

**CITATION:** Nakano v. Cohen Highley LLP, 2025 ONSC 3147  
**DIVISIONAL COURT FILE NO.:** DC 1569/24  
Oshawa  
**DATE:** 20250528

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**W.D. Newton RSJ, D.L. Corbett and S. Nakatsuru JJ**

**B E T W E E N :** )  
)  
Toshiko Nakano ) *N.J. Nakano*, for the Appellant  
)  
Client / Appellant )  
)  
**- and -** )  
)  
Cohen Highley LLP ) *M. Rynen*, for the Respondent  
)  
Solicitor / Respondent ) **HEARD at Oshawa:** January 20, 2025

2025 ONSC 3147 (CanLII)

**REASONS FOR DECISION**

**W. D. Newton RSJ**

**Overview**

- [1] This is a dispute between Ms. Nakano (the “client”) and Cohen Highley LLP (the law “firm”) over the fees charged to the client, commonly referred to as a solicitor/client assessment.
- [2] After a hearing before an Assessment Officer (“AO”), the firm’s fees were reduced to \$80,000.00, inclusive of HST and disbursements, from \$110,164.81.
- [3] The client sought to have the AO reconsider the decision and reduce the fees further by delivering objections.
- [4] The procedural history of this case demonstrates the confusion over the proper procedure for disputing the decision of an AO on a solicitor/client assessment.
- [5] For the reasons that follow, the appeal is dismissed with costs to the firm.

## The Legislative Framework

### Solicitor/Client Assessments

[6] The *Solicitors Act*<sup>1</sup> sets out the procedure for disputes over “fees, charges, and disbursements for business done by a solicitor.”

[7] Where the retainer of the solicitor is not disputed and there are no special circumstances, a client may request an order for the assessment of a bill.

[8] The *Act* describes the assessment as a “reference”. Subsection 6(5) describes the decision on the assessment as a “certificate” and provides that the certificate is confirmed “in the same manner as confirmation of a referee’s report under the Rules of Civil Procedure”.

[9] Subsection 6(9) states that a motion to oppose confirmation of the certificate shall be made to a judge of the Superior Court of Justice. Subrule 54.09(3)<sup>2</sup> sets out the requirements of a notice of motion to oppose confirmation.

### Party and Party Costs Assessments

[10] Rule 58 of the Rules deals with the assessment of costs “where a rule or order provides that a party is entitled to the costs of all or part of a proceeding and the costs have not been fixed by the court...” (emphasis added). Costs are to be assessed by an Assessment Officer. As in a solicitor and client assessment, the AO is to set out the amount of costs assessed and allowed in a certificate.

[11] As Macleod J. noted in *Moore v. John A. Annen Barrister Professional Corporation*,<sup>3</sup> “Rule 58 deals with “assessment of costs” and not proceedings under the *Solicitors Act*” (emphasis added).

[12] Rule 58.10 provides for objections to an assessment:

#### Objections to Assessment

**58.10** (1) On request, the assessment officer shall withhold the certificate for seven days or such other time as he or she directs, in order to allow a party who is dissatisfied with the decision of the assessment officer to serve objections on every other interested party and file them with the assessment officer, specifying concisely the grounds for the objections

(2) A party on whom objections have been served may, within seven days after service or such other time as the assessment officer directs, serve a reply to the objections on every other interested party and file it with the assessment officer.

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<sup>1</sup> R.S.O. 1990. c. S.15.

<sup>2</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (the “Rules”).

<sup>3</sup> 2017 ONSC 7720, at para. 10 (“*Moore*”).

(3) The assessment officer shall then reconsider and review the assessment in view of the objections and reply and may receive further evidence in respect of the objections, and the assessment officer shall decide on the objections and complete the certificate accordingly.

(4) The assessment officer may, and if requested shall, state in writing the reasons for his or her decision on the objections.

[13] Subsection 17(b) of the *Courts of Justice Act*<sup>4</sup> directs that an appeal lies to the Superior Court of Justice from “a certificate of assessment of costs issued in a proceeding in the Superior Court of Justice, on an issue in respect of which an objection was served under the rules of court” (emphasis added).

### **Conflation of the Procedures for Solicitor/Client and Party and Party Assessments**

[14] Unfortunately, the objections procedure reserved for party and party assessments (costs of a proceeding) has been imported into the procedure for solicitor/client assessments. The *Solicitors Act* does not provide for objections. A motion to oppose confirmation of the certificate is to a judge of the Superior Court.

[15] The delivery of objections is a precondition to the issuance of a Certificate of Assessment, which grounds an appeal to the Superior Court on a party and party assessment.

[16] In *RZCD Law Firm LLP v. Williams*,<sup>5</sup> an appeal of a solicitor/client assessment, this court stated that it is an error to allow an appeal of a Certificate of Assessment without objections having been filed.<sup>6</sup> The court stated the following:

[34] When an appeal is about the assessment officer’s jurisdiction; i.e., an appeal about the principle upon which the assessment proceeded or the fairness or natural justice of the assessment procedure rather than an appeal about particular items, then the appeal may proceed without objections having been made to the assessment officer.

[35] However, where the appeal from a certificate of assessment is confined to specific items in the solicitor’s bill, objections should be delivered, and if objections are not delivered, the appeal court may dismiss the appeal upon preliminary motion. [Citations omitted; emphasis added].

[17] The decisions relied upon by the Court in support of the statements at paragraphs 34 and 35 of *RZCD* were party and party assessments (see *Campbell v. Baker*; *Robinson v. England*; *Snowden v. Huntington*; *Rowland v. Sackmar*; *Clark v. Virgo*) and an assessment under the then *Mental Incompetency Act (Re Avery)*. Although *Brooker v. 626381* did involve a solicitor/client

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<sup>4</sup> R.S.O. 1990, c. C.43 (the “CJA”).

<sup>5</sup> 2016 ONSC 2122 (“*RZCD*”).

<sup>6</sup> *RCZD*, at para. 39.

assessment, the core of that decision deals with an abuse of process by the client in the assessment process. *Borden & Elliot v. Deer Home Investments Ltd.* and *Wilson v. Gunn & Associates* did involve solicitor/client assessments, but no authority was cited for the proposition that Rule 58.11 applies to solicitor/client assessments.

[18] In *1395804 Ontario Ltd. (c.o.b. Blacklock's Reporter) v. Hameed*,<sup>7</sup> this court declined to revisit whether *RZCD* was correct in deciding that objections were required to ground an appeal as that issue was not squarely before it on appeal.

[19] In *Sullivan Mahoney LLP v. McDonald*,<sup>8</sup> the court described whether objections were required on a solicitor/client assessment, as a “common confusion between the procedures for an assessment of an account under the *Act* and an assessment of costs under the Rules.”

[20] Judges in two recent decisions, *Moore* and *Gilbert's LLP v. David Dixon Inc.*<sup>9</sup>, have expressed frustration with the *Solicitors Act* as drafted. In *Gilbert's LLP*, Nordheimer J., as he then was, described the language of the *Solicitors Act* as “confusing and problematic ... render[ing] any coherent understanding of the objectives of that statute virtually impossible”.<sup>10</sup> MacLeod J. expressed a similar sentiment in *Moore*:

... let me add my voice to those calling upon the legislature to review and update the *Solicitor's Act*. In the interim I suggest the Rules Committee enact a clear procedure for assessment of lawyers' accounts and approval of fee agreements.<sup>11</sup>

[21] I accept that the objection procedure may be of some benefit in solicitor/client assessments, and I add my voice to those calling for legislative reform.

### **Procedural History to Date**

[22] The assessment proceeded for three days in April 2022 before AO Sellers.

[23] The decision of the AO was released on December 9, 2022. The released reasons consisted of 178 paragraphs, or 27 pages.

[24] On February 12, 2023, the client delivered a Notice Of Objections under Rule 58.10, together with an affidavit. The objections covered 154 paragraphs over 48 pages. The firm filed reply submissions of 13 pages on February 17, 2023.

[25] By reasons dated March 13, 2023, the AO stated that the objection procedure was not applicable to an assessment under the *Solicitors Act* and set out the sections of the *Act* and Rules that I have set out above and cited the *Moore* decision.

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<sup>7</sup> 2024 ONSC 2797 at paras. 42–43 (“*Blacklock*”).

<sup>8</sup> 2025 ONSC 983 at para. 50.

<sup>9</sup> 2017 ONSC 1345 (“*Gilbert's LLP*”).

<sup>10</sup> *Gilbert's LLP*, at para 6.

<sup>11</sup> *Moore*, at para. 2.

[26] On April 25, 2023, the AO released reasons on costs and awarded no costs to either party.

[27] The client brought a motion for an order compelling the AO to consider the objections and the affidavit filed. That motion was not opposed by the firm. The order of Cameron J., dated July 26, 2023, set out a timetable for the delivery of further objections and reply.

[28] By reasons dated October 16, 2023, the AO considered some of the objections and declined to hear others. He observed that the objection process was an “attempt to relitigate the issues”.

[29] On October 23, 2023, the client appealed pursuant to s. 17(b) of the *CJA*.

[30] On March 25, 2024, the appeal was argued before Christie J. As she noted, “[t]he Appellant raised a number of grounds of appeal, including denials of procedural fairness, errors of law, palpable and overriding errors of fact, patent misapprehensions of the evidence, and insufficiency of reasons.”<sup>12</sup>

[31] Following an 89-paragraph review of the submissions on the appeal, Christie J. dismissed the client’s appeal and ordered that the client pay the firm \$5000 for costs<sup>13</sup>.

### **Reasons of the Assessment Officer – December 9, 2022**

[32] The AO provided comprehensive and detailed reasons and undertook his assessment in accordance with the factors set out in *Cohen v. Kealey & Blaney*,<sup>14</sup> italicized below.

#### *Legal Complexity*

[33] The AO found the matter undertaken by the firm to be of moderate complexity.

#### *Time Expended by the Solicitor*

[34] The AO performed an extensive review of the 23 accounts delivered over three years.

[35] The AO noted the client’s “contentions”:

- a. All time expended after the consummation of the separation agreement shall be reduced to nil due to no tangible results;
- b. The lack of physical inter-office documentation to corroborate any docket associated with same;
- c. The court should make a negative inference for the solicitor not providing all documentation in relation to the work conducted;

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<sup>12</sup> *Cohen Highley LLP v. Nakano*, 2024 ONSC 1971 at para. 2 (“*Cohen/Nakano*”).

<sup>13</sup> Costs Decision, *Cohen Highley LLP v. Nakano*, 2024 ONSC 2215.

<sup>14</sup> (1985), 10 O.A.C. 344 (C.A.), at p. 346.

- d. For the solicitor charging 0.2 hours minimum for any work on the file as per the retainer agreement;
- e. The solicitor charging the client for administrative work;
- f. Jimmy Ding's expended time was of little value although a significant discount was provided; and
- g. As all timekeepers on the accounts were not present during the assessment to provide testimony and be cross-examined, their portion of the accounts should be omitted.

[36] The AO addressed all of these contentions in detail at paragraphs 28 to 68 and concluded that the accounts should be reduced.

*Degree of Responsibility Assumed by the Solicitor*

[37] The AO applied and analyzed each consideration from *Lamont v. Polak*:<sup>15</sup>

- (a) Ensuring that the client understands the terms of the retainer agreement;
- (b) Keeping the client apprised of the status of the litigation and the costs thereof, and maintaining control of the costs;
- (c) Providing the client with sufficient information in order to enable the client to make informed decisions;
- (d) Obtaining the client's instructions on the various steps and ensuring that the client understand the implications and possible consequences of those steps;
- (e) Exploring the possibility of a settlement at an early stage and at every stage; and
- (f) Delegating work to the least expensive timekeeper who possess the necessary skills and competence.

[38] His analysis of these factors is at paragraphs 71 to 84, and the AO concluded that a reduction was warranted for the “least expensive timekeeper” factor and deferred consideration of other factors for analysis with other *Cohen* factors.

*Monetary Value of the Matters in Issue*

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<sup>15</sup> [2013] O.J. No. 3443.

[39] The AO described the monetary value as significant. He recognized that the property conveyance did not “transpire” and stated that this fact will be discussed further in the consideration of the “Degree and Competence” factor.

*Importance of the Matter to the Client*

[40] Noting that that this matter “was of extreme importance” to the client, the AO was satisfied that the solicitor understood the importance of the matter and acted in an appropriate manner.

*Degree of Skill and Competence Demonstrated by the Solicitor*

[41] The AO noted that the client’s contentions mostly consisted of the following:

- a. Both counsel gave legal advice that was outside of their bailiwick.
- b. The term "concurrently" within the separation agreement as it pertains to the conveyance of the "330 Highway 7" property was not properly completed.
- c. The law firm was "negligent" in consenting to the dismissal of the client's application without the client's instructions.

[42] The AO assessed these contentions at paragraphs 99 to 129 and concluded that no reduction was warranted.

*Results Achieved*

[43] The AO addressed this factor at paragraphs 130 to 140. The AO noted that the client contended that the firm was only able to achieve some limited success, and that the firm provided little to no valuable services after the execution of the separation agreement. The AO concluded as follows:

I am not satisfied with the argument of the client that the solicitor provided no valuable services aside from the execution of the separation agreement and the commercial leases. The solicitor made reasonable attempts to resolve the outstanding legal issues as outlined in the extensive correspondence provided. It is clear that the client was unsatisfied with the subsequent legalities that stemmed from Mr. Ding not conveying the property, however, although the solicitor was not able to convey the "330 Highway 7" property as per the separation agreement, nor able to negotiate a settlement regarding the legal fees associated with same, does not preclude the solicitor from their fees or suggest that this court must reduce the accounts exponentially or value those services at nil. That would be an unreasonable position for this court to take and as articulated above in *RZCD v. Williams*, it would be an err in principle for this court to make a finding to the contrary.

*Client’s Expectation as to the Amount of Fees*

[44] Noting that the retainer agreement was in clear and concise language, the AO addressed two issues:

- a. Did the solicitor appropriately explain the expectation as to the fees of the litigation and was the client apprised of the mounting fees and updated accordingly throughout the process?
- b. Did the solicitor inform the client as to his increased hourly rate from \$475 to \$500?

[45] The AO addressed these issues at paragraphs 144 to 163. He gave four reasons for supporting his conclusion that the client would understand what the expected fees could be: see paras 150–154. With respect to the increase in hourly rates, the AO concluded that, as this was not expressly communicated to the client, the firm would be held to the lower rates and the fees would be reduced.

#### *Ability of Client to Pay*

[46] The AO was satisfied that the client had “ample means” to compensate the firm and observed that the client was in receipt of \$10,000 monthly lease payments by operation of the separation agreement and had paid all prior accounts except the last one.

#### *Conclusion on Assessment*

[47] The client did not dispute the disbursements.

[48] After determining the “courtesy discount”, the AO determined the totality of the accounts at \$110,164.81 and, based on the areas where he found a reduction to be appropriate, found that the amount due on a quantum meruit basis to be \$80,000 inclusive of HST and disbursements.

#### **The Objections - February 12, 2023**

[49] The client submitted that the AO should have considered the following facts and arguments:

- a. the Solicitor did not properly inform and advise Toshiko throughout the litigation process, and failed to obtain Toshiko's informed consent on critical issues;
- b. the Solicitor neglected and abandoned Toshiko's file;
- c. the Solicitor had communication issues within the firm as well as with Toshiko;
- d. the Solicitors charged Toshiko for its errors and for its time to explain to her its errors;
- e. there was significant damage and impact caused by the Solicitor's errors, including their failure to take the necessary steps to transfer property to Toshiko and dismissing her family law matter prior to the resolution of all issues;

f. the Solicitor failed on performing their deliverables such as setting down court dates, draft letters, drafting necessary court documents, and attending Court, despite the Solicitor advising Toshiko that they would do so;

g. the Solicitor was untimely in their provision of legal services and providing their bills;

h. the legal services provided by the Solicitor was lacking, despite having two senior partners on her file; and

i. the Solicitor provided Toshiko with contradicting and conflicting advice and statements.

[50] The client also suggested that the AO may not have considered the client's "Brief", which contained the Client's statement of facts and arguments, and asked the AO to provide reasons regarding the arguments raised in the Brief. The client stated that she "restated most of her key arguments" in the objections.

[51] The nature of each objection, without reference to all the facts or arguments cited by the client are summarized below.

Objection 1: Solicitor's Failure to adhere to *Evidence Act*

[52] The client alleged that the firm did not permit the client to inspect documents listed in the *Evidence Act* notice and failed to "include any evidence" except for invoices in the notice.

Objection 2: Drawing Negative Inference

[53] The client submitted that an adverse inference should be drawn because the firm did not produce internal correspondence and memos to support dockets.

Objection 3: Core Issues and Facts Mischaracterized or Missed Altogether

[54] The client objected to the findings of the AO at paragraphs 52, 68, 74, 77, 79, 105, 114, 116, and 118 of the AO's reasons and repeated that the firms' errors were as follows:

a. the Solicitor did not provide the necessary advice, skill, and due diligence prior to the signing of the Separation Agreement;

b. the Solicitor botched the transaction with respect to the Separation Agreement and Commercial Lease Agreement (the "Transaction"), and placed Toshiko in a position of complexity and uncertainty;

c. the Solicitor had issues performing legal services in a timely and competent manner; and

d. the Solicitor had significant miscommunication issues within the firm and with Toshiko, evidenced by their contradictory, misleading, and inaccurate statements.

Objection 4: Resulting Prejudice to Client due to Firm's Errors

[55] The client states that she was prejudiced by the dismissal of the Family Law Application.

Objection 5: Solicitor Mislead the Court on Multiple Occasions

[56] The client submitted that the AO should have found the solicitor not credible on the assessment based on alleged misleading statements.

Objection 6: Client's Expectations as to Fees

[57] The client argued that the firm admitted that it did not discuss fees with the client and that the client expected a discount of at least 25 per cent.

Objection 7: Complexity

[58] The client argued that the AO erred in his analysis of legal complexity by considering the lawyer's understanding of the complexity of the issues and not the complexity of the issues in the proceedings which the AO described as not having a high degree of complexity.

Objection 8: Client Not Sophisticated

[59] The client said she was unsophisticated and disagrees with the AO assessment that she would have understood what the expected fees could be.

Objection 9: No Evidence of Client's Financial Status

[60] The client objected to the AO's finding that the client had ample means to pay the firm.

Objection 10: Solicitor Did Not Stay within Their "Bailiwicks"

[61] The client disagreed with the AO finding that the solicitors did not provide legal services "outside their Bailiwick".

Objection 11: Death by a Thousand Papercuts

[62] The client argued that the AO should have discounted the fees further and alleged that the billing practices of the firm were a tactic which "culminated into the Solicitors' scheme of A Death by a Thousand Papercuts".

[63] With her objections, the client delivered an affidavit sworn February 10, 2023, attaching various transcripts, documents, and emails.

### **Reply to Objections – February 17, 2023**

[64] The firm noted that most of the objections relate to attempts to re-raise and relitigate the issues that were made at the assessment hearing. Other objections were not raised at the hearing and should have been raised then.

[65] The firm argued that the client submitted no new evidence in her objections and simply pointed to evidence already considered by the AO.

[66] The firm responded to each of the 11 Objections raised by the client.

### **AO Reasons on Objections – March 13, 2023**

[67] As noted, the AO declined to deal with the objections relying upon the *Act* and Rule 54.09(3), which sets out the procedure on a motion to oppose confirmation.

### **Order of Cameron J. – July 26, 2023**

[68] This order directed that the objections be returned to the AO for consideration, that the endorsement of Himel J. dated April 27, 2023, be added to the client’s objections, and that the client could provide additional written objections, with a right of reply to the firm.

### **Supplemental Objections to Assessment – August 10, 2023**

[69] The client submitted that the endorsement of Himel J., dated April 27, 2023, is evidence that the firm provided “little to no value” to the client after the execution of the separation agreement and the commercial lease agreement.

[70] On January 10, 2020, the firm executed a consent to dismiss the application. Paragraph 6 of the consent provided the following: “The terms of the separation agreement between the parties are enforceable and in full force and effect.” The issued order from the Court did not include paragraph 6 and the client submitted that the firm took no steps to correct this error. The endorsement of Himel J. stated that the client, through her new lawyer, had brought a motion to enforce the separation agreement and that her husband was intending to move to set aside the separation agreement. One of the reasons given by Himel J. for dismissing the client’s motion was that the separation agreement was not converted into a court order. The other reason was that the application was dismissed by order of Douglas J. dated June 5, 2020.

[71] The client submitted that all fees for work performed after June 10, 2020, provided no value to the client and should be “assessed at nil or significantly reduced”.

### **Reply to Supplemental Objections – August 21, 2023**

[72] The firm responded that the objection arising from the Himel J. endorsement lacked both a contextual and evidentiary background. The firm stated that there was no evidence, either via the client or her current lawyer, to establish that no value was accomplished after January 2020. The

firm noted that the forum for enforcement of the separation agreement was an application, and the endorsement states that the client was to commence her application within 14 days.

### **AO's Reasons on Objections – October 16, 2023**

[73] The AO summarized the objections raised by the client and the firm's reply submissions.

[74] The AO declined to deal with the endorsement of Himel J., concluding that he was "*functus officio*" and that new evidence must be reviewed and determined by a judge on appeal.

[75] He did consider the objections to his prior findings on the assessment. He reviewed the submissions of the parties, the transcripts, and his reasons. He concluded the following, beginning at paragraph 12:

Within that review, I am not satisfied with the submissions of the Client that the Court misapprehended or mischaracterized any evidence that would suggest a reconsideration. Additionally, I agree with the submissions of the Solicitor that this is an attempt to relitigate the issues previously before this court expecting a different outcome.

13. All of the documentation and oral testimony were taken into advisement by this Court prior to it rendering its decision. Although it appreciated that the Client may have a different understanding or perception of the same facts, does not suggest that this court views that same opinion. This Court made some adverse findings in favour of the Client, and for that, reduced the accounts by approximately 25%. There were also findings that the work produced was of some value to the Client and therefore a reduction to nil after the consummation of the separation agreement was an unreasonable position and reserved to egregious actions of a Solicitor.

### **Reasons of Christie J. on Motion to Oppose Confirmation – April 4, 2024**

[76] Justice Christie set out the areas of agreement between the parties as follows:

- a. The parties agree that Assessment Officers have broad discretion to control the assessment process, make findings of fact, and weigh evidence.
- b. The parties agree on the standard of review, in that the Order of an Assessment Officer is entitled to a great deal of deference. In *Rabbani v. Niagara (Regional Municipality)*, [2012 ONCA 280](#), the Court stated:

[6] The standard of review on an appeal from an assessment officer's decision is well established. The order below is discretionary. The hearing is an appeal, not an opportunity for the reviewing court to rehear the assessment and come to its own conclusion as to what is reasonable, absent an error in law, misapprehension of the evidence, palpable and overriding error on a factual matter, or an assessment amount that is so unreasonable

as to constitute an error in principle. The assessment officer's decision was entitled to considerable deference absent such error. See *Samuel Eng & Associates v. Ho* [2009 ONCA 150 \(CanLII\)](#).

c. The parties agree that this court has the authority and jurisdiction to consider an Appeal from this Order pursuant to s. 17(b) of the *Courts of Justice Act*.

d. The Assessment Officer erred in law in some respects during the objection phase of the proceedings. Specifically, he erred in unduly limiting the scope of his function, in that he refused to consider the objections made by the Appellant client in relation to the delivery of documents, the *Evidence Act*, and the Order of Himel J.

e. This court should not send the matter back to the Assessment Officer, but rather should make a determination on the solicitors' accounts and the hearing costs based on the record presented.

f. Any determination this court makes on the appropriate quantum does not require mathematical precision, rather the determination should be made using a holistic approach with a consideration of all of the issues.<sup>16</sup> [Emphasis added.]

[77] Christie J. concluded that the AO had “misconstrued his role” in denying proper consideration of the objections,<sup>17</sup> and found that the reasons given on the reconsideration were insufficient.<sup>18</sup>

[78] Christie J., therefore, “engaged in a more thorough analysis” and was satisfied that the AO’s original reasons were “unassailable”.<sup>19</sup> She stated the following at para 38:

While this court was not satisfied that the Assessment Officer properly engaged with the objections as required, it would not have changed the result. The original reasons are more than sufficient, demonstrating a detailed review of the evidence, credibility issues, and applicable law. There was a reasoned analysis in relation to the assessment of the accounts. Further, the costs reasons were also comprehensive, with a clear consideration and application of the *Courts of Justice Act*, *Rules of Civil Procedure*, and *Solicitor’s Act*.

[79] With respect to the evidentiary issues raised by the client, compliance with the *Evidence Act* and production of documents for the assessment hearing, Christie J. found no lack of procedural fairness. She noted as follows:

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<sup>16</sup> *Cohen/Nakano*, at para. 25.

<sup>17</sup> *Cohen/Nakano*, at para. 32.

<sup>18</sup> *Cohen/Nakano*, at para. 34.

<sup>19</sup> *Cohen/Nakano*, at para. 38.

[45] This court is satisfied that the Appellant had access to the intended business records and, therefore, had ample time to inspect them. These documents were provided to the Appellant in pre-assessment briefs and again in hearing briefs – physically and digitally. The business records were the very accounts / invoices that the Appellant was assessing. Nothing further would have been gained by attending at the office to look at these documents. It must also be noted that these events were occurring during a pandemic.

[46] As for the suggestion by the Appellant that she did not receive complete production of documents requested, the Assessment Officer dealt with this issue directly and reduced the accounts as a result.

[80] Christie J. then considered the AO’s reasons and the objections, in light of the *Cohen* factors.

#### *Legal Complexity*

[81] With respect to the client’s objection that the AO did not conduct a proper analysis of this factor, Christie J. concluded that the portion of the AO’s reasons relied upon by the client for her arguments take the AO’s words out of context. Christie J. stated as follows:

[53] The Assessment Officer clearly articulated in his reasons his consideration of the complexity of the matter. Reading these comments in context, it is clear that the Assessment Officer was aware of and applied the notion that the more complex the litigation, the more likely that a higher fee will be warranted. The Assessment Officer concluded that the matter was moderately complex and he assessed the accounts in light of that complexity. In addition, he considered and dismissed the Appellant’s argument that the solicitors increased the complexity due to their lack of knowledge.

#### *Degree of Responsibility*

[82] The client acknowledged that the AO correctly articulated the law but the AO did not apply the facts correctly. Christie J., therefore, applied an appellate review standard and found no palpable and overriding error.<sup>20</sup>

#### *Degree of Skill and Competence Demonstrated by the Solicitors*

[83] As noted by Christie J., the client argued that the AO misapprehended the evidence and incorrectly did not impose a reduction without providing sufficient reasons. In paragraphs 57 to 60 of her reasons she outlined the client’s objections and reproduced the AO’s reasons. She concluded that the AO’s original reasons were detailed and comprehensive and found no merit to this objection.

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<sup>20</sup> *Cohen/Nakano* at para. 54 - 56.

*Results Achieved*

[84] Christie J. set out the client’s arguments that the firm achieved little or no results for the client, including the client’s arguments about the endorsement of Himel J. In rejecting this objection, Christie J. noted that the AO “thoroughly engaged with this issue and provided sufficient reasons for his conclusions”.<sup>21</sup>

*Time Expended by the Solicitors*

[85] The client argued that the AO misapprehend the facts and incorrectly applied the law with respect to this factor. Christie J. summarized the client’s objections, reviewed the AO’s reasons, and declined to vary the original conclusions of the AO.

*Client’s Expectation as to the Amount of Fees*

[86] Again Christie J. set out the client’s objections and the AO’s reasons, which she described as a “very thorough and reasoned analysis of the issues”,<sup>22</sup>and rejected the objection that further reduction in fees was required.

*Client’s Ability to Pay*

[87] The client argued that the AO improperly concluded, without sufficient reasons, that the client had the ability to pay the firm. Christie J. reviewed the AO’s reason and conclusions and concluded that the client’s argument was without merit.<sup>23</sup>

*Costs*

[88] Christie J. reviewed the reasons of the AO for not awarding costs to either party on the assessment and, after noting the broad discretion of the AO, declined to interfere with that cost award, describing the reasons as “thoughtful, considered and reasonable”<sup>24</sup>.

[89] By reasons dated April 16, 2024, Christie ordered the client to pay costs to the firm in the amount of \$5000.

**Positions of the Parties**

[90] The client appeals the decision of Christie J. on three broad grounds:

- a. The objections were subjected to a standard of review analysis and not fully reconsidered;

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<sup>21</sup> *Cohen/Nakano*, at para. 65.

<sup>22</sup> *Cohen/Nakano*, at para. 78.

<sup>23</sup> *Cohen/Nakano*, at para. 80.

<sup>24</sup> *Cohen/Nakano* at para. 84.

- b. By not reconsidering the objections “in its entirety, the client was denied procedural fairness; and
- c. The reasons were inadequate, lacking sufficient detail for meaningful appellate review, especially with respect to the *Evidence Act* issue.

[91] Further, the client submits that the motion judge erred in her analysis of the legal complexity factor and erred in the exercise of her discretion with respect to costs.

[92] The client submits that, although acknowledging that objections allow for reconsideration, the judge improperly assessed the objections on a standard of review analysis showing deference to the AO finding rather than assessing the objection afresh.

[93] The firm submits that Christie J. applied the correct standard of review where appropriate and reassessed the objections in light of the AO’s comprehensive reasons. The firm asks for the appeal to be dismissed with costs.

### **Standard of Review**

[94] As the parties agreed, and as set out by Christie J. at paragraph 25 of her reasons, the standard of review is an appellate standard. This was recently reiterated by this court in *Blacklock*:

[23] The standard of review on an appeal from a decision of a motion judge on a motion to refuse certification of an Assessment Officer, in itself akin to an appeal (see: *Heyday Homes Ltd. v. Gunraj*, (2005) 44 CLR (3d) 169 (Ont. S.C.J.); *Samuel Eng & Associates v. Ho*, [2009 ONCA 150](#) (C.A.)), is well-established. The order of an Assessment Officer is discretionary and the hearing before the motion judge or before this Court on further appeal is not an opportunity for the reviewing court to rehear the assessment and come to its own conclusion as to what is reasonable, absent an error in law, misapprehension of the evidence, palpable and overriding error on a factual matter, or an assessment amount that is so unreasonable as to constitute an error in principle (see: *Rabbani v. Niagara (Regional Municipality)* [2012 ONCA 280](#)).

### **Analysis**

#### **Reconsideration**

[95] While the court below concluded that the AO’s position denied the client’s internal reconsideration and that the reasons on reconsideration were inadequate, the reasons on reconsideration must be read with the AO’s comprehensive initial reasons. While the AO did not address the *Evidence Act* issues or the new evidence (the Himel order), when read together, the reasons demonstrate that the objections were insufficient to cause the AO to vary his original decision. As noted above, the AO reviewed the submissions of the parties, the transcripts, and his reasons. He concluded the following, beginning at paragraph 12:

...Within that review, I am not satisfied with the submissions of the Client that the Court misapprehended or mischaracterized any evidence that would suggest a reconsideration. Additionally, I agree with the submissions of the Solicitor that this is an attempt to relitigate the issues previously before this court expecting a different outcome.

[96] The objections track the initial decision of the assessment officer and were a repetition of arguments previously made and rejected.

[97] However, Christie J. undertook an independent review and reached the same conclusions as the AO, as she was entitled to do. This does not mean that she did not undertake her own independent review of the objections, as suggested by the client. This means that she, like the AO, found the objections unpersuasive.

[98] It was not an error to take a deferential approach to the AO initial reasons on reconsideration via objections. Where the AO had reached conclusions with comprehensive reasons, it was not an error to defer to those conclusions when the objections did not merit changing the decision.

[99] As this court observed in *RZCD*, a court hearing the motion appealing a certificate of assessment should not retry the matter or interfere with the result, unless the reasons demonstrate some error in principle or some patent misapprehension of the evidence.<sup>25</sup>

[100] Accordingly, I find that, as Christie J. did reconsider the objections, there was no denial of procedural fairness,

### **Adequacy of Reasons**

[101] The client argues that the reasons are insufficient, lacking in detail for meaningful appellate review. Read as a whole and contextually, I am satisfied that the conclusions are clear and adequately supported by her reasoning. A judge is not required to refer to every piece of evidence in their reasons unless it is material to the issues to be determined.<sup>26</sup>

### **The Evidentiary Issue and Procedural Fairness/the Himel Order**

[102] At paragraphs 39 to 50 of her reasons, Christie J. addressed the *Evidence Act* issues raised by the client. She found no lack of procedural fairness, noting that the client had access to the business records and that the AO reduced the accounts when supporting documentation was absent. Her reasons in support of her conclusions on this issue are comprehensive and clear and not insufficient.

[103] With respect to the Order of Himel J. the client argued that the reasoning of Christie J. was “fundamentally flawed” in adopting the AO’s reasoning when that Order was not before the AO.

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<sup>25</sup> *RZCD* at para. 48.

<sup>26</sup> *Canada Forgings Inc v. Atomic Energy of Canada Ltd.*, 2024 ONCA 677 at para. 26.

The Order of Himel J. was relevant to the “negligence” and “no valuable services” raised by the client issues in AO’s reasons (see paras. 41(c) and 43 above) and the client’s objections (see paras. 49(a), (b), and (e) and 55 above) and supplemental objections (see para. 69, above).

[104] It is clear that Christie J. understood that the Order of Himel J. was evidence going to the “negligence” and “no valuable services” issues raised by the client. I do not read her reasons at paragraphs 61 to 65 as “fundamentally flawed”. As she concluded, the AO thoroughly “engaged with this issue” (emphasis added).

### **The Legal Complexity Factor**

[105] The client repeats the same argument on this issue that was raised before Christie J. At paragraphs 51 to 53, Christie J. concluded that the client’s argument was without merit and that the words used by the AO were taken out of context. I agree.

### **Discretion as to Costs**

[106] While conceding that costs are in the discretion of the motion judge, the client argues that the award of costs against her was unreasonable as she submits that she was successful in claiming that she was denied procedural fairness by the AO even though her appeal was dismissed.

[107] At paragraph 5 of her decision on costs, Christie J. considered this very circumstance and concluded, after reviewing the entirety of the circumstances, that the client should pay \$5000 to the firm for its costs.

[108] A court should not set aside a costs award on appeal unless the judge below has made an error in principle or if the costs award is plainly wrong.<sup>27</sup> I discern no error in principle and the costs award is not plainly wrong. There is no reason to interfere with the judge’s discretion with respect to costs, as she was in the best position to determine who should receive costs and the quantum. I note that the firm was awarded \$5000 in costs but had claimed over three times that amount.

### **Conclusion**

[109] For the foregoing reasons, the appeal is dismissed.

### **Costs**

[110] I have reviewed the parties cost submissions. The client shall pay the firm its costs fixed in the amount of \$10,000.00.

“W.D. Newton RSJ.”

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<sup>27</sup> *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303 at para. 27.

I agree: "S. Nakatsuru J."

**D.L. Corbett J. (Concurring):**

[111] I agree with my colleagues that the appeal should be dismissed, with costs as they would direct. I part company with my colleagues on one point of principle.

[112] In para. 4 of his reasons, Newton RSJ notes:

The procedural history of this case demonstrates the confusion over the proper procedure for disputing the decision of an AO on a solicitor/client assessment.

I agree.

[113] In paras. 10 – 14 of his reasons, my colleague notes that, under the governing legislative provisions, the objections process is a condition precedent to a motion to oppose confirmation before a judge, for assessments of costs orders, but not for assessments as between solicitors and clients. My colleague notes that the case importing the requirement to pursue objections into the process of assessments between solicitors and their clients was a decision of a panel of this court, *RZCD*, and was based on prior cases that were costs assessments rather than assessments as between solicitors and clients. Put another way, my colleague has shown that importing the objections requirement does not follow from the governing legislation, and the case that established this requirement failed to explain a legal basis the basis for the requirement. *RZCD* is controlling authority for Assessment Officers and for judges hearing motions to oppose confirmation of Assessment Officer reports. It is wrongly decided. In my view, this court should say so, clearly, and not leave the task of fixing this error to the Court of Appeal or the Legislature. It was an error from this court. It was, on its face, *per incuriam*. We should fix it.

[114] I appreciate that *RZCD* was decided in 2016 and has been followed in other cases. However, it is a decision on a matter of procedure, not substantive law, and it cannot be said that fixing this procedural problem now will prejudice ongoing cases. This court is bound by the principle of horizontal *stare decisis*, but this does not mean that minor procedural errors cannot be corrected when it is clear on the face of the impugned authority that it was decided *per incuriam*.

[115] Given that the objections process is not mandatory for assessments between solicitors and their clients, I would find that the proper course for the motions judge to have taken was to review the original decision of the Assessment Officer. She did that. As explained by my colleague, and as noted by the motions judge, the Assessment Officer gave full and fair consideration to the appropriate factors and exercised his discretion appropriately; there is no basis for this court to intervene.

“D. L. Corbett J.”

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**CITATION:** Nakano v. Cohen Highley LLP, 2025 ONSC 3147  
**DIVISIONAL COURT FILE NO.:** DC 1569/24  
Oshawa  
**DATE:** 20250528

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**W.D. Newton RSJ, D.L. Corbett and  
S. Nakatsuru JJ**

**BETWEEN:**

Toshiko Nakano

Client / Appellant

**– and –**

Cohen Highley LLP

Solicitor / Respondent

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**REASONS FOR DECISION**

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**W.D. Newton RSJ**

**Released:** May 28, 2025