

*Case Name:*

**Rayson & Associates v. Levitt**

**IN THE MATTER OF The Solicitors Act**

**Between**

**Rayson & Associates, (solicitors), and  
Howard Alan Levitt, (client)**

[2006] O.J. No. 3739

Court File No. 05-CV-285442

Ontario Superior Court of Justice

**Assessment Officer Heighington**

September 14, 2006.

(25 paras.)

*Legal profession -- Barristers and solicitors -- Compensation -- Taxation or assessment of accounts -- Determination of costs of assessment of a solicitor's bill -- The solicitor's bill was allowed in full -- The client had sought a full refund and alleged professional negligence -- The solicitor made and withdrew an offer to forgive the unpaid amount -- The court awarded substantial indemnity costs fixed at \$16,500 due to the unreasonable positions taken by the client at assessment, unsubstantiated charges that the solicitor had misled the court, and accusations of negligence and fraud -- The withdrawn offer was a factor in the exercise of the court's discretion.*

*Civil procedure -- Costs -- Solicitor and client or substantial indemnity -- AS damages or punishment for improper conduct -- Offers to settle -- Determination of costs of assessment of a solicitor's bill -- The solicitor's bill was allowed in full -- The client had sought a full refund and alleged professional negligence -- The solicitor made and withdrew an offer to forgive the unpaid amount -- The court awarded substantial indemnity costs fixed at \$16,500 due to the unreasonable positions taken by the client at assessment, unsubstantiated charges that the solicitor had misled the court, and accusations of negligence and fraud -- The withdrawn offer was a factor in the exercise of the court's discretion.*

**Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rule 49.13

Solicitors Act

**Counsel:**

No counsel mentioned

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**1** ASSESSMENT OFFICER HEIGHINGTON:-- My reasons dated July 13, 2006, in this assessment invited brief written submissions regarding costs and interest, if the parties were unable to agree on these matters.

**2** The solicitor's total charges, including fees, disbursements and G.S.T., amounted to \$13,308.89, of which \$3,716.28 remained outstanding, after a voluntary reduction of \$244.35, but the client was seeking a full refund. The result of my assessment was to allow the solicitor's account in full.

**3** The solicitor's Costs submissions revealed that at the time of the pre-hearing on October 17, 2005, seven weeks before the assessment hearing, the solicitor had offered to forego the balance remaining outstanding, but the client was not willing to sign a release of all claims against the solicitor, including negligence. Furthermore, the client's letter to the solicitor on October 21, 2005, on the letterhead of the Lang Michener firm, stated his intention to sue the solicitor for negligence and damages, and inquired whether the solicitor or her counsel would accept such service. In the face of this threat, the client retained counsel, who withdrew the solicitor's offer of settlement on October 26, 2005.

**4** The solicitor's counsel seeks substantial indemnity costs, on the basis of the offer which was withdrawn, and on the unfounded allegations by the client during the assessment hearing that the solicitor was misleading the court. Counsel for the solicitor argued that in the circumstances, the solicitor's reputation was put in issue, clearly for the purpose of intimidating the solicitor, and that any adverse finding in this regard would have been well publicized.

**5** In view of the aggressive position which was taken by the client throughout the assessment hearing, it was argued that the solicitor had been entitled to retain counsel for the objective presentation of her evidence. Her counsel maintained that the solicitor should be entitled to costs on a substantial indemnity basis, notwithstanding that the amounts of costs involved might be in excess of the amounts in issue in the assessment.

**6** The submissions of the client, on his own behalf protested that the amount of costs claimed would exceed the client's reasonable expectations, but he gave no indication of how his expectations had been calculated. The client's submissions did not dispute the solicitor's entitlement to costs, but

challenged the quantum, maintaining that this was "a straightforward assessment", and that the hourly rates proposed were excessive.

**7** While the solicitor's accounts were straight-forward, the client's objections were not. My reasons extended to 125 pages to deal with all of the extraordinary issues which were raised by the client. In most if not all cases, I rejected the client's arguments and his version of the facts, including in particular his accusation during the assessment hearing that the solicitor was misleading the court in relation to the interpretation of the *Family Law Rules*. It would have been sufficient for the purposes of the assessment hearing if he had questioned the solicitor's judgment or challenged her interpretation, but the charge of misleading the court carries with it an implication of wilful intent, which was totally unnecessary, unsubstantiated and inappropriate.

**8** As noted in my reasons, I declined during the assessment hearing to consider certain events which occurred after the period covered by her accounts, since I questioned their relevance to the assessment, but I noted also that such events might be considered relevant with respect to the question of costs, after the completion of the assessment.

**9** In addition to the threat of a negligence action, the client had also accused the solicitor of fraud in using his Visa account for payment of her charges. Such accusation is doubly offensive, when made by a senior member of the Bar.

**10** The client plays a rough game, and he should not be surprised when he is criticized for unnecessary roughness. While his costs submissions now seek the sympathy of the court in mitigation, because of the emotionally charged nature of the matrimonial dispute, this plea is made only when he is faced with the prospect of paying costs, and there is no suggestion of any regret or remorse. Furthermore, he fails to distinguish between the matrimonial dispute with his former wife, and the professional relationship with his own counsel, which should be devoid of emotional considerations.

**11** My reasons also expressed my conclusion that the client had deliberately provoked the solicitor's withdrawal by his own conduct, and then feigned shock and injury from the consequences. His real motive became transparent.

**12** In view of all these circumstances, I do not consider that the expectation of the unsuccessful party can be a dominant or compelling factor in relation to an award of costs in this case. The client knew, at least by October 26, 2005, that the solicitor had retained counsel for the assessment, and that accordingly, he could anticipate a claim for a counsel fee. It seems to me that the threat of negligence and the accusation of fraud transcend the basic issue of the amount of the solicitor's charges.

**13** While the solicitor's offer to reduce her charges was withdrawn, in the face of the threat of a negligence action, Rule 49.13 permits me to take into account the existence and terms of the offer, in exercising my discretion as to costs.

**14** The client's costs submissions cited the decision of Killeen, J. in *Pagnotta v. Brown* [2002] O.J. No. 3033, and the hourly rates that were applied in that case. In my view, that case is readily distinguishable. It included reference to what was then "the new Costs Grid", and applied the specific provisions of the Costs Grid for various steps in the proceeding, such as pre-discovery, examinations for discovery, motions, pre trial and preparation for trial, in what Killeen, J. emphasized was "a common garden variety personal injury case" of a relatively routine nature, lacking in complexity.

**15** However, the Costs Grid ceased to exist on July 1, 2005, prior to the commencement of this assessment hearing. In addition, the changes which were made to Rule 57.01, which also became effective on July 1, 2005, added specific reference, for the first time, to the principle of indemnity, and to the experience of the lawyer and the rates charged and the hours spent, as matters which could be considered in awarding costs, and also added reference to the concept of full indemnity.

**16** In *Mortimer v. Cameron* (1994) 17 O.R. (3d) 1, the Ontario Court of Appeal referred on page 23 to the law respecting solicitor-and-client costs as being "admirably reviewed" in Orkin, *The Law of Costs*, 2nd ed. (1993), at pages 291 to 292, including the following:

"Costs on the solicitor-and-client scale should not be awarded unless special grounds exist to justify a departure from the usual scale."

The quote continues later:

"An award of costs on the solicitor-and client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus: Solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement."

**17** Similarly, in a decision of Greer, J. in *Re: Equity Waste Management v. Halton Hills* (1995) 22 O.R. (3d) 796, the applicants had succeeded in quashing an interim control by-law, and claimed costs on a solicitor and client basis, due to the judge's finding of bad faith on the part of the Town.

**18** Greer, J. cited similar comments of Henry, J. in *Apotex Inc. v. Egis Pharmaceuticals* in (1991), 4 O.R. (3d) 321 regarding an award of costs on a solicitor and client scale in cases where "... the court wishes to show its disapproval of conduct that is oppressive or contumelious."

**19** I said in my reasons that it was not my responsibility in the process of making an assessment to make any value judgment with respect to the relative nature or merits of a client's conduct.

However, it is clear from these authorities that I am entitled to make such value judgments in relation to costs, having regard to the conduct of the assessment.

**20** In my view, the conduct of the client in this case was reprehensible, and merits the impact of costs on a substantial indemnity basis as an appropriate form of chastisement or disapproval.

**21** This still leaves open the question of quantum. I agree with the observation of Killeen, J. in *Pagnotta* that a court should not "attempt to turn the fixation of costs process into a bloated mini trial", or to attempt "to re-try the case in a different guise".

**22** The client has not criticized any of the specific time entries which had been provided by counsel for the solicitor, nor has he challenged the necessity of the particular time entries being required in the assessment, other than to suggest unspecified "overlawyering".

**23** Furthermore, the client has recently introduced yet another extraordinary consideration, by seeking to persuade me to defer the release of my costs decision until after the conclusion of his matrimonial proceedings, in order to preserve confidentiality, and by raising for the first time objections suggesting an alleged improper association by the solicitor's counsel and one of his partners with persons involved in those proceedings. I declined to defer my decision for any such reason, partly because to do so might affect the rights of persons who were not parties to the assessment, and partly because there does not seem to be any prospect of a final result in the client's matrimonial proceeding for the foreseeable future. In any event, the assessment process is a public procedure, which was initiated by the client, and I am not persuaded that the client has provided any compelling reason to conceal the result.

**24** As a result of my review of all of these considerations, I have determined that the solicitor is entitled to costs on a substantial indemnity basis, which in my discretion I have fixed at \$16,500.00, plus G.S.T. on that amount of \$990.00, together with the disbursements of \$184.58, and G.S.T. thereon of \$9.75.

### **Interest**

**25** The solicitor's accounts included an endorsement claiming interest pursuant to the *Solicitors Act*, at the rate of 6% per year. The solicitor's submissions claimed an amount for interest, which was not disputed by the client. I will award interest, which I calculate as \$349.79.

**26** These figures will appear in my Report and certificate.

ASSESSMENT OFFICER HEIGHINGTON

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Appendix

ONTARIO SUPERIOR COURT OF JUSTICE  
COUR SUPERIEURE DE JUSTICE

IN THE MATTER OF THE SOLICITORS ACT and IN THE MATTER OF

Rayson & Associates, Solicitor

- and -

Howard Alan Levitt, Client

PURSUANT TO THE ORDER DATED THE 7th DAY OF March, 2005, an appointment was issued for the assessment of the bill of costs delivered by the above named solicitor to the above named client and on December 5, 2005, and on the 16th day of January, 2006, I was attended by counsel for the solicitor and by the client and proceeded with the assessment of the said bill and I find and certify as follows:

THAT THE BILL OF COSTS AS DELIVERED  
AMOUNTED TO \$13,308.89

AND AS ASSESSED BY ME AMOUNTS TO \$13,064.54

AND THERE HAS BEEN PAID ON ACCOUNT OF  
THE  
SAID BILL \$ 9,348.36

AND THEREFORE I FIND THERE IS DUE TO THE  
SOLICITOR BY THE CLIENT \$ 3,716.28

AND I ALLOW INTEREST TO THE SOLICITOR  
OF \$ 349.79

AND THE COSTS AND DISBURSEMENTS OF THE  
ASSESSMENT ARE ALLOWED TO THE SOLICIT- \$17,3684.33  
OR AT

MAKING A TOTAL OF

\$ 21,750.40

DUE (TO)THE SOLICITOR (BY) THE CLIENT

ALL OF WHICH I RESPECTFULLY BEG TO REPORT.

DATED AT Toronto THIS 14th DAY OF September, 2006

THIS JUDGMENT BEARS INTEREST AT THE RATE OF PER CENT PER YEAR FROM, 2002

qp/s/qw/qlhjk/qltxp