor costs for preparation of the assessment, stating at paragraph 10: "[t]he solicitor prepared two extensive briefs for the assessment hearings, and it was necessary for her to expend considerable time in preparation for the hearings." Accordingly, Heighington Assess. O. awarded the solicitor costs for preparation.

In addition, the decision of Master Clark in the case of *Wright & McTaggart v. Soapak Industries Ltd. (Receiver of)*,[25] reaffirms the principle that the self-represented lawyer can recover for appearing at an assessment and, going a step further, also stands for the proposition that counsel costs can also be recovered on (the same) assessment. Thus, as Mr. Love, a partner in the former firm of Wright & McTaggart, had spent time preparing for the assessment and giving evidence, Master Clark found that there was "no good reason why he, his former partners, and present partners should suffer that loss if the loss is proved." And, referring to Mr. Peck, a partner at the (since dissolved) law firm who was retained to represent the firm on the assessment, Master Clark stated:

> As a partner, Mr. Peck was and is a self-employed solicitor who earns his living by selling his time. While he was appearing on this assessment, he was unable to sell his time to anyone else, and thereby incurred a liability to himself and to his present partners. I can think of no good reason why he, his former partners, and his

[23] *Holzman v. Laue*, 1994 CarswellOnt 4999 at para. 8.
[24] *Ibid.*
[25] 1990 CarswellOnt 962 (Ont. Assess. O.).

> present partners should bear the direct costs of proving this bill, whereas had an independent counsel had been hired, the bill would have been assessable.

Hence, the Master awarded a counsel fee in the amount of $1,500.00 (including preparation time) for Mr. Peck, together with disbursements.

Although not an assessment case *per se*, the Ontario Court of Appeal case of *Fong v. Chan* (1999),[26] shores up the principle in *Wright & McTaggart v. Soapak Industries Ltd. (Receiver of)* and, as an appellate-level decision, gives it more 'precedent-power.'

The facts of *Fong v. Chan* are as follows. The law firm of Genest Murray DesBrisay Lamek moved, unsuccessfully, to remove the solicitors representing the respondents. Consequently, the trial judge ordered the law firm to pay solicitor/client costs. The law firm retained outside legal counsel, Mr. Eric Murray, to represent it on appeal. The appeal was successful and the firm was awarded party-and-party costs. The firm's costs were then assessed. Although there was no dispute by either the Assessment Officer or the Court of Appeal that the law firm was entitled to recover an allowance for Mr. Murray's counsel fee, the issue arose as to whether the law firm ought to be prohibited from attempting to recover its costs for work performed by its partner, salaried associates, or articling student in assisting Mr. Murray with preparation of the appeal. The Assessment Officer accepted the respondents' argument that the law firm was not entitled to do so, and the law firm appealed the taxing officer's assessment of the law firm's accounts to the Ontario Court of Appeal.

On the basis of section 36 of the *Solicitors Act*, the Court of Appeal saw no reason to deny the law firm the benefit of this statutory provision and determined that the costs related to the work performed by "salaried employees" and articling students were recoverable. However, the legislation was of less assistance on the issue of costs incurred by a "partner" who was not a salaried employee and, as such, resort was had by the Court to the conflicting case law on this issue.

After careful review of the English and Canadian jurisprudence, the Court of Appeal opined (at paragraph 21) that: "the preponderance of modern authority supports the contention that both self-represented lawyers and self-represented lay litigants may be awarded costs and that such costs may include allowances for counsel fees." As stated by the Court at paragraphs 21 and 23:

> 21 […] Since [the case of *London Scottish Benefit Society v. Chorley* (1884), 13 Q.B.D. 872] in 1884, it seems not to have been doubted that self-represented solicitors could recover costs for solicitor's fees […].
>
> […]
>
> 23 Since [the case of *London Scottish Benefit Society v. Chorley* (1884), 13 Q.B.D. 872] over one hundred years ago, it

[26] 1999 CarswellOnt 3955 (Ont. C.A.).

> had been accepted that self-represented lawyers are entitled to indemnity on the "time is money" or opportunity cost rationale. […]

Notably, the Court of Appeal was careful to point out that the right to recover costs is not automatic, and the matter remains fully in the discretion of the trial judge.

There is evidence of a trend in the case law supporting the view that self-represented solicitors ought to recover the costs associated with the preparation for and/or attendance at assessments as well as the costs incurred in retaining counsel to represent them on assessment.

As an example, in the decision of *Whaley v. Tandon,* the solicitor was successful in proving her account and Assessment Officer upheld the account but for a single disbursement. In addressing the issue of the solicitor's costs of the assessment, Assessment Officer Ittleman ordered the client to pay the solicitor's costs for the assessment in the amount of $3,500.00 plus tax.[27]

PART II: THE *SOLICITORS ACT* -- RECENT CASE LAW

The Law on Assessments: Confusing for All

Before reviewing case law on assessments under the *Solicitors Act*, it is worth noting that even the Courts have pointed out the assessment process is not clear-cut.

In *Fiset v. Falconer*[28] Justice Perell noted that the law on assessments is confusing for lay people, lawyers and even judges:

> Most clients are not lawyers, and it is unfortunate that the law associated with when a client is entitled or disentitled from having his or her accounts assessed speaks in a language that would appear to have been designed to confuse lay people. Moreover, the law in this areas is unusually complicated with much to confuse lay people, lawyers and judges alike.

Even the Court of Appeal noted, in *Guillemette v. Doucet,* that "[t]he provisions of the *Solicitors Act* governing applications for assessments are notoriously unclear…"[29]

[27] 09-CV-377564 http://www.whaleyestatelitigation.com/resources/reportedcases/09-CV-377564.pdf
[28] 2005 CarswellOnt 4519, [2005] O.J. No. 4023 (Ont. S.C.J.) at para. 24
[29] At paragraph 11

The Limitations Act and the Solicitors Act: When can a client obtain an Order for assessment?

Subsection 3(b) of the *Solicitors Act* provides that a client may obtain an order for assessment of a lawyer's account, on requisition from a local registrar of the Superior Court of Justice within one month of the bill's delivery.

Subsection 4(1) provides that there shall be no reference on an application made after a verdict or judgment has been obtained or more than twelve months have been passed since the bill has been delivered unless there are "special circumstances" that can be proved to the satisfaction of the court of judge to whom the application for reference is made:

> **No reference on an application of party chargeable after verdict or after 12 months from delivery**
>
> **4.(1)** No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances to be proved to the satisfaction of the court of judge to whom the application for the reference is made.

The terms "verdict or judgment" are in reference to a decision on the account of the solicitor, and not in respect of the matter in the retainer.[30]

References are governed by Rule 54 of the Rules of Civil Procedure.[31]

Section 11 of the *Solicitors Act* provides that payment does not preclude assessment:

> **Payment not to preclude assessment**
>
> **11.** The payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case, in the opinion of the court, appear to require the assessment.

In a 2007 decision, *Guillemette v. Doucet*,[32] the Court of Appeal considered the applicability of the provisions of the *Limitations Act*, R.S.O. 2002, c. 24 to assessments

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[30] *Franklin (Litigation Guardian of) v. Neinstein & Associates*, [2000] O.J. No. 4192 (Ont. C.A.) at paras. 4 to 5

[31] R.R.O. 1990, Reg. 194:
Subrule 54.02(1) provides that "a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue…"
Subrule 54.03(1) provides that "[a] reference may be directed to the referring judge, to another judge with that judge's consent, to a registrar or other officer of the court or to a person agreed on by the parties."
In the case of costs, even where a judge orders a scale of costs, he or she may order an assessment of such costs to be conducted by an assessment officer: See for example, *Kostuik v. Zaharchuk* 1992 CarswellOnt 1992 (Gen.Div.)

[32] 2007 ONCA 743, 48 C.P.C. (6th) 17, 230 O.A.C. 208, 88 O.R. (3d) 90, 287 D.L.R. (4th) 522

of solicitor's accounts. In that case, the client sought to have her lawyer's account assessed nearly three years after the account had been delivered and paid. The lawyer had argued that the two-year time period set out in the *Limitations Act, 2002* barred the assessment. The application judge rejected that argument, and the lawyer appealed that decision

The Court of Appeal reviewed the applicability of the *Limitations Act, 2002* and in particular sections 19 and 20 that deal with the applicability of the two-year limitation period on proceedings under other legislation. In summary, the Court of Appeal held that "by virtue of s. 19 of the *Limitations Act*, the two year limitation period in that Act trumps the twelve month limitation period in s. 4, s. 20 of the *Limitations Act* preserves the "special circumstances" exception set out in s. 4 of the *Solicitors Act*."[33] In the Court's analysis, the client had to show special circumstances in order to have the account assessed, on the basis that she had already paid it, and because she was seeking to have it assessed more than two years after the account had been delivered.

In the decision, the Court recognized that its ruling led to a conclusion that effectively there could be no limitation period for assessments:

> I appreciate that my interpretation of the interaction of the *Limitations Act* and the *Solicitors Act* means that there is no absolute time bar against applications for the assessment of lawyer's accounts. This result may seem inconsistent with the purpose underlying the *Limitations Act*. However, solicitors' accounts have always been treated differently than other debts and even other professional accounts. A superior court has an inherent jurisdiction to review lawyers' accounts entirely apart from any statutory authority. That inherent jurisdiction ws not subject to a time limit. My interpretation of the two Acts preserves that *status quo:* see *Rooney v. Jasinski*, [1952] O.R. 869 (Ont. C.A.) at 875; *Plazavest Financial Corp. v. National Bank of Canada et al., supra* paras. 14-16.[34]

The Court did note, however, that the passage of a "lengthy time period after a bill has been paid, will be a significant consideration in exercising the "special circumstances" discretion in both ss. 4 and 11 of the *Solicitors Act*. Time alone will not, however, preclude the examination of the suitability of a lawyer's accounts where other circumstances compel a review of those accounts."[35] In the end, the Court of Appeal found the claim was not time-barred.

[33] *Ibid.* at para. 33
[34] *Ibid. a*t para. 35
[35] *Ibid.* at paragraph 36

The outcome is, therefore, that a client who can establish "special circumstances" can have a solicitor's account reviewed even beyond the twelve month or two-year time periods.

Limitation Periods for a Solicitor's Assessment

In the 2010 decision of *Cosentino v. S. Cosentino Leasing Ltd.*[36] the Divisional Court considered when a limitation period for an assessment by a solicitor under the *Solicitors Act* starts to run. In that case, the lawyer had performed legal services for his uncle's company between 1994 and 1999. The lawyer only delivered his final account in August 2002, and brought an action in respect of that account in July 2008. The Deputy Small Claims Court Judge found that the cause of action arose in June 1999, when the lawyer ceased work on the file, not when he delivered his final account. The Divisional Court agreed with that ruling, finding that section 2(1) of the *Solicitors Act* which provides that "[n]o action shall be brought for the recovery of fees…until one month after a bill thereof.." has been delivered does not delay the commencement of the limitation period. The Divisional Court also ruled that although section 3 of the *Solicitors Act* provides that a client can obtain an order for delivery and assessment of an account, this does not alter the date for the cause of action for a solicitor.

Therefore, a solicitor who seeks to have his or her account taxed under the *Solicitors Act* should keep in mind that the limitation period starts to run, not when the account is delivered, but rather, when the work is completed.

Obtaining an Order from the Registrar or by Applying to Court: the Thirty-Day Rule Applies

The recent Court of Appeal decision in *Kulidjian & Associates v. Gareene Homes Inc.*[37] clarified the applicability on different provisions for assessments under the *Solicitors Act.* In that case, the client paid the bills that were regularly delivered by the solicitor, and twenty-one days after the delivery of one account obtained an Order from the Registrar for an assessment. The solicitor brought a motion to set aside the assessment order. That motion was dismissed on the basis that the Order for assessment had been properly made under subsection 3(b) of the *Solicitors Act.* The Court of Appeal clarified that there was no need for the client to apply to Court for a referral under section 11 of the *Solicitors Act*, and that thirty days is the time limit by which a client can obtain an Order for assessment from the Registrar, per section 3 of the *Solicitors Act*. Any time following thirty days after the delivery of an account, a client must apply to Court to obtain an Order for assessment.

[36] 2010 CarswellOnt 2745 (Div. Ct.)
[37] 2011 CarswellOnt 1786 (C.A.)

How does a Court assess "special circumstances"?

Section 11 of the *Solicitors Act* provides that where an account has been paid, a Court may still refer the account for assessment if the "special circumstances of the case, in the opinion of the court, appear to require the assessment."

In the case of *Christian v. William Shanks/Cheadles LLP*[38] the Superior Court of Justice considered whether "special circumstances" existed to justify an assessment of a solicitor's account that had previously been paid. At paragraph 7, in exploring the historical definition of special circumstances, Justice McCartney wrote:

> Quite frankly, I think the law has evolved since this decision [*Rooney v. Jasinski*, [1952] O.R. 869 (Ont. C.A.)] concerning the definition of special circumstances as set out in the *Solicitors Act.* For example, in the case of *Tuckey v. Ledroit* [2004] Carswell Ont 4163 (Ont. S.C.J.) (2004 Canlii 33777) the Court stated at Paragraph 9 "In my view "special circumstances" in the contents of 6.11 does not mean "unusual" circumstances so much as "particular" circumstances. In my opinion, the circumstances of this case "appear to require" an assessment." This view was supported in the case of *Santos v. Sokoloff* [2007 CarswellOnt 6247 (Ont. S.C.J.)] (2007 Canlii 41279). There the Court indicated as follows:
>
> > The Application has succeeded in satisfying me that special circumstances existed in her dealings with the Respondent to justify an Order for Assessment. I find as did the Court in Burt, Supra, that the tests for special circumstances should be flexible and determinations made based on the particularities of the circumstances of each case." Finally reference should be made to the case of "*Burt v. Johnstone* (1996 Ontario Judgment #2473) as to the meaning of special circumstances under Sections 4 and 11 of the Solicitors Act. "In my view there is no difference in the test for "special circumstances" under Section 11 as compared to Section 4. *In both cases, the test is elastic in the sense that it allows the court to exercise a broad discretion in the interest of justice by taking into consideration the particular circumstances of the case.*[39]

Thus, a Court that is asked to determine whether "special circumstances" exist has a broad discretion and ought to be flexible in its consideration of the facts of the case.

In reviewing the facts of the case, part of which included administrative confusion in which the Registrar's office assured her she could obtain an Order for assessment even though it was thirty days after the delivery of the account, the Court held that there were "special circumstances" to warrant an assessment.

[38] 2009 CarswellOnt 4568 (S.C.J.)
[39] Emphasis added

In *Echo Energy,*[40] a 2010 decision referred to above, the Court of Appeal addressed the issue of "special circumstances" in assessments.

The appellant, Echo Energy had retained Lenczner Slaght Royce Smith Griffin LLP who then recommended that Echo Energy retain further counsel from Voorheis & Co. for certain aspects of the litigation. The former control group of the appellant's lawyers had retained McCarthy Tetrault LLP because of a conflict of interest. The appellant sought to assess the accounts of Lenczners and McCarthys. Almost all legal accounts had been paid. At the Superior Court of Justice, Justice Brown had found there were no special circumstances with respect to the accounts in question and refused to direct references. The majority of the Court, (Rosenburg J.A. writing and Feldman J.A. concurring) allowed the appeal with respect to the Lenczners and Voorheis accounts, finding that there were special circumstances such that the accounts should be ordered assessed. In his dissent, Goudge J.A. found no error in the Superior Court decision.

In his review, Rosenburg J.A (Feldman J.A. concurring wrote that "special circumstances will tend to either undermine the presumption that the account was accepted as proper or show that the account was excessive or unwarranted."[41] The Court reviewed circumstances under which the presumption will be rebutted and an assessment ordered, such as when the solicitor is still acting for the client, as the client would risk alienating his or her advocate, and if the client makes known his or her concerns within a reasonable time. The Court concludes that "special circumstances is a fact-specific inquiry"[42]

Rosenburg J.A. emphasized that the analysis of special circumstances should focus on the client's perspective.[43] In reviewing the evidence, Rosenburg J.A. noted that the Lenczners written retainer was not signed by all directors, that there was no written retainer with Voorheis, and that in the time period, the company spent nearly one-third of its revenue on legal fees. These factors with respect to Lenczners and Voorheis met the criteria for "special circumstances" in the view of the Court of Appeal such that an assessment could be ordered.

Rosenburg J.A. found no special circumstances existed with respect to the McCarthy's account and declined to order assessments of those accounts.

Goudge J.A. agreed with the majority ruling on the McCarthys accounts but dissented on the Lenczner and Voorheis accounts. Goudge J.A. found no reviewable error on the part of the application judge.

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[40] *Supra* note 8
[41] *Supra* note 8 at para. 31
[42] *Supra* note 8 at para. 32
[43] *Supra* note 8 at para.36

PART III: ASSESSMENTS IN THE CONTEXT OF ESTATE MATTERS

Principle of Indemnification; Estate Trustees to be Indemnified for Legal Costs

In the decision of *Geffen v. Goodman*,[44] the Supreme Court of Canada upheld the principle that Estate Trustees are generally entitled to have their reasonably-incurred legal costs covered:

> The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonable incurred. Reasonable expenses include the costs of an action reasonably defended. The caselaw of recent, appears to be muddying these waters—and one has to ask how do we reconcile this and provide cogent yet courteous advice to clients?[45]

In *Re Dallaway*,[46] Sir Robert Megarry V.C. states:

> In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.

Assessments of Lawyer's Accounts by Estate Trustees

Although it is generally accepted that Estate Trustees will be indemnified for their reasonable legal costs, there are cases where the Estate Trustee takes issue with those costs and their reasonableness.

The issue of the "Estate Solicitor" often arises in Estate matters, i.e. for whom does counsel retained to assist with the administration of the Estate act. This is an often misunderstood concept. In the context of assessments, this is relevant, as it is a "client", under the *Solicitors Act*, who can obtain an Order for Assessment. Justice Cullity clarified this issue in the decision of *Bott Estate (Trustee of) v. MacAuley*.[47] In that case, the Estate Trustee had sought an Order for an assessment of the Estate solicitor's accounts under the *Solicitors Act.* The lawyer who had assisted the Estate Trustee with the administration of the Estate, argued that the Court did not have jurisdiction to order an assessment under the *Solicitors Act* and the question of the

[44] 1992 CanLII 69 (SCC) at pages 48 to 49 [hereinafter *Geffen v. Goodman*]
[45] Re Dingman (1915), 35 O.L.R. 51

[46] Re Dallaway, [1982] 3 All E.R. 118

[47] 2005 CarswellOnt 3743, 18 E.T.R. (3d) 15, 76 O.R. (3d) 422 [hereinafter *Bott Estate*]

lawyer's accounts could only be dealt with on a court passing of accounts under the Rules of Civil Procedure.[48]

Cullity J. disagreed with the solicitor and noted that the Estate Trustee was the "client" and as such had standing under the *Solicitors Act* to apply to have the solicitor's accounts assessed. Justice Cullity took pains to note that the solicitor was not the lawyer for the Estate and could only be the lawyer for the Estate Trustee.

In particular, Cullity J. clarified at paragraphs 19 to 22:[49]

> 19. *Mr. Bott, and not his mother's estate, was the Solicitor's client. Although references to an estate solicitor are deeply ingrained in estate practice in this jurisdiction, they are descriptive only of the work a solicitor is retained to perform for his client. An estate is not a juridical person and cannot retain anyone, or incur liabilities. An estate solicitor is one performing services to a personal representative acting as such.*
>
> 20. It follows that the estate trustee, and not the estate, is personally liable to the estate solicitor. Such liability exists whether or not the estate trustee is entitled to an indemnity – or to be reimbursed – from the estate (i.e. from its assets) for the amounts owing to the solicitor….
>
> 21. *If the estate trustee wishes to challenge the fees or disbursements charged by the estate solicitor, the appropriate procedure is by an assessment pursuant to the Solicitors Act unless, on a passing of accounts, the beneficiaries have challenged the reasonableness of the fees as an expense incurred by the estate trustee in administering the estate, or unless the estate trustee wishes to have an order approving the right to an indemnity or reimbursement. In either event, the court may order an assessment, or in some cases, may review the reasonableness of the accounts at the passing.* This jurisdiction was formerly explicit in – but its existence was not, I believe, dependent on – the provisions of section 62 of the surrogate court rules. Neither approach involves any recognition that the solicitor rendered services to the estate or to the beneficiaries – or that either has rights or obligations to the other or others – but, rather, that the estate trustee is entitled to charge the estate only for expenses and liabilities reasonably incurred. As Leach Suff. Ct. J. stated in *Smith, Re,* [1972] 2 O.R. 256 (Ont. Surr. Ct.):
>
> > The solicitor is solicitor for the executor and not of the estate and costs recoverable by him against the executor can be charged against the estate by the executor only if he shows they are necessary and proper charges against the estate.

[48] *Ibid.* at para. 8
[49] Emphasis added

> 22. Beneficiaries of an estate do not have to insist on a passing of accounts. The fact that they do not do so – or have not yet done so – does not affect the right of the estate trustee to have his or her legal bills assessed pursuant to the *Solicitors Act*. This is obviously the case when the executor is the sole beneficiary and, in principle, the position is no different where there are several beneficiaries or, as is the case here, where the estate is to be divided between the estate trustee and another person in equal shares.

In two recent cases, *DeLorenzo v. Beresh*[50] and *Craven v. Osidacz*[51], the Superior Court of Justice has confirmed that estate trustees are liable for fees they incur in their capacity as estate trustee and cannot be reimbursed for such without the consent of all the beneficiaries or by Court order.

Thus the Estate Trustee, as the client for counsel who assists with the administration of the Estate has standing under the *Solicitors Act* to seek an assessment of that solicitor's account.

Lawyers' Fees in the Administration of Estates

Prior to November 1982, and pursuant to the *Surrogate Courts Act*, R.S.O. 1980, c. 491, s. 80(c), lawyers who performed services relating to the administration of estates were paid in accordance with a fixed solicitor's tariff, which was a percentage of the estate up to $300,000.00 and above $300,000.00 was payable on a *quantum meruit* basis. That tariff was revoked as of November 1, 1982, following which time, lawyers who dealt with estate administration could only charge on a *quantum meruit* basis.[52]

In general, solicitors' accounts in estate administration matters can be assessed on the same basis as those under the *Solicitors Act*.[53] In the decision of *Kelleher v. Knipfel*,[54] Blair J.A., of the Court of Appeal assessed the solicitor's *quantum meruit* fees (under the old *Surrogate Courts Act*) on the criteria of "the amount and character of the services rendered, the labour, time and trouble involved, the character and importance of the services rendered, the amount of money or value of the estate, the professional skill and experience called for, the character and standing in the profession of the solicitors involved, the results obtained and the ability of the clients to pay."[55]

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[50] 2010 ONSC 5655
[51] 2010 ONSC 6637
[52] Orkin, *The Law of Costs* (2011, Canada Law Book, Second Edition) at 322.1 [hereinafter, Orkin]
[53] *Ibid.*
[54] 1982 CarswellOnt 417, 27 C.P.C. 309, 37 O.R. (2d) 92, 133 D.L.R. (3d) 662, 11 E.T.R. 93
[55] *Ibid.* at para. 11
Blair J.A. quotes directly from and applies the criteria set out in Macdonell, Sheard and Hull, *Probate Practice* (3rd ed. 1981) at page 417 therein.

In *Bott Estate*,[56] Justice Cullity opined that unless there is another agreement between the Estate Trustee and the solicitor, the solicitor may charge based on the work performed, and not as a percentage of the Estate.[57] Those fees are to be charged on a *quantum meruit* basis and when assessed, their reasonableness can be questioned, according to the criteria employed under the *Solicitors Act.*

In *Wilson, Barat, Farlam, Willson v. Canada Trust Co*.[58], Justice Cusinato reduced the fees of the law firm in question, in part because too much time was spent on tasks that could have been completed by the client Committee.

As an aside, lawyers who perform "executor's work", as opposed to legal services per se, are not entitled to charge such work in the same manner as they would for legal work. If a lawyer intends to charge legal fees for work undertaken that the executor otherwise would have done, he or she should confirm that in writing first with the client, or otherwise risk having such fees disallowed on an assessment under the *Solicitors Act* or on a court passing of accounts.[59]

Rule 74.18(13): Assessments Stemming from Passings of Accounts

Although Estate Trustees can seek assessments under the *Solicitors Act*¸ beneficiaries may challenge the amounts paid to a lawyer retained by the estate trustee, through a passing of accounts and the operation of Rule 74.18(13). Rule 74.18(13) of the Rules of Civil Procedure[60] provides as follows:

> At the hearing the court may assess, or refer to an assessment officer, any bill of costs, account or charge of lawyers employed by the estate trustee.

In *Raeburn Estate, Re*.[61] the Court assessed solicitor's costs in a contested passing of accounts. The deceased had named three Estate Trustees in his Will: two of his friends, and Royal Trust. All three applied for and obtained a Certificate of Appointment of Estate Trustee with a Will. In the passing of accounts, one of the beneficiaries filed objections and the Estate Trustees were represented by separate counsel. The parties

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[56] *Supra,* note 45 at paras. 24 and 25

[57] At paragraph 25 of his decision, Justice Cullity notes that "[p]rior to 1982, Appendix B to the surrogate court rules contained a tariff that permitted a solicitor to charge for legal services to an executor specified percentages of the value of the estate not in excess of $300,000. For larger estates the fee properly chargeable would, in effect, be computed on a *quantum meruit* basis unless this would justify a fee smaller than the percentage allowed on an estate of $300,000….The tariff has now been abolished and, subject to any rules of practice for assessments adopted in different regions, the normal *quantum meruit* approach should apply."

[58] (1993), 39 A.C.W.S. (3d) 419 (Ont. Ct. (Gen. Div.)

[59] Orkin, *supra* note 50 at 322.3 and references thereto

[60] R.R.O. 1990, Reg. 194

[61] 2009 CarswellOnt 6431, 52 E.T.R. (3d) 150

were eventually able to settle, but for the issue of legal costs incurred. The Estate Trustees sought full indemnification of their separate legal costs, with Royal Trust claiming priority based on a legal agreement signed by the Deceased. The Objector opposed the legal costs sought by the Estate Trustees on the basis that the matter was ultimately dealt with on consent, and that there were two sets of counsel retained for the different Estate Trustees.

Justice Boswell referred to Rule 74.18(13) of the Rules of Civil Procedure and in the analysis, referred to the factors and principles for costs awards set out in Rule 57 of the Rules. In reviewing those factors, Justice Boswell determined that the counsel fees were "somewhat out of proportion to the issues involved and the steps taken in the proceedings." Justice Boswell ordered the costs reduced such that rather than the total of $53,000.00, payment in the amount of $40,000.00 was ordered to be paid proportionately to each of the Estate Trustees' counsel.

Importantly, at paragraph 29, Justice Boswell rejected Royal Trust's argument that their legal fees were a "bill to the estate" to be paid prior to legal costs. Justice Boswell found that Royal Trust's legal costs were just that, legal costs, and were subject to the review of the Court. Therefore the Court rejected the argument that Royal Trust's legal fees were guaranteed by an agreement signed by the Deceased that Royal Trust was to be indemnified for all legal fees and expenses incurred. Although the Estate Trustees relied on *Geffen v. Goodman*,[62] referred to above, the Court did not apply the principle of full indemnification of Estate Trustees, referring the costs incurred rather to a thorough examination.

It is also worth noting that Justice Boswell analyzed the solicitor's accounts in accordance with the "costs" criteria under Rule 57,[63] rather than the criteria under

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[62] *Supra*, note 44

[63] Subrule 57.01(1) outlines the factors that a Court is to consider in exercising its discretion under section 131 of the *Courts of Justice Act* to award costs:

> (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.

Cohen v. Kealey & Blaney,[64] which are typically employed in assessments under the *Solicitors Act.*

The analysis using the "costs" model also led to the conclusion that the Objector would be personally liable for any shortfall. The Court had been informed that there were insufficient funds in the Estate to cover the costs claimed. Justice Boswell ordered that the Objector beneficiary pay the shortfall in fees on the basis that the Objector had delayed matters, that he had received an interim distribution, and that the Estate Trustees were successful in respect of the objections.

In the case of *Raeburn,* the Court exercised its authority under Rule 74.18(13) to require a beneficiary whose conduct had led to increased costs to pay those legal costs that could not otherwise by paid by the Estate.

The outcome is interesting, and reflects a trend in jurisprudence where beneficiaries are charged with legal costs that are incurred as a direct result of their conduct. In these cases, the courts have ordered costs against beneficiaries who have compelled contested passings when settlement was otherwise possible.[65]

This trend runs counter to the historical treatment as explained by Professor Orkin in the *Law of Costs* and related case law,[66] that "[t]here is no rule of case law that would allow the court to order that the costs of a passing of accounts be paid by a beneficiary whose obstreperous conduct delayed winding up the estate."

The Court's Jurisdiction to Review Non-Estate Related Legal Accounts on a Passing of Accounts

In the case of *Knight Estate, Re*,[67] the Deceased had suffered catastrophic injuries in a car accident for which he received an award of damages for $2,000,000.00. The Deceased died some seven years after the car accident, intestate with one child beneficiary.

In the passing of accounts, the Estate Trustee sought to pay counsel in the motor vehicle litigation payment from the Estate for legal fees incurred in the context of the

[64] *Supra*, note 14
[65] See for example, *Bigelow Estate (Re)* (2008), 170 A.C.W.S. (3d) 433 (Ont.S.C.J.), supp. Reasons 176 A.C.W.S. (3d) 569 (Ont.S.C.J.); *Wood Estate v. Wood* (2006), 28 E.T.R. (3d) 293, 152 A.C.W.S. (3d) 1165 (Ont.S.C.J.); *Watterworth Estate (Re)*, (1996) 60 A.C.W.S. (3d) 1098 [1996] O.J. No. 269 (QL) (Gen.Div.) and the unreported reasons of Justice Corrick in *Vincent Estate (Re.)* ONSC 5625
[66] At 226.1, Passing of Accounts; reference to *Watterworth Estate (Re)* (1996), 60 A.C.W.S. (3d) 1098 (Ont. Ct. (Gen.Div.)). And *Heron Estate (Re)* (1996), 10 E.T.R. (2d) 281 (Ont. Ct. (Gen.Div.))
[67] 1999 CarswellOnt 4115

motor vehicle litigation for the amount of $455,000.00. The Children's Lawyer sought the Court's assessment of the legal fees being charged against the Estate.

The Court ruled that as no solicitor's bill had been delivered, this was not an application for assessment under the *Solicitors Act* but proceeded pursuant to subsection 49(2) of the *Estates Act*,[68] as well as under the inherent jurisdiction of the Court to review the legal fees claimed.

The Court declined to rule under Rule 74.18(13) finding that the rule only applies to the assessments of bills of costs on the passing of accounts for "charges for solicitors employed by the estate trustee for estate related matters."[69] Therefore, a legal bill, albeit somewhat related to the estate, but not directly related to estate matters, could not be assessed or referred to assessment by the Court in a passing of accounts.

In this instance, therefore rather than undertake a line-by-line assessment, the Court simply reviewed whether the Estate Trustee's decision to authorize the payment of $455,000.00 for legal fees as being reasonable. In its review, the Court approved the disbursements as "reasonable".

Therefore the Court's authority to assess solicitor's accounts or refer solicitor's accounts for assessments in a passing of accounts is restricted to accounts for work performed in estate-related matters, and not for any other solicitor's accounts, even if they are a disbursement in the passing of accounts.

A Client's Right to Assessment

In *Glanc v. O'Donohue & O'Donohue*[70] the Court of Appeal considered a decision by a motions judge declining Estelle Glanc's request to have legal accounts reviewed. The appellant and her sisters had been involved in an estate dispute with their uncle, following the death of their father. The dispute was over a real estate portfolio that had been built by Ms. Glanc's father and her uncle. Ms. Glanc and one of her sisters retained counsel, Melville O'Donohue and his son, and then retained the services of Hughes Amy at the recommendation of Mr. O'Donoghue. Ms. Glanc sought to have both firm's accounts assessed under the *Solicitors Act.* Ms. Glanc was able to obtain an order for assessment of O'Donoghue, the firm she retained directly but not of the

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[68] Subsection 49(2) of the *Estates Act*, R.S.O. 1990, c.E.21:

> **Powers of judge on passing accounts**
>
> (2) The judge, on passing the accounts of an executor, administrator or trustee under a will of which the trustee is an executor, has jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and its administration and disbursement

[69] *Supra*, note 63 at para. 28

[70] 2008 CarswellOnt 2799, 2008 ONCA 395, 54 C.P.C. (6th) 199, 90 O.R. (3d) 309, 236 O.A.C. 124

second firm, Hughes Amy. The motions judge refused to order an assessment of Hughes Amy's accounts.

An issue in the proceedings was whether the law firms had charged a "premium" for their services and if they had informed Ms. Glanc of such.

Writing for the Court, Blair J.A. wrote that Ms. Glanc and her sister were both "clients" of both law firms and therefore have standing to have the accounts assessed. Blair J.A. noted that the *Rules of Professional Conduct* required Ms. Glanc and her sister to be informed as to whether the accounts contained a premium and to have the accounts assessed under the *Solicitors Act.*

Blair J.A. also referred to the inherent jurisdiction of the court "over the conduct of solicitors and over their own process to maintain public confidence in the administration of justice and to ensure that a client's request for an assessment is deal with fairly and equitably..."[71]

Blair J.A. also noted, after dealing with procedural matters, that:

> *"..it is well-established that the court has a discretion to direct the assessment of a solicitor's account apart from the provisions of the Solicitors Act…"*[72]

In the end, the Court allowed the appeal and authorized the appellant to bring an application under the *Solicitors Act* to have the accounts assessed. The Court's decision was based not only on affirming the client's right to assess a solicitor's account, but on the need for transparency and the role of the Court in maintaining the confidence of the public in the administration of justice and the accountability of lawyers.

Assessments by Non-Clients

Section 3 of the *Solicitors Act,* R.S.O. 1990, c.S.15 provides that where the retainer is not in dispute and there are no "special circumstances", a "client" or "solicitor" may obtain an Order for Assessment on requisition from a local registrar of the Superior Court of Justice. If the solicitor's bill has not already been delivered, the client may obtain the Order for the delivery and assessment of the bill, and if the bill has already been delivered, the client has up to one month following the delivery of the bill to obtain the Order for Assessment.

Section 9 of the *Solicitors Act,* R.S.O. 1990, c.S.15 provides that a non-client who is liable to pay or has paid a solicitor's bill may apply for an Order referring an account for assessment.

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[71] *Ibid.* at page 5
[72] *Ibid.* at page 9 [emphasis added]

In particular, subsection 9(1) of the *Solicitors Act*, allows for persons, "not being chargeable as the principle party" to apply to the Court for an Order for Assessment, if that person is liable to pay or has paid a bill to the solicitor:

> **Assessment where a party not being the principal, pays a bill of costs**
>
> **9.** (1) Where a person, not being chargeable as the principal party, is liable to pay or has paid a bill either to the solicitor, his or her assignee, or personal representative, or to the principal party entitled thereto, the person so liable to pay or paying, the person's assignee or personal representative, may apply to the court for an order referring to assessment as the party chargeable therewith might have done, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable.

Subsection 9(4) of the *Solicitors Act* allows the court to refer an account for assessment where so requested by a third party and that party is entitled to an account, but "by reason of the conduct of the client the applicant is precluded from assessing the bill":

> **Assessment at instance of third person**
>
> (4) When a person, other than the client, applies for assessment of a bill delivered or for the delivery of a copy thereof for the purpose of assessment and it appears that by reason of the conduct of the client the applicant is precluded from assessing the bill, but is nevertheless entitled to an account from the client, it is not necessary for the applicant to bring an action for an account, but the court may, in a summary manner, refer a bill already delivered or order delivery of a copy of the bill, and refer it for assessment, as between the applicant and the client, and may add such parties not already notified as may be necessary.

In the context of Estates matters, the issue that arises is whether beneficiaries have standing to obtain an order for assessment of a solicitor's account pursuant to the *Solicitors Act.*

In the case of *Hardy v. Rubin*[73] five applicants in an Estate matter sought to have the Estate Trustee's solicitor's accounts assessed under the *Solicitors Act.* The Deceased had died intestate and Royal Trust was appointed Estate Trustee Without a Will. In the course of acting as Estate Trustee, Royal Trust had retained counsel and had, with the assistance of counsel, distributed the bulk of the Estate to three persons who were believed to be the only beneficiaries. The lawyer's accounts were paid by the Estate Trustee from the assets of the Estate. At some later time, five other individuals who lived in the United Kingdom brought an Application on the basis that they also were beneficiaries under the Estate. Justice Lissaman heard the Application and ordered that the remaining undistributed funds in the Estate be distributed to the five applicants.

[73] 1998 CarswellOnt 2381, 20 C.P.C. (4th) 372, 23 E.T.R. (2d) 113

The applicants brought a further application to have Royal Trust's solicitor's accounts referred for assessment pursuant to section 9 of the *Solicitors Act.*

Justice Blair reviewed the application in light of the provisions of the *Solicitors Act* and held that the applicants could not claim that they were "chargeable as the principle party" or otherwise liable to pay the solicitor's accounts as they were paid by the Estate. Justice Blair considered whether, the fact that they were beneficiaries and as a result were affected by the payments, meant that they could thus have the accounts referred to assessment under subsection 9(1) of the *Solicitors Act.* Justice Blair ruled they were not clients or otherwise liable to pay the accounts and as a result could not access the referral to assessment process.

Justice Blair also considered whether subsection 9(4) applied to the assistance of the applicants, considering that the "client" Royal Trust had already paid the accounts and had declined to have the accounts assessed.

Justice Blair held that the accounts had already been paid and more than twelve months had passed since their payment, that section 11 of the *Solicitors Act* precluded an assessment and that there were no "special circumstances" that would justify a referral to assessment. Justice Blair noted that there are no specific complaints in respect of the accounts and on that basis could find no "special circumstances" to order an assessment.

Justice Blair noted, in declining to order an assessment of the solicitor's accounts, however, that the applicants had other remedies available to them on the passing of accounts.

Therefore, beneficiaries cannot compel an assessment through section 9(1) of the *Solicitors Act* as they are not "chargeable" parties,[74] and they will likely face hurdles under section 9(4) of the *Solicitors Act* as well. But there are still remedies for beneficiaries at passings of accounts, as addressed above.

[74] In other cases, the Courts have strictly applied the concept of a client or a "chargeable" person to determine who can seek an assessment. In *McCugan v. McCugan* (1892), 19 O.A.R. 56 (Ont. C.A.), aff'd (1892), 21 S.C.R. 267 (S.C.C.) a taxpayer sought to have a lawyer's bill of costs for services rendered to a school trustee referred for assessment. The Court of Appeal found that the taxpayer was not "the person chargeable" with the bill or liable to pay it, even if he indirectly paid a portion of it, such that he was not a client and could not obtain an order for assessment. Likewise, in *Kayar Energy Systems Inc. v. Davies, Ward & Beck,* [2001] O.T.C. 468 (Ont. S.C.J.) a former shareholder in a company sought to have the company's legal bills for loans assessed. The Court ruled that the applicant was not the client and was not the person "chargeable" or "liable to pay" such that it could not obtain an order for assessment.

The Incapable Client and the Assessment of Lawyers' Fees

In the case of *DeMichino v. DeMichino*,[75] Michele DeMichino was catastrophically injured in a car accident. Mr. DeMichino was represented by Gary Neinstein in respect of a statutory accident benefits claim and a tort claim. Mr. Neinstein also dealt with matters relating to Mr. DeMichino's incapacity including proceedings before the Consent and Capacity Board, and a guardianship application.

When he brought the guardianship application, Mr. Neinstein failed to serve Mr. DeMichino's family members in spite of the requirement to do so under *Substitute Decisions Act*. Upon belatedly learning of the guardianship application, Mr. DeMichino's sisters retained counsel and commenced proceedings to remedy the defects in the guardianship application. Counsel under section 3 of the *Substitute Decisions Act* was arranged for Mr. DeMichino, and a settlement was ultimately arrived at between all the parties, with the involvement of the Public Guardian and Trustee.

In the 2011 decision, Justice Roberts was asked to review the fees to be paid to Mr. Neinstein's firm. In a previous ruling, prior to the application brought by Mr. DeMichino's sisters and the involvement of section 3 counsel, the Court had approved the settlement of the tort action including a structured annuity and payment in the amount of $1,153,617.08. The Court had also approved payment to Mr. Neinstein in the amounts of $318,000.00 for fees and $50,000.00 for assessable disbursements which were also allowed. The Court directed the PGT to provide a report in respect of the further fees claimed by Mr. Neinstein.

In 2007, the PGT provided a report to the Court in which it outlined the criteria that should be considered by the Court in determining counsel's costs on a settlement for a person with disability. In general, the PGT noted that the court should consider the factors outlined in *Cohen v. Kealey & Blaney.*[76] The PGT then recommended a further payment to Mr. DeMichino's counsel in the amount of $510,232.81 for fees and disbursements.

However in the meantime, Mr. Neinstein's firm had transferred an additional $562,426.41 from funds held for Mr. DeMichino in its trust account to the general account and made payments on disbursements such that instead of $538,537.08 in trust, the firm retained $500.00 in trust.

In reviewing the PGT's recommendation, and the fact that the parties had agreed to a further payment to Mr. Neinstein, Justice Roberts wrote that she was taking into account the fact that Mr. Neinstein had pre-taken fees:

[75] 2011 CarswellOnt 742, 2011 ONSC 142
[76] [1985] O.J. No. 160 (C.A.).

> …The pre-taking of fees and disbursements by Mr. Neinstein and his firm and his failure to account properly for those amounts are relevant factors in my assessment of the solicitor's claim for fees. *An award of costs is discretionary. As part of the Court's exercise of its discretion, the Court may take into account a myriad of different criteria, including the conduct of the person requesting the payment of costs*.[77]

The Court noted that the funds in the firm's trust account were indeed held in "trust" and

Justice Roberts also noted that Mr. Neinstein was seeking an equitable remedy and as such had to come to Court with clean hands:

> *Further, in seeking costs, Mr. Neinstein and his firm are requesting an equitable remedy. A lawyer's bill for services is to be assessed on the basis of quantum meruit. Since quantum meruit is an equitable remedy, a lawyer who does not come to court with clean hands may not be entitled to a fee. A lawyer who breaches his fiduciary duty to his client and thereby causes harm to his client does not come to court with clean hands. In the present case, there is no question that Mr. Neinstein breached his fiduciary duty to Mr. DeMichino by pre-taking his fees to his client's detriment.*[78]

In light of the pre-taking of compensation, and breach of fiduciary duties, the Court declined to apply the PGT's recommendation for fees and disbursements. Justice Roberts clarified, however, that even without the pre-taking, she would have concluded that the fees charged by Mr. Neinstein were not properly payable.

The Court reviewed the amounts claimed by Mr. Neinstein's firm for fees and disbursements in light of the *Cohen v. Keeley and Blaney* criteria and disallowed all further claims, finding that Mr. Neinstein's firm had "already received more than reasonable and fair compensation." In reviewing the amounts claimed, Justice Roberts found that the firm did not keep or provide dockets and that the time claimed was "extravagant."[79] Justice Roberts also re-reviewed the amount previously allowed to Mr. Neinstein for the guardianship application which had not been brought in compliance with the *Substitute Decisions Act* and found that the time expended was "completely wasted and that Mr. DeMichino received no value from those services."[80] On that basis, the Court disallowed the amount in spite of the fact that it had been previously allowed.

In sum, Justice Roberts ordered that Mr. Neinstein return the entire sum pre-taken and reimburse the amount of $10,000.00 previously allowed for the guardianship application, and did not allow payment for any more fees or disbursements to Mr. Neinstein's firm.

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[77] *Ibid.* at para. 34 [emphasis added]
[78] *Ibid.* at para.35 [emphasis added]
[79] *Ibid.* at para. 58
[80] *Ibid.* at para.76

Justice Roberts's ruling is a stern warning to counsel who represent incapable persons that they have fiduciary duties to such clients. Even in cases where a judge has previously approved payment in a court-approved settlement, a judge later may retract such approval. In this case, the Court first held that the conduct of counsel meant he was disentitled to further fees. While this was not a *Solicitors Act* assessment, the criteria in *Cohen v. Kealey & Blaney*[81] were still applied by the Court in its review of the proposed settlement. The Court is not obliged to simply approve a settlement, even with the recommendation of the PGT. Applying the criteria in *Cohen v. Kealey & Blaney,* Justice Roberts found that the firm's failure to keep dockets and accurately record time, and to spend time in a way that was of benefit to the (incapable) client, meant that those accounts were disallowed. The fact that the client was incapable only elevates counsel's duty to the client, and the scrutiny under which the counsel will find him or herself.

The decision of Justice Roberts is currently under appeal.

CONCLUSION

The law on assessments is constantly developing. A solicitor is well-advised to stay up to date on the law of assessments and costs and develop practice habits that assist in avoiding the spectre of assessments and at the same time, assist that lawyer with dealing with the challenge of an assessment should one arise. Solicitors should also know how to avail themselves of the tools of the *Rules of Civil Procedure* and the *Solicitors Act* to protect their own accounts.

[81] *Supra* note 14