

15/10/

Harris & Harris v. Midas Capital Corp. Brampton File No. 98BN8168

Harris & Harris v. Innotech Multimedia Corporation

SUPERIOR COURT OF JUSTICE

**IN THE MATTER OF THE SOLICITORS ACT
AND IN THE MATTER OF**

HARRIS & HARRIS

Appearances: R. A. Harris for the Solicitors Solicitors
AND for the Court

INNOTECH MULTIMEDIA CORPORATION

REASONS FOR DECISION Client

- AND -

Brampton File No. 98BN8169

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE SOLICITORS ACT (see dates in 1999 and 2000)
AND IN THE MATTER OF The corporate entities were both controlled at one time by a group of whom

the main driving force **HARRIS & HARRIS** (hereinafter referred to as

"McKinnon"). At the end of June, 1998, control of the companies passed to

the Midas Group, of which the principal person associated with the Solicitors was one

Jeffrey Punt (hereinafter referred to as "Punt").

MIDAS CAPITAL CORPORATION

Although the change in control of the Client corporations was originally Client

Appearances: R. A. Harris for the Solicitors
H. A. Fancy for the Client

REASONS FOR DECISION

ASSESSMENT OFFICER CANNING:

These two matters were heard together on various dates in 1999 and 2000. The corporate Clients were both controlled at one time by a group of whom the main driving force was one John McKimm (hereinafter referred to as "McKimm"). At the end of June, 1998, control of the companies passed to McKimm. McKimm confirmed that he had referred the Solicitors with respect to the Misir Group, of which the principal contact with the Solicitors was one Jeffrey Puritt (hereinafter referred to as "Puritt")..

Although the change in control of the Client corporations was originally

planned to overcome a shortage of working capital, and was described as a "friendly takeover", the relationship between McKimm and his group and the Misir Group deteriorated into open hostility.

McKimm

Before looking at the actual bills before me for assessment it is useful as background for a review of the bills to consider McKimm's evidence on the assessment.

There is no doubt from the evidence before me that there was a close relationship between McKimm and the Solicitors. That quality of that relationship was evident in the testimony of McKimm on the assessment and in the fact that at the time of the hearing of the assessment the Solicitors were acting for McKimm in litigation against the Misir Group. Although there were repeated references to that litigation, there were no details of the nature of the litigation in the evidence before me.

McKimm confirmed that he had retained the Solicitors with respect to services provided to both corporate Clients in the matters in which bills are before me for assessment. He specifically requested the services provided by the Solicitors and had a general idea of the hourly rates of various lawyers

at the Solicitors and of the cost in general terms of the various services requested. McKimm indicated that he was aware of time expended by the Solicitors as work progressed and that the bills delivered by the Solicitors were in line with his expectations. He stated that he believed that work was performed in accordance with the services billed, that the work was satisfactory and that the fees and disbursements were satisfactory. He had authorized payments of bills delivered up to the change of control on June 30, 1998. Failure to pay bills resulted from the financial problems of the Client corporations, the very problems which had led to his relinquishing control.

Although McKimm indicated that he was generally aware of rates charged for services of the various members of the Solicitors, the only documentary evidence of communication of rates placed before me on the assessment was contained in two written retainer agreements executed by McKimm and several associates in February, 1996 (Exhibits # 14 and # 15), showing rates for various members of the firm as follows:

<u>Member of Firm</u>	<u>Hourly Rate</u>	<u>Per Diem Counsel Fee</u>
R. Alan Harris	\$275.00	\$2,750.00
Gregory H. Harris	\$175.00	\$1,750.00
Paul R. Lebreux	\$175.00	\$1,750.00
Andrew J. MacDonald	\$150.00	\$1,500.00
James B. C. Edney	\$150.00	\$1,500.00
Robert McFarlane	\$150.00	\$1,500.00

In assessing bills of fees, charges or disbursements pursuant to the *Solicitors Act*, I must always be mindful of and be guided by the factors for consideration by assessment officers approved by the Court of Appeal in *Cohen v. Kealey & Blaney*, (1988), 26 C.P.C.(2d) 211, as follows:

1. The time expended by the solicitor;
2. The legal complexity of the matters 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 matters to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The reasonable expectation of the client as to the amount of the fee.

I have carefully considered the evidence before me in the context of the nine factors.

INNOTECH MULTIMEDIA CORPORATION BILLS

By Order of the Local Registrar dated the 11th day of December, 1998, twenty-seven bills delivered between the 28th day of June, 1996, and the 5th day of November, 1998, were referred for assessment. The bills pertained

to legal services provided by the Solicitors on behalf of the Client in fourteen different matters.

The total of the twenty-seven bills delivered to the Client, Innotech Multimedia Corporation, before me for assessment is \$97,074.94. The Solicitors noting \$40,364.83 having been paid, and all credited against the bills referred to as "ats. Richardson", the balance owing on the twenty-seven bills as claimed by the Solicitors is \$56,710.11.

Biehn Settlement

Bill # 1 - June 4, 1997

fees	\$	585.00
disbursements	\$	3.20
GST	\$	41.17
total	\$	629.37

I accept Greg's evidence that he expended the 1 3/4 hours included in Bill #1. Gregory Harris, (hereinafter referred to as "Greg"), was called to the bar in 1992. He did not keep a record of time expended on services included in the bills before me for assessment. He stated that his memory of the services was very good and reliable at the time he prepared the bills. It was clear, however, that in giving his evidence on the assessment his memory was much less reliable and that he frequently accepted the accuracy of

estimates made at the time of preparing the bills and merely divided the total bill for fees by the \$200.00 per hour rate he believed he had applied. At other times. However, he was adamant that his time far exceeded the result of such a calculation.

In assessing the bills before me for assessment I have reviewed the subject matter of services provided by Greg and have allowed times and fees in the context of all of the evidence before me.

Notwithstanding the billing for Greg's time at \$200.00 per hour, I am satisfied that there is no evidence before me to indicate that the Client should be required to pay more than \$175.00 per hour for Greg's services, a rate disclosed to the Client in the written retainer agreement dated the 20th day of February, 1996 (Exhibit # 14).

I accept Greg's evidence that he expended the 1 ½ hours included in Bill #1. I am prepared to allow time of two hours for a Mr Thomas at \$140.00 for services I am satisfied were provided by some person on behalf of the Client.

Fees in Bill # 1 would, therefore, be allowed in the sum of \$542.50. Disbursements as billed and applicable Goods and Services Tax will also be allowed.

1997 Annual Meeting

Bill # 2 - July 10, 1997

fees	\$	1,560.00
disbursements	\$	99.17
GST	\$	55.94
total	\$	1,715.11

I am prepared to allow Greg's time in excess of 7.8 hours in accordance with his evidence concerning corporate services at \$175.00. and I accept that Mr Thomas expended 4 hours at \$140.00. Since Greg's time was apparently only partially billed, there will be no reduction, and, accordingly, fees in Bill # 2 are allowed as billed in the total sum of \$1,560.00, together with disbursements as billed and applicable Goods and Services Tax.

Handgun CD

Bill # 3 - October 30, 1997

fees	\$	2,675.00
disbursements	\$	28.13
GST	\$	189.22
total	\$	2,892.35

Services covered by Bill # 3 pertained to matters of title to software relating

to handgun safety. The Client's original purchase order for legal services indicated fees of \$2,000.00. An additional \$675.00 represented fees for drafting a release. Greg estimated the time expended as being fifteen to twenty hours. Considering the evidence before me in the context of the factors I am required to apply to that evidence, I am prepared to allow fees billed in Bill # 3 in the sum of \$2,675.00. Disbursements and Goods and Services Tax are allowed as billed.

TSE Listing

Bill # 4 - December 24, 1997

fees	\$ 1,655.00	
disbursements	\$ 98.00	
GST	\$ 122.71	
total	\$ 1,875.71	

The Client, listed on the Vancouver Stock Exchange, considered seeking listing on the Toronto Stock Exchange. McKimm sought the assistance of the Solicitors in dealing with listing requirements. Most documentation was completed by the Client and McKimm's assistant, Ms Racicot. Greg reviewed the documentation and provided an opinion and made the initial filing with the new listings department at the TSE. A bad financial quarter for the Client resulted in instructions from McKimm to place the TSE listing

"on the back burner until further notice".

Greg believes that his time on the TSE listing file was probably thirty hours. He indicates that the volume of business brought to the Solicitors by McKimm led to a reduction in the bill to \$1,655.00 for fees from what it otherwise might have been.

There would appear to be no reason for the bill to be reduced on assessment. Disbursements and Goods and Services Tax are allowed as billed.

Wolf Settlement

Bill # 5 - December 24, 1997

fees	\$	575.00
disbursements	\$	14.75
GST	\$	41.28
total	\$	631.03

The Client had a substantial indebtedness to Wolf Advertising, estimated by Greg to be in excess of \$300,000.00. Greg estimated that he expended four to five hours in arranging settlement for \$238,000.00 paid to Wolf. The actual settlement sum had been negotiated by McKimm. The bill shall be allowed

as delivered.

Hummingbird Contract

Bill # 6 - December 24, 1997

fees	\$ 1,035.00
disbursements	\$ 56.25
GST	\$ 76.38
total	\$ 1,167.63

The Client was entering into a software licensing agreement with Hummingbird Communications Ltd. which McKimm wished the Solicitors to review. A junior lawyer for whom the Solicitors billed at the rate of \$140.00 recorded three hours of time on this file in addition to Greg's time estimated at three hours. With change in control of the Client, the arrangement with Hummingbird was terminated without involvement of the Solicitors. Recognizing that I did not hear evidence from the junior lawyer and that the junior lawyer was not available for cross examination, and considering the totality of the evidence before me relating to the services represented by Bill # 6, I am prepared to allow the sum of \$700.00 for fees, together with Goods and Services Tax and disbursements as billed.

Multibible Sale

Bill # 7 - December 24, 1997

fees	\$	425.00	
disbursements	\$	49.25	
GST	\$	33.20	
total			\$ 507.45

The Client had entered into agreement to sell a software title for \$15,000.00. The documentation was faxed to the Solicitors with a request for review on a high priority basis. The Solicitors received the sale proceeds in trust and paid them to the Client. On the basis of the evidence before me I am prepared to allow Bill # 7 as delivered.

Vokey Fired

Bill # 8 - December 24, 1997

fees	\$	485.00	
disbursements	\$	30.75	
GST	\$	36.10	
total			\$ 551.85

Consultations and documentation prepared and reviewed at the time of the termination of Norm Vokey's termination of employment in July, 1997, would appear to justify Bill # 9 as delivered.

Earthweb Agent

Bill # 9 - December 24, 1997

fees	\$	265.00
disbursements	\$	16.25
GST	\$	19.69
total	\$	300.94

Services first requested in July, 1997, by Norm Vokey prior to termination of his employment were completed by report to Patterson. I am prepared to allow Bill # 9 as delivered.

Cybersource Agent

Bill # 10 - December 24, 1997

fees	\$	185.00
disbursements	\$	5.00
GST	\$	13.30
total	\$	203.30

On July 14, 1997, Norm Vokey requested the Solicitors to review a document in a project that was probably cancelled with changes in the control of the Client. Greg's evidence with respect to time and services was vague and the bill shall be disallowed in full.

600,000 Private Placement

Bill # 11 - December 24, 1997

fees \$ 2,845.00

disbursements \$ 353.88

GST \$ 223.92

total \$ 3,422.80

From initial discussions with McKimm, the Solicitors proceeded with searches and opinions, preparation of promissory notes and closing in the Solicitors' boardroom. There was, however, apparently no final reporting letter at the end of the services covered by Bill # 11.

No time records were produced to establish times expended. Greg estimated that the bill probably represented time expended at \$200.00 per hour, the rate he wished to have applied for his services.

Where there it is reasonable to accept that the services represented in a particular bill include time well in excess of the sum billed at the preferred hourly rate or where the effective hourly rate is below the rate of which there is evidence of actual communication to the Client, there may be little reason to reduce an amount billed.

In the circumstances relating to Bill # 11, the Solicitors have not satisfied the

onus upon them to prove the bill as delivered. It shall be allowed in the sum of \$2,000.00, together with Goods and Services Tax and disbursements as billed.

Audit Response

Bill # 12 - May 29, 1998

fees	\$	650.00	
disbursements	\$	55.40	
GST	\$	49.38	
total	\$		754.78

The standard letter was produced on instructions from the Client at a flat rate which appears to have been known to the Client. Bill # 12 will be allowed as delivered.

ats. Richardson

Bill # 13 - June 28, 1996

fees	\$	2,965.00	
disbursements	\$	149.90	
GST	\$	218.06	
total			\$ 3,332.96

Bill # 14 - July 31, 1996

fees	\$	925.00	
------	----	--------	--

Bill # 14 - November 25, 1996
disbursements \$ 175.70
GST \$ 77.04
total \$ 1,177.74

Bill # 15 - November 25, 1996
fees \$ 1,700.00
disbursements \$ 307.00
GST \$ 140.49
total \$ 2,147.49

Bill #16 - December 31, 1996
fees \$ 517.00
disbursements \$ 238.60
GST \$ 52.89
total \$ 808.49

Bill # 17 - March 11, 1997
fees \$15,250.00
disbursements \$ 612.30
GST \$ 1,123.67
total \$17,185.07

Bill # 18 - April 25, 1997
fees \$14,750.00
disbursements \$ 2,643.02
GST \$ 1,217.51
total \$18,610.53

Bill # 19 - June 9, 1997

fees	\$	575.00	
disbursements	\$	151.84	
GST	\$	50.87	
total			\$ 777.71

Bill # 20 - June 30, 1997

fees	\$	600.00	
disbursements	\$	15.40	
GST	\$	43.07	
total			\$ 658.47

Bill # 21 - July 31, 1997

fees	\$	600.00	
GST	\$	42.00	
total			\$ 642.00

Bill # 22 - July 21, 1998

fees	\$	1,500.00	
disbursements	\$	103.58	
GST	\$	112.25	
total			\$ 1,715.83

Bill # 23 - November 5, 1998

fees	\$	665.00	
disbursements	\$	51.20	
GST	\$	50.13	

total \$ 766.33

Prior bills in the Richardson matter not before me for assessment (Exhibit # 13) included the following:

March 18, 1996

fees \$24,660.00

disbursements \$ 1,197.10

GST \$ 1,798.27

total \$27,655.37

and

April 11, 1996

fees \$ 2,472.50

disbursements \$ 500.97

GST \$ 198.90

total \$ 3,172.37

and

May 9, 1996

fees \$ 3,950.00

disbursements \$ 183.15

GST \$ 289.28

total \$ 4,422.43

The eleven bills before me for assessment and the three previous bills relate to an action commenced by plaintiffs, including one Richardson, against the

Client. The Statement of Claim was issued February 9, 1996.

The Solicitors were retained to act for the Client, McKimm, Norm Vokey and Paul Manina. R. Alan Harris, (hereinafter referred to as "Alan"), a senior lawyer with the firm, had carriage of the file.

The previously noted written retainer (Exhibit # 14) dated the 20th day of February, 1996, was executed on behalf of the Client and by McKimm, Norm Vokey and Paul Manina.

The Solicitors were later retained to act for Frank Duffy and Robert Long. The written retainer (Exhibit # 15) dated the 29th day of February, 1996, was executed by Frank Duffy and Robert Wong.

The two written retainer agreements each referred to the above-noted schedule of fees showing the hourly rate for Alan as \$275.00, for Greg as \$175.00 and for MacDonald as \$150.00.

It appears from the evidence before me and as confirmed by Alan that the Client was retaining the Solicitors to act for it and the other named individuals in their personal capacities and that the individuals signed the retainers to confirm this arrangement, and not to assume any financial responsibility.

Richardson sued for \$111,300.00 plus GST for breach of contract and conspiracy to injure. It was claimed that the money owed was secured by a promissory note and by a general security agreement.

The fact situation leading to the litigation was complicated. The Solicitors

The Plaintiffs alleged that the defendants conspired to injure the plaintiffs by unlawful means, those unlawful means being breach of contract and/or innocent, negligent or fraudulent misrepresentation regarding the presentation and subsequent dishonouring of a cheque for \$9,275.00.

Documentation in the litigation was voluminous. In December, 1991, the

An amendment to the statement of claim sought the appointment of a manager and receiver for "the defendant", presumably referring to the Client.

The plaintiffs sought a restraining order with respect to disposal of assets of the Client and they increased their claim to \$250,000.00 for conspiracy to injure. The plaintiffs also claimed breach of the general security agreement.

There was a claim for damages arising from delay in releasing Richardson's shares from an escrow arrangement. A still further claim arose from Richardson's having to sell shares at depressed prices because of the dishonoured cheque.

words, the defendant, Frank Duffy, "went over to the other side". He was removed from the litigation.

A further amended statement of claim, essentially the same as the previous claim, was served.

McKimm and most directors indicated that they thought that Richardson had

conspired with another person, an officer of the Client, "to cook the books" to entitle themselves to bonuses and performance shares.

The fact situation leading to the litigation was complicated. The Solicitors prepared a 36-page statement of defence and counterclaim dated March 18, 1996. A third party claim was commenced against the former company officer who the Client alleged had conspired with Richardson.

Documentation in the litigation was voluminous. In December, 1996, the Solicitors were served with a three-volume motion record by the plaintiffs and the other former officer seeking transfer of the actions to the commercial list, leave to amend the statement of claim to include a claim for aggravated punitive damages, summary judgment, appointment of a receiver and other remedy.

The matters were put over to the commercial list. The motion for summary judgment was deferred to May 12, 1997 to allow examinations to take place. Meanwhile, in Alan's words, the defendant, Frank Duffy, "went over to the other side". He was removed from the litigation.

Affidavits were prepared to oppose the motion for summary judgment. The Solicitors prepared and served offers to settle and later withdrew them. Examinations proceeded. Eventually accountants had been appointed to

conduct a forensic audit. The report was damaging to the case of the plaintiffs and the third party. The report was given to the other side at the commencement of examination of one of the defendants.

Then, after all of the activity in the litigation, in Alan's words, "The matter died." Nothing further happened while the Solicitors were solicitors of record. The Client's counsel's firm served a notice of change of solicitors dated January 12, 1999.

Alan stated: "On my watch this case died; we stopped it". Alan stated that, although nothing was recovered, "we were always content to just walk away". Alan said that to McKimm the result had been a win.

In addition to Alan, MacDonald and another lawyer with the Solicitors, Kevin Scullion, (hereinafter referred to as "Scullion"), worked on the litigation file. Scullion was produced by the Solicitors to confirm his contribution to the file and the accuracy of the recorded times as billed to the Client.

The various bills relating to the Richardson matter before me for assessment will be allowed with an adjustment to reflect application of the rates set out in the written retainer agreements (Exhibits # 14 and # 15). Scullion's time will be allowed at the same rate as MacDonald's. Nothing will be allowed for services shown to have been provided by persons who were not produced

by the Solicitors on the assessment.

1998 Annual Meeting

Bill # 24-- August 11, 1998

fees	\$ 1,625.50
disbursements	\$ 122.85
GST	\$ 122.30
total	\$ 1,870.74

Instructions for the Solicitors to act in matters relating to the Client's 1998 Annual Meeting were received from Biehn on June 15, 1998. This Annual Meeting was different from usual in that the new group were preparing to take control. A share consolidation would provide one common share for every two shares. The name of the Client was to be changed to Astaware Technology Inc. The Annual Meeting would seek approval of the issuance of one million 10% convertible notes with certain accompanying share purchase warrants. The new group would purchase the notes and convert to equity to take control. There would be change of control from the McKimm group to the Misir group.

The Solicitors were instructed to facilitate an end which had been agreed upon between the two groups. This was structured by the parties to be a friendly takeover. Additional services arose from concern over possible

actions of disgruntled shareholders, particularly two original founders of the Client.

Greg acted as corporate secretary at the meeting and prepared documentation as evidence of the actions taken.

Greg estimated that he devoted twenty hours to services relating to the 1998 Annual Meeting.

I am satisfied that Bill #24 as delivered is not unreasonable and should be allowed in full.

ats. Kordish and Kordish Appeal

Bill # 25 - May 13, 1998

fees	\$	575.00	
disbursements	\$	12.20	
GST	\$	41.10	
total			\$ 628.30

Bill # 26 - September 18, 1998

fees	\$26,000.00
------	-------------

disbursements	\$ 1,741.98
GST	\$ 1,936.69
total	\$29,678.67

Bill # 27 - November 4, 1998

fees	\$ 2,000.00
disbursements	\$ 262.99
GST	\$ 158.40
total	\$ 2,421.39

Prior bills in the Kordish matter not before me for assessment (Exhibit # 5)

included the following:

July 17, 1997

fees	\$ 7,210.00
disbursements	\$ 491.20
GST	\$ 533.90
total	\$ 8,235.10

and

September 30, 1997

fees	\$ 262.50
disbursements	\$ 908.25
GST	\$ 81.96
total	\$ 1,252.71

Andrew J. MacDonald of the Solicitors, (hereinafter referred to as "MacDonald") received instructions from various officials of the Client. Close to the pre-trial in the wrongful dismissal litigation commenced by Kordish, MacDonald commenced receiving his instructions from Puritt, who was familiar with the case from his participation in due diligence process prior to change in control of the Client.

The Client was actually sued by both Paul Kordish in his personal capacity and his company. The employment contract with Kordish and his company was terminated by the Client after eleven months. The lawsuit sought a total of over \$150,000.00.

The pre-trial judge suggested a settlement of \$15,000.00 "all in". Puritt said that he was unwilling to pay \$15,000.00 and instructed MacDonald to offer \$10,000.00 and to prepare for trial. On several occasions the other side offered to settle for \$40,000.00 "all in", reduced prior to trial to \$23,000.00 plus costs. The \$23,000.00 offer was apparently tied into the possibility of an award within the range of the simplified procedure rules.

Kordish and his company appeared to be relying on an authority where the employer corporation contracted with a second corporation for the services of the principal of the second corporation. The pleadings were not consistent with this kind of relationship. The trial judge reserved to the end

of the trial his decision on a motion to strike out the Kordish claim on the basis that there was no evidence of the specific contract. The trial judge appeared to agree that there was a pleadings problem by awarding costs of the motion to the Client, thereby resulting in \$2,000.00 being deducted from costs awarded against the Client fixed in the sum of \$20,000.00, the costs being based allowed on a solicitor and client basis after the Kordish offer which he exceeded at trial.

There is no doubt that the trial judge stated, in effect, that MacDonald had waited too late to bring his motion to strike out the Kordish company's claim. I am not satisfied that the ultimate result at trial was any different as a result of MacDonald's timing.

Puritt instructed MacDonald to appeal the decision at trial. MacDonald sought a specific retainer and clear instructions with respect to lodging the appeal. I am satisfied that "obtaining clear instructions" was at least in part a euphemism for attempts to collect the sum owing on the bill for the trial or to obtain a firm commitment for payment.

With changes in those directing the affairs of the Client there were complications in marshalling the evidence for the Kordish trial, problems totally beyond the control of the Solicitors.

Bill # 25 represents services of MacDonald at \$175.00 per hour. The bill charges fees of \$575.00. The basis of calculation of the bill is not evident from the actual bill itself. Supporting documentation reveals time expended by MacDonald of only one hour. Not being satisfied that there is any contractual arrangement for a fee for MacDonald's services in excess of \$150.00, the sum for fees will be reduced to \$150.00.

Bill # 26 covers the period of the pre-trial and trial and most significant events in carriage of the file.

The Client's counterclaim prepared by MacDonald alleged dishonesty and a breach of fiduciary duty on the part of Kordish. I am satisfied that MacDonald failed to discuss adequately with the Client the costs consequences of allegations of dishonesty and misconduct. I am not satisfied, however, that such failure was material to the ultimate loss to the Client or the assessment of the Client's bill.

I have carefully reviewed all of the evidence placed before me with respect to conduct of the Kordish case on behalf of the Client, including extensive documentation.

One troubling aspect of MacDonald's conduct of the case was his accusation during the trial that Kordish had accepted a kickback. The trial

judge confronted MacDonald with the impropriety of his conduct and expressed impatience with MacDonald's tactics over a prolonged period of the trial.

Although MacDonald, called to the bar in 1992, had never previously had carriage of a wrongful dismissal case and had never taken to trial a case in which he had carriage and, notwithstanding evidence raising doubt as to MacDonald's handling of the case, I am satisfied that it would be improper, on the basis of the totality of evidence before me, to second-guess the professional judgment of MacDonald and the overall handling of the Kordish case by the Solicitors.

MacDonald took the Client's case to trial and lost. I am satisfied that he received instructions to mount a spirited defence and to take the offence in a substantial counterclaim. I am not satisfied that the sophisticated individuals in control of the Client from time to time were misled by any puffery inherent in the tactics employed by MacDonald on behalf of the Client.

The computer printout showing details of times expended and charges therefor and the summary of various solicitors' time used to prepare Bill # 26 was provided on the assessment. It was not supplied with the bill when it was originally delivered to the Client. Nor was there any indication on the

face of the bill as to the methodology utilized in calculating the bill.

The summary shows that MacDonald expended 104.62 hours at \$175.00 an hour for a total of \$18,305.00. The summary shows one Evelyn J. Baxter devoting 98.60 hours at \$150.00 per hour for a total of \$14,790.00. Various other persons are shown with billed time totalling \$ 259.50.

The total time in the summary comes to \$33,354.50, a sum shown as the total from which the bill was reduced to \$26,000.00 actually billed for fees in Bill # 26.

MacDonald's time will be allowed at \$150.00 per hour, for a total of \$15,693.00.

At one point Counsel for the Solicitors withdrew any claim for fees for the services of Ms Baxter. He subsequently withdrew his withdrawal of claim for fees for her services.

Ms Baxter did not testify as to what she did. More significantly, she was not available for cross-examination. The evidence before me suggests that it would be improper to allow charges for any time claimed to have been expended by Ms Baxter. Except under exceptional circumstances, nothing will be allowed for any person who did not provide evidence on the

assessment.

CONCLUSION

The bills of fees, charges or disbursements delivered to Innotech Multimedia Corporation are allowed as follows:

Bill # 1 - June 4, 1997

fees	\$	542.50	
disbursements	\$	3.20	
GST	\$	38.20	
total			\$ 583.30

Bill # 2 - July 10, 1997

fees	\$	1,560.00	
disbursements	\$	99.17	
GST	\$	55.94	
total			\$ 1,715.11

Bill # 3 - October 30, 1997

fees	\$	2,675.00	
disbursements	\$	28.13	
GST	\$	189.22	
total			\$ 2,892.35

Bill # 4 - December 24, 1997

fees	\$ 1,655.00	
disbursements	\$ 98.00	
GST	\$ 122.71	
total		\$ 1,875.71

Bill # 5 - December 24, 1997

fees	\$ 575.00	
disbursements	\$ 14.75	
GST	\$ 41.28	
total		\$ 631.03

Bill # 6 - December 24, 1997

fees	\$ 700.00	
disbursements	\$ 56.25	
GST	\$ 52.93	
total		\$ 809.18

Bill # 7 - December 24, 1997

fees	\$ 425.00	
disbursements	\$ 49.25	
GST	\$ 33.20	
total		\$ 507.45

Bill # 8 - December 24, 1997

fees	\$ 485.00	
disbursements	\$ 30.75	

GST	\$ 36.10	
total	\$ 551.85	
Bill # 9 - December 24, 1997		
fees	\$ 265.00	
disbursements	\$ 16.25	
GST	\$ 19.69	
total	\$ 300.94	
Bill # 10 - December 24, 1997		
fees	\$ 00.00	
disbursements	\$ 00.00	
GST	\$ 00.00	
total	\$ 00.00	
Bill # 11 - December 24, 1997		
fees	\$ 2,000.00	
disbursements	\$ 353.88	
GST	\$ 164.77	
total	\$ 2,518.65	
Bill # 12 - May 29, 1998		
fees	\$ 650.00	
disbursements	\$ 55.40	
GST	\$ 49.38	
total	\$ 754.78	
Bill # 13 - June 28, 1996		

fees	\$ 2,965.00	\$16,862.03
disbursements	\$ 149.90	
GST	\$ 218.06	
total	\$ 3,332.96	

Bill # 14 - July 31, 1996

fees	\$ 925.00	\$18,442.54
disbursements	\$ 175.70	
GST	\$ 77.04	
total	\$ 1,177.74	

Bill # 15 - November 25, 1996

fees	\$ 1,700.00	\$ 739.72
disbursements	\$ 307.00	
GST	\$ 140.49	
total	\$ 2,147.49	

Bill #16 - December 31, 1996

fees	\$ 505.00	\$ 634.39
disbursements	\$ 238.60	
GST	\$ 51.95	
total	\$ 795.55	

Bill # 17 - March 11, 1997

fees	\$15,142.00
disbursements	\$ 612.30
GST	\$ 1,113.73

GST total \$ 48.70 \$16,868.03

Bill # 18 - April 25, 1997

Bill # fees November 5, 1997 \$14,593.00

disbursements \$ 2,643.02

GST disbursements \$ 1,206.52

GST total \$ 40.18 \$18,442.54

Bill # 19 - June 9, 1997

Bill # fees August 11, 1997 \$ 539.50

disbursements \$ 151.84

GST disbursements \$ 48.38

GST total \$ 122.30 \$ 739.72

Bill # 20 - June 30, 1997

Bill # fees May 15, 1998 \$ 577.50

disbursements \$ 15.40

GST disbursements \$ 41.49

GST total \$ 11.35 \$ 634.39

Bill # 21 - July 31, 1997

Bill # fees September 18, 1997 \$ 591.00

GST \$ 41.37

disbursements total \$ 1,741.30 \$ 632.37

Bill # 22 - July 21, 1998

fees total \$ 735.00 \$16,049.19

Bill # disbursements 4, 1998 \$ 103.58

GST \$ 68.70

total \$ 907.28

Bill # 23 - November 5, 1998

fees \$ 522.50

disbursements \$ 51.20

GST \$ 40.15

total \$ 613.85

Bill # 24 - August 11, 1998

fees \$ 1,625.50

disbursements \$ 122.85

GST \$ 122.30

total \$ 1,870.74

Bill # 25 - May 13, 1998

fees \$ 150.00

disbursements \$ 12.20

GST \$ 11.35

total \$ 173.56

Bill # 26 - September 18, 1998

fees \$15,693.00

disbursements \$ 1,741.98

GST \$ 1,415.20

total \$18,849.18

Bill # 27 - November 4, 1998

fees	\$ 2,000.00
disbursements	\$ 262.99
GST	\$ 158.40
total	\$ 2,421.39

The twenty-seven bills of fees, charges or disbursements delivered to Innotech Multimedia Corporation are, accordingly, assessed in the total sum of \$82,767.14. The sum of \$40,364.83 having been applied to the bills, the balance remaining owing by Innotech Multimedia Corporation is \$42,402.31.

MIDAS CAPITAL CORPORATION BILLS

By Order of the Local Registrar dated the 11th day of December, 1998, twelve bills delivered between the 28th day of February, 1997, and the 17th day of August, 1998, were referred for assessment. The bills pertained to legal services provided by the Solicitors on behalf of the Client in eleven different matters.

The total of the twelve bills delivered to the Client, Midas Capital Corporation, before me for assessment is \$58,991.04. The Solicitors noting \$10,000.00

having been paid, and noted as being "Received from Croesus - March 9, 1998", the balance owing on the twelve bills as claimed by the Solicitors is \$48,991.04.

1997 Annual Meeting

Bill # 1 - September 30, 1997

fees	\$ 2,705.00
disbursements	\$ 86.25
GST	\$ 195.39
total	\$ 2,986.64

The Client was a public company with shares listed on the Toronto Stock Exchange. Greg acted a secretary at the Annual Meeting after drawing up agenda. There was an issue with respect to a management agreement with McKimm entitling him to shares and a stock option plan. The Exchange raised concerns about the number of shares and limits thereon.

It was necessary to provide information to the TSE. The services covered by Bill # 1 included the audit response letter and correspondence and discussions with the accounting firm of Ernst and Young.

Greg indicated that the fees billed represented fourteen hours at his hourly

rate of \$200.00. There were no dockets and insufficient evidence to support the \$200.00 hourly rate. Subject to the final treatment of actual liability of the Client, the fees represented by Bill # 1 will be allowed in the sum of \$2,100.00, together with applicable Goods and Services Tax and disbursements as billed.

ats. Panov

Bill # 2 - November 27, 1997

fees \$ 1,007.50

disbursements \$ 3.25

GST \$ 70.76

total \$ 1,081.51

Documentary evidence indicating 4.3 hours of MacDonald's time was confirmed by his oral evidence concerning services relating to a dismissal of an employee and provisions of the Employment Standards Act.

Subject to the final treatment of actual liability of the Client, fees for 4.3 hours at \$150.00 per hour, for a total of \$645.00, will be allowed, together with disbursements as billed and applicable Goods and Services Tax.

Sub 12% Notes

Bill # 3 - December 23, 1997

fees	\$ 4,345.00
disbursements	\$ 481.95
GST	\$ 327.67
total	\$ 5,154.61

The proposed issue of \$1,500,000.00 was eventually reduced to \$1,400,000.00. Services included communications including an opinion to the Toronto Stock Exchange, and filings with the Ontario and Alberta Securities Commissions.

The bill was based on estimated time at an hourly rate of \$200.00. Without a record of time made contemporaneously with the delivery of services, the Solicitors have not satisfied the onus upon them to prove the time utilized in calculating the bill. In addition, time will be allowed at \$175.00, the highest rate for which there is objective corroborative evidence of communication to the Client.

Subject to the final treatment of actual liability of the Client, fees will be allowed in the sum of \$3,500.00, together with Goods and Services Tax and disbursements as billed.

M.G. Boatworks

Bill # 4 - December 24, 1997

fees	\$ 3,600.00
disbursements	\$ 278.75
GST	\$ 271.51
total	\$ 4,150.26

The Solicitors received instructions to act in the matter of a \$150,000.00 loan from MG Boatworks. The services included drafting the loan agreement and a share pledge agreement, promissory note guarantee and providing documentation and reviewing and revising documentation. The Solicitors attended on execution of documentation and on delivery of documents preparatory to closing. The services were completed and the funds released to the Client.

Although unable to produce any record of time expended, Greg indicated that the Client had been billed at his hourly rate of \$200.00. Subject to the final treatment of actual liability of the Client, I am prepared to allow time slightly discounted to reflect the lack of supporting documentation at the rate of \$175.00 per hour for a total of \$2,800.00 together with applicable Goods and Services Tax and disbursements as originally billed.

\$2.5 M Financing

Bill # 5 - December 24, 1997

fees	\$ 8,460.00
disbursements	\$ 478.52
GST	\$ 625.70
total	\$ 9,564.22

McKimm instructed the Solicitors to act in a transaction in which the Client proposed to raise \$2,500,000.00. The Solicitors did a notice of private placement which went to the Toronto Stock Exchange in early 1997. The transaction involved offering 7.5 million units to investors at a price of 35 cents per unit. The units consisted of one common share and a share purchase warrant entitling the holder to acquire one-half of a common share at an escalating purchase price. Proceeds of the placement were to pay indebtedness and to apply to general working capital purposes.

Bill # 5 - December 24, 1997

It was necessary to amend the notice of private placement to reflect a minimum price no less than the average price of shares over a period of time. The new price was 35.5 cents.

Counsel for the Toronto Stock Exchange raise many issues to be addressed concerning matters such as insider participation in the transaction.

Special documentation was necessitated by the fact that some purchasers would be overseas.

Greg applied his hourly rate of \$200.00 to time he estimated as having expended on the \$2,500,000 placement. He indicated specifically that there had been no discount of time or rate applied in the calculation. He was unable to produce any documentation to support his estimate of time.

Subject to the final treatment of actual liability of the Client, I shall allow slightly discounted time at a rate of \$175.00 an hour for a total for fees of \$7,000.00, together with applicable Goods and Services Tax and disbursements as set out in the bill as delivered.

Fire Racicot

Bill # 6 - December 24, 1997

fees	\$	185.00
disbursements	\$	2.00
GST	\$	13.09
total	\$	200.09

I am satisfied that the sum billed to the Client represents less time than that actually expended on the services relating to termination of employment of

Ms Racicot. Subject to the final treatment of actual liability of the Client, it shall be allowed as delivered.

ats. Croesus

Bill # 7 - February 28, 1997

fees	\$13,128.00
disbursements	\$ 871.40
GST	\$ 971.41
total	\$14,970.81

Bill # 8 - May 1, 1998

fees	\$ 1,225.00
disbursements	\$ 137.60
GST	\$ 95.38
total	\$ 1,457.98

MacDonald and Scullion provided services in an Application by Croesus Capital Management Corporation under Sections 248 and 249 of the *Business Corporations Act* in which the Solicitors and Greg, personally, were named responding parties. It is argued on behalf of the Solicitors that their involvement as parties arose merely because they held the shares which were the subject of the litigation and for which they were trustees without any beneficial interest.

Although McKimm had no difficulty reinforcing the Solicitors' perception of events, a question of conflict of interest arises with respect to services provided to what were in fact co-respondents. McKimm confirmed that he, a sophisticated client with a background in law, not only instructed the Solicitors to act for the Client, but that he also instructed the Solicitors to act on their own behalf and to bill the Client for all such services.

Counsel for the Client argued that the Solicitors could have addressed any possible appearance of a conflict by relinquishing control of the shares to the Court and seeking to be removed as parties. By failing to take this step the Solicitors maintained a perception of possible conflict which should disentitle them to fees in matters relating to the Croesus Capital litigation.

Audit Letter

Bill # 9 - June 23, 1998

fees	\$	500.00
disbursements	\$	69.82
GST	\$	39.89
total	\$	609.71

The usual fee for audit letters was \$650.00, reduced in this case to \$500.00.

Bill # 9 shall be allowed as delivered.

1998 Annual Meeting

Bill # 10 - August 11, 1998

fees	\$ 3,725.00
disbursements	\$ 91.40
GST	\$ 267.15
total	\$ 4,083.55

Greg described the Client's 1998 Annual Meeting as "fairly standard". The new group was entering the picture and there was an issue of a possible proxy contest.

The new group taking control were concerned that McKimm might garner enough proxy votes to upset the plans for the outcome of the meeting. There was concern about the votes of a Wayne Turner, holder of a large block of shares. If McKimm did not bow out he apparently would have been defeated.

Greg acted as corporate secretary for the shareholders' meeting, as well as meetings of the directors before and after the shareholders' meeting. Apparently the meetings ran smoothly. Greg later prepared the usual documentation pertaining to the meetings and business conducted at the meetings.

The long association of McKimm with the Solicitors led to meetings between the group taking control and Greg to sound out where McKimm stood.

Bill # 10 was based on application of the \$200.00 hourly rate to Greg's estimate of the time, with "no discount". There being only Greg's recollection without dockets or notes made contemporaneously with the services, a slightly discounted time will be allowed at the communicated \$175.00 hourly rate, for total fees of \$2,975.00, together with applicable Goods and Services Tax and disbursements as billed.

Sub 11% Notes

Bill # 11 - August 17, 1998

fees	\$ 6,463.00
disbursements	\$ 555.35
GST	\$ 491.28
total	\$ 7,509.63

The Client sought to raise \$1,400,000.00 to refinance \$1,400,000.00 senior notes due in March, 1998. The Solicitors received instructions, prepared documentation and corresponded with the Toronto Stock Exchange, attempting to meet the requirements and expressions of concern of the Exchange.

The fees charges in Bill #11 were said by Greg to be "fairly reflective of the time we were required to put in". There were no records of time produced on the assessment. Fees will be allowed for slightly discounted time at \$175.00 per hour, for total fees of \$5,250.00, together with applicable Goods and Services Tax and disbursements as billed.

Overall View of Midas bills 1 through 7

\$550 K Financing

Bill # 12 - August 17, 1998

fees	\$ 6,463.00
disbursements	\$ 293.75
GST	\$ 465.27
total	\$ 7,222.02

This transaction involved shares being issued, the proceeds from which were to be used to repay a portion of senior secured notes. The transaction was closely related to the financing plans of the group taking over control of the Client.

The time period of the services and the contacts and services covered by Bill # 12 involved considerable overlap with the services represented by Bill # 11. Once again there was an estimate of the time expended. It is unlikely a coincidence that the fees charged in Bill # 12 were identical to

those in Bill # 11.

Fees will be allowed in the sum of \$5,250.00 in addition to applicable Goods and Services Tax and disbursement s as billed.

Overall View of Midas bills 1 through 7

The total of the first seven bills to Midas Capital Corporation before me for assessment, that is, those numbered 1 through 7 above, comes to over \$38,000.00. According to the Solicitors, these bills were outstanding as of December 31, 1997 and were still outstanding as of April, 1998, when they prepared an audit response letter (Exhibit # 17, Tab # 5) directed to the Client, a public corporation and its auditors, containing the following statement:

We can also advise that as of December 31, 1997 there existed \$9,422.86 of billed but unpaid fees and disbursements owing by the Company to our firm and that unbilled fees and disbursements as of December 31, 1997 were \$26,393.67.

The Solicitors argue that there is no evidence that any specific party relied on the representation by the Solicitors as to total billed fees and disbursements outstanding.

The Client argues that the discrepancy exists either because the alleged outstanding bills had in fact been paid or because they bill did not then exist and were prepared and backdated after control of the company was to change or had changed.

Greg's explanation for the discrepancy, that the bills were undetected in April 1998 because they represented time not docketed, is absurd. If the bills actually existed at the end of 1997 they should have been in the system and their existent evident in April 1998.

Nothing in the evidence before me is consistent with a finding that the bills were not detected because they had been paid. The tax consequences of entering bills into a lawyer's accounting system and the financial status of the Client at the end of 1997 are consistent with some propensity to hold back on creating a receivable until payment prospect arises. I am satisfied that the Solicitors have failed the onus upon them to illustrate that actual timely delivery of the seven bills in question created notice to the Client so as to reduce or even negate the consequences of the audit response misrepresentation.

No evidence from the Solicitors' accounting department was introduced to explain a discrepancy to which Client's counsel repeatedly returned in his argument that the Solicitors should, at best, be restricted to the sum they

acknowledged in April 1998 as being billed and outstanding. The doctrine of estoppel should be applied to limit the Solicitors to that sum upon which others were entitled to rely in determining the value of the interest being acquired.

The Solicitors were under contract to supply information upon which others could and would rely. When the subject matter lay clearly within areas in which they had or must be deemed to have had complete knowledge, and in which they had a very specific interest, they must be held to a standard which prevents them from pleading administrative error, especially error without any semblance of logical explanation.

Whether the misrepresentation was relied upon or not, the Solicitors knew or must be deemed to have known that such statements in an audit response letter are intended to be relied upon and cannot be equated with a casual enquiry or representation which lacks the statutory status of the letter to the Client dated April 17, 1998.

Notwithstanding my indication of allowance for the seven bills were it not for the overall consideration arising from the audit response misrepresentation, the allowance for the three bills will be limited to \$10,000.00, a sum close enough to the figure used in the audit response letter to reflect a reasonable margin of error, and being offset by \$10,000.00 paid, albeit not voluntarily,

with respect to the Croesus matter.

CONCLUSION

For the reasons indicated above, the first seven bills delivered to Midas Capital Corporation before me for assessment will be assessed in the total sum of \$10,000.00. In the event that it should be determined that I have erred in finding that assessment of the said first seven bills is subject to the Solicitors' being prohibited by the doctrine of estoppel from having the seven bills assessed at a sum in excess of \$10,00.00, the following allowances shall apply to the seven bills:

Bill # 1 - September 30, 1997

fees	\$ 2,100.00	
disbursements	\$ 86.25	
GST	\$ 153.04	
total		\$ 2,339.29

Bill # 2 - November 27, 1997

fees	\$ 645.00
disbursements	\$ 3.25
GST	\$ 45.38

total \$ 693.63

Bill # 3 - December 23, 1997

fees \$ 3,500.00

disbursements \$ 481.95

GST \$ 268.52

total \$ 4,250.47

Bill # 4 - December 24, 1997

fees \$ 2,800.00

disbursements \$ 278.75

GST \$ 215.51

total \$ 3,293.26

Bill # 5 - December 24, 1997

fees \$ 7,000.00

disbursements \$ 478.52

GST \$ 523.50

total \$ 8,002.02

Bill # 6 - December 24, 1997

fees \$ 185.00

disbursements \$ 2.00

GST \$ 13.09

total \$ 200.09

Bill # 7 - February 28, 1997

fees \$ 00.00