Court File No. CV-21-00657656-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

- and -

BRAD DUBY PROFESSIONAL CORPORATION

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O 1990 C. C.43, AS AMENDED

BOOK OF AUTHORITIES OF THE RESPONDING PARTY (NEW COUNSEL), RYAN NAIMARK PROFESSIONAL CORPORATION

September 29, 2022

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Court File No. CV-21-00657656-00CL

ONTARIO
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SCHEDULE A – LIST OF AUTHORITIES

1. *Slan v Tanny*, 1998 CarswellOnt 2399
2. *Balena v Beck*, 2000 CarswellOnt 419
3. *Re Solicitor*, (1971), [1972] 1 O.R. 694
4. *Clatney v Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377
5. *Plazavest Financial Corporation v National Bank of Canada*, 2000 CanLII 5704 (ON CA)
6. *Cassels Brock & Blackwell LLP v. 1578838 Ontario Inc.*, 2013 ONSC 4194
7. *Ilic v Ducharme Fox LLP (Ducharme Weber LLP)*, 2022 ONCA 463

8. *Borden Ladner Gervais LLP v Cohen,* 2005 CarswellOnt 244 (ON SCDC), rev'd 2004 CarswellOnt 6409

9. *Jean Estate v Wires Jolley LLP*, 2009 ONCA 339,

10. *Javornich v McCarthy*, 2007 ONCA 484,

11. *McIntyre Estate v. Ontario (Attorney General),* 2002 CanLII 45046 (ON CA)

12. *Koliniotis v Tri Level Claims Consultants Ltd*., 2005 CanLII 28417 (ON CA)

13. *Williams v Bowler*, 2006 CanLII 19466, at para 23.

14. *Andrew Feldstein & Associates Professional Corporation v. Keramidopulos*, 2007 CanLII 40202 (ON SC)

15. *Rooz Law Professional v Hallett*, 2021 ONSC 3529 at paras 28-33

16. *Borden & Elliot v Barclays Bank of Canada*, 1993 CarswellOnt 1071

17. *Temedio v Niagara North Condominium Corporation No. 6,* 2019 ONCA 762

18. *Newell v Sax,* 2019 ONCA 455

19. *Loreto v Little et al,* 2010 ONSC 755

20. *Norame Inc. (Re),* 2008 ONCA 319

SCHEDULE B – RELEVANT PROVISIONS OF LEGISLATION

1. Section 2, 28.1, 9, 29, 30, *Solicitors Act*, R.S.O. 1990, c. S.15

 Original
1998 CarswellOnt 2399
Ontario Court of Justice (General Division)

Slan v. Tanny

1998 CarswellOnt 2399, [1998] O.J. No. 2366, 80 A.C.W.S. (3d) 198

Paul Slan v. David Tanny

Lax J.

Judgment: June 12, 1998
Docket: 97-MU-16362

Counsel: none given.

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.a Agreements for fees
VIII.5.a.ii Form of agreement

Headnote
Barristers and solicitors --- Relationship with client — Fees — Agreements for fees — Form of agreement
Plaintiff acted for defendant in matrimonial matter — Dispute arose regarding fees and, after termination of solicitor's retainer, defendant obtained praecipe order for assessment of plaintiff's accounts — Defendant abandoned appointment and plaintiff obtained praecipe order for taxation of five unpaid accounts — Defendant commenced action for damages for solicitor's negligence — Defendant brought motion for summary judgment dismissing action for solicitor's fees, alleging there was written agreement respecting fees, all fees had been paid and that under Solicitors Act court had no jurisdiction to assess solicitors' accounts — Motion for summary judgment dismissed and matter ordered tried immediately after action for solicitor's negligence as there was triable issue of whether defendant was entitled to rely on agreement in which case, court would determine whether appropriate fees had been paid or if defendant was not entitled to rely on agreement court would assess accounts — Court had jurisdiction under Solicitors Act to protect client under agreements made with solicitors or, if there was no agreement, to protect client from being charged unreasonable fees — Solicitors Act, R.S.O. 1990, c. S.15, ss. 17-31.

Table of Authorities

Cases considered by *Lax J.*:

Solicitor, Re (1971), [1972] 1 O.R. 694 (Ont. H.C.) — applied

Statutes considered:

Solicitors Act, R.S.O. 1990, c. S.15

ss. 16-30 — considered

ss. 16-31 — considered

s. 17 — considered

ss. 17-31 — considered

s. 19 — considered

s. 21 — considered

s. 23 — considered

s. 31 — considered

***Lax J.*:**

1 Paul Slan is a solicitor who acted for David Tanny in a matrimonial matter. A dispute arose regard to fees. Shortly after the termination of the solicitor's retainer, Mr. Tanny obtained a praecipe order for assessment of Mr. Slans' accounts. A few days before the scheduled return date, the appointment was abandoned by the client and Mr. Slan then obtained a praecipe order for taxation of five unpaid accounts. Mr. Slan subsequently became aware that Mr. Tanny was alleging negligence and by consent Order of Master Cork dated August 29, 1997, the assessment was traversed to this court. It was scheduled for hearing on April 21, 1998, but did not proceed as new counsel for Mr. Tanny proposed to bring this motion. On March 26, 1998, Mr. Tanny commenced an action (No. 98-CV-144521SR) in which he claims substantial damages for solicitor's negligence.

2 It is Mr. Tanny's position that there was a written agreement between him and Mr. Slan respecting fees, that he has paid all amounts (and then some) owing under their agreement, and that, by virtue of the provisions of the *Solicitor's Act*, there is no jurisdiction in the court to assess the solicitors' accounts. An order is sought dismissing this proceeding. Alternatively, the applicant wishes an order consolidating this proceeding with the negligence action.

3 The applicant relies on ss. 17 to 31 of the *Solicitors Act* (particularly ss.21 and 31) and on one authority, *Solicitor, Re* (1971), [1972] 1 O.R. 694 (Ont. H.C.), which counsel advised was the only authority which could be found which has considered the provisions in issue. In *Solicitor, Re*, which was an appeal from a report of a taxing officer, the parties and the taxing officer proceeded on the basis that there was an agreement between the solicitor and the client for payment of the solicitor at an hourly rate for professional work. It is Mr. Slan's position that there is insufficient evidence that there was a written agreement between him and Mr. Tanny and he does not concede that there was. But, if there was, it seems to me, as it seemed to Wright J. in *Solicitor, Re*, that ss. 17-31 of the *Solicitors Act* set out a statutory mechanism to deal with fee agreements and afford a client protection under such agreements. Other provisions of the *Solicitors Act* preserve certain protections to both clients and solicitors where there are no agreements. As was stated in *Solicitor, Re*:

> [The Act] makes it clear that there can be no action for recovery on a solicitor's bill until one month after it be rendered. It gives rights to the client to have it taxed. It requires agreements to be in writing and to be fair and reasonable. Where there is such an agreement, the amount due under it is not subject to taxation. It preserves an elaborate but not perfect system, weighted against solicitors, of measures which enable the Court to determine the quantity and quality of the bill. Thus it may be said of the solicitor's profession, that its members cannot set their own individual charges and that there is a procedure for determining in every case where it is invoked, that a solicitor's charges are fair and reasonable.

4 The provisions in issue here relate to situations where an agreement has been made. If the agreement is in respect to litigation, section 17 precludes the solicitor from receiving payment under the agreement until it is reviewed by an assessment officer. If it appears to the assessment officer that the agreement is not fair and reasonable, it may be referred to the court and it is the court which determines its effect and validity (s. 23). By virtue of s. 19, the court may reduce the amount payable, cancel the agreement or order the fees assessed as if the agreement had not been made. While it is true that s. 31, upon which the applicant relies, precludes a solicitor from assessing an amount due under any agreement, this section is subject to ss. 16 to 30 of *the Act*. It is also true

that s. 21 excludes any further claim of the solicitor beyond the terms of the agreement, but it is my opinion that both sections must be read in the context of a complete statutory scheme dealing with fee agreements.

5 The entire thrust of the *Solicitors Act* is to cloak the court with jurisdiction to either protect the client under agreements made with solicitors, in which case ss. 16 to 31 apply or if there is no agreement, to protect the client from being charged unreasonable and unwarranted fees, in which case, other provisions of *the Act* apply. In *Solicitor, Re*, the proper procedure was not followed, yet the court did not decline to deal with the matter when it was brought before it. The agreement upon which Mr. Tanny relies is in regard to "court business", but it was never submitted to an assessment officer for approval as contemplated by s. 17. Nor was there any objection taken to Mr. Slan receiving fees under the agreement until more than a year after it was made. When the retainer was terminated, Mr. Tanny obtained a praecipe order for taxation. It is at least arguable that in acting as he did, Mr. Tanny waived the protection of the procedural scheme regarding written agreements and was content to have the accounts assessed as if there was no agreement. It seems to me that this raises a triable issue. Either Mr. Tanny is entitled to rely on the agreement in which case, the court will determine whether the appropriate fees have been paid, or Mr. Tanny is not entitled to rely on the agreement, in which case the court will assess the accounts. In either case, there is jurisdiction under the *Solicitors Act* for the issues between these parties to be decided.

6 The action brought by Mr. Tanny will be defended. It puts in issue the agreement between Mr. Slan and Mr. Tanny, and in this sense subsumes the dispute concerning fees. Because of the procedural difference between the solicitor's negligence action and this proceeding and because there is an issue to be tried as to which provisions of the *Solicitors Act* apply, I order that this proceeding be tried immediately following Action No. 98-CV-144521SR by the same trial judge. I further order that the limitation periods in the *Solicitors Act* are not to be raised by any party so as to bar a determination of the issues on their merits. The motion for summary judgment is dismissed. Costs of the motion are reserved to the trial judge.

Motion dismissed.

 Original
2000 CarswellOnt 419
Ontario Superior Court of Justice

Balena v. Beck

2000 CarswellOnt 419, [2000] O.J. No. 422, [2000] O.T.C. 102, 94 A.C.W.S. (3d) 851

Daniel J. Balena, Applicant and Corey Beck, Allane J. McMackin, Respondent

Corey Beck, Applicant and Daniel J. Balena, Respondent

Jenkins J.

Judgment: January 25, 2000
Heard: January 13, 2000
Docket: 55930/93

Counsel: Daniel J. Balena for himself.
Allan J. McMackin for himself and for Corey Beck.

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.a Agreements for fees
VIII.5.a.v Fair and reasonable requirement

Headnote
Barristers and solicitors --- Relationship with client — Fees — Agreements for fees — Fair and reasonable requirement
Solicitor represented client in personal injury action in which client was awarded $950,829.26 in damages and prejudgment interest — Solicitor provided client with agreement which client signed which stated that fees and disbursements owing totalled $250,000 less assessed costs — Client claimed he did not recall signing fee agreement, he never read agreement and it was not read to him and refused to pay — Solicitor brought application pursuant to Solicitors Act for declaration that agreement for fees and disbursements with client was fair, reasonable and enforceable — Client brought counter-application for declaration that agreement was void and cancelled by reason of it not being fair and reasonable — Application granted; counter-application dismissed — Solicitor achieved excellent trial result for client — Solicitor's evidence that agreement was signed in his presence and presence of one of his clerks and it was explained to client before client signed was accepted — Considering principles in rule 57.01(3), which stated court may fix costs with or without reference to tariffs and instead of referring them for assessment, and considering totality of services rendered, solicitor was owed $158,084.67 as stated by him — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 57.01(3).

Table of Authorities
Cases considered by *Jenkins J.*:
Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Ont. Gen. Div.) — considered
Browne v. Dunn (1893), 6 R. 67 (U.K. H.L.) — considered
Ferraro v. Lee (1974), 2 O.R. (2d) 417, 43 D.L.R. (3d) 161 (Ont. C.A.) — considered
Roberts v. Morana (1997), 37 O.R. (3d) 333, 18 C.P.C. (4th) 338 (Ont. Gen. Div.) — considered

Ruetz v. Morscher & Morscher (1995), 47 C.P.C. (3d) 110, 28 O.R. (3d) 545 (Ont. Gen. Div.) — considered
Slan v. Tanny (June 12, 1998), Doc. 97-MU-16362 (Ont. Gen. Div.) — considered
Solicitor, Re (1971), [1972] 1 O.R. 694 (Ont. H.C.) — considered

Statutes considered:

Solicitors Act, R.S.O. 1990, c. S.15

Generally — considered

s. 16 — considered

s. 17 — considered

s. 18 — considered

s. 19 — considered

s. 23 — considered

s. 24 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 49.10 — considered

R. 57.01(3) — considered

***Jenkins J.*:**

1 This is an application and counter-application brought before me because I was the trial judge presiding in the action with a jury with Beck as Plaintiff and Ian C. Blane, *Tri-City Food Service Ltd. and Royal Insurance Company* as Defendants.

2 This is an application by a solicitor and a counter-application by the client pursuant to the *Solicitors Act*.

3 Daniel J. Balena (Balena) claims against Corey Beck (Beck), the client, the following relief:

(a) The Agreement dated April 1, 1999, between Balena and Beck is fair, reasonable and enforceable.

(b) Alternatively, that Justice Jenkins, assess the fees, charges and disbursements in respect of the work done, in the same manner as if the agreement had not been made.

4 Balena claims against McMackin the following:

a) A charging order against the sum currently being held in trust by McMackin in the sum of $92,528.25 representing the balance of the amount owed pursuant to he Agreement between Balena and Beck dated April 1, 1999.

5 Balena claims costs of this application against Beck and McMackin in the sum of $3,500.00.

6 Beck claims against Balena in his application the following relief:

(a) A declaration that the agreement between Balena and Beck is void and cancelled by reason of it not being fair and reasonable.

(b) An order referring Balena's bills, dated December 8, 1999, to an assessment before David Edwards, Assessment Officer.

(c) A declaration that Balena is not entitled to interest on his bill.

(d) A declaration that the bill is premature.

The Law

7 The relevant sections of the *Solicitors Act* are as follows: s. 16, 17, 18, 19, 23 and 24 are as follows:

S.16(1) Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated.

(2) In this section, "commission" and "percentage" apply on to non-contentious business and to conveyancing. R.S.O. 1980, c. 478, s.18(1,2).

S.17 Where the agreement is made in respect of business done or to be done in any court, except the Small Claims Court, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by an assessment officer. R.S.O. 1980, c. 478, s. 20.

S.18 Where it appears to the assessment officer that the agreement is not fair and reasonable, he or she may require the opinion of a court to be taken thereon. R.S.O. 1980, c. 478, s.20.

S.19 The court may either reduce the amount payable under the agreement or order it to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be assessed in the same manner as if the agreement had not been made R.S.O. 1980, c. 478, s.21.

S.23 No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being the Small Claims Court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any curt, by the Ontario Court (General Division). R.S.O. 1980, c. 478, s.25, *revised*.

S.24 Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in which manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner. R.S.O. 1980, c. 478, s.26, *revised*.

8 In the case of *Slan v. Tanny* (June 12, 1998), Doc. 97-MU-16362 (Ont. Gen. Div.), Lax J. dealt with the validity and enforcement of the written agreement between the solicitor and client. At page 10 she quotes from the case of *Solicitor, Re* [reported [1972] 1 O.R. 694 (Ont. H.C.)] per Wright J.

In Re Solicitor ss. 17-31 of the Solicitors Act set out a statutory mechanism to deal with fee agreements and afford a client protection under such agreements. Other provisions of the Solicitors Act preserve certain protections to both clients and solicitors where there are no agreements. As was stated in Re Solicitor:

[The Act] makes it clear that there can be no action for recovery on a solicitor's bill until one month after it be rendered. It gives rights to the client to have it taxed. It requires agreements to be in writing and to be fair and reasonable. Where there is such an agreement, the amount due under it is not subject to taxation. It preserves an elaborate but not perfect system, weighted against solicitors, of measures which enable the Court to determine the quantity and quality of the bill. Thus it may be said of the solicitor's profession, that its members cannot set their own individual charges and that there is a procedure for determining in every case where it is invoked, that a solicitor's charges are fair and reasonable.

The provisions in issue here relate to situations where an agreement has been made. If the agreement is in respect to litigation, s. 17 precludes the solicitor from receiving payment under the agreement until it is reviewed by an assessment officer. If it appears to the assessment officer that the agreement is not fair and reasonable, it may be referred to the court and it is the court which determines its effect and validity (s.23) (emphasis mine). By virtue of s.19, the court may reduce the amount payable, cancel the agreement or order the fees assessed as if the agreement had not been made. While it is true that s.31, upon which the applicant relies, precludes a solicitor from assessing an amount due under any agreement, this section is subject to ss. 16 to 30 of the Act. It is also true that s.21 excludes any further claim of the solicitor beyond the terms of the agreement, but it is my opinion that both sections must be read in the context of a complete statutory scheme dealing with fee agreements.

The entire thrust of the Solicitors Act is to cloak the court with jurisdiction to either protect the client under agreements made with solicitors, in which case ss. 16 to 31 apply or if there is no agreement to protect the client from being charged unreasonable and unwarranted fees, in which case, other provisions of the Act apply.

9 In the case of *Ruetz v. Morscher & Morscher* (1995), 28 O.R. (3d) 545 (Ont. Gen. Div.)

Salhany J. dealt with an application to set aside an appointment to assess a solicitor's account based on a written agreement made between a solicitor and his client. At p.16 Salhany held as follows:

Section 16 of the Solicitors Act does not require that the agreement take on any particular form. The authorities are clear that all that is required is that the document be an enforceable agreement. In my view, the document entitled, "Authorization and Direction" is an agreement within the meaning of s.16 of the Solicitors Act:

Having reached that conclusion, this matter could be disposed of by granting the motion and setting aside the order for delivery and assessment of the solicitors' bill made ex parte by the local registrar on May 9, 1994. This would not, however, preclude the client from applying under s.17 of the Solicitors Act to have the agreement approved by the assessment officer. What I propose to do here is to determine whether the agreement is fair and reasonable in the circumstances.

9 Salhany held that the agreement (authorization and direction) executed by the client was fair and reasonable, however, he declined to award the solicitor costs of the application since the clients were not given an opportunity to examine it, and ask questions about the fees that they were paying. They were expected to make up their minds without the opportunity of reflection.

The Agreement

10 I duplicate the agreement as follows:

Court File No. 5533093/93

Appeal No. C26702

Ontario Court (General Division)

BETWEEN:

DEREK BECK Plaintiff

and

IAN C. BLANE, TRI CITY FOOD SERVICE LTD. AND ROYAL INSURANCE CANADA Defendants

The parties hereto acknowledge that they have entered into this Agreement hereto acknowledge that this is an agreement relating to the total fees to be charged to the Plaintiff herein by Daniel J. Balena, Barrister and Solicitor. The parties hereto acknowledge full understanding of the fees being charged by Daniel J. Balena in respect to all services provided in obtaining judgment in action number 55930.93, in obtaining a successful result at the Court of Appeal under file number C26702, and for all work involved in the herein file. The parties hereto agree as follows:

1. The said Daniel J. Balena will render an account to the Plaintiff for all services rendered in connection with the herein action in the total amount of $250,000.00, together with GST in the amount of $17,500.00, for an overall total of $267,500.00.

2. The Plaintiff herein acknowledge full and total satisfaction with these fees and acknowledges by this Agreement that he is satisfied with the quantum of these fees being charged on account of all services rendered by Mr. Balena in respect of the herein action and the appeal thereof.

3. All parties to this Agreement acknowledge that these fees represent all services for past work done, together with any additional work to be done by Mr. Balena in completing the herein action.

4. All parties to this Agreement acknowledge full and complete understanding of this Agreement and complete satisfaction with same

DATED at Ajax, Ontario, this 1 st day of April, 1999.

_____

DEREK BECK aka COREY BECK

_____

DANIEL J. BALENA

11 Balena deposes that the agreement dated April 1, 1999, was signed in Balena's presence and in the presence of his clerk wherein Beck agreed to pay fees of $250,000.00plus GST. Balena further deposes that the question of fees had been discussed between Beck and himself frequently. Balena pointed out to him that he intended to keep this fee at $250,000.00 despite much additional further work following the Agreement.

12 Beck deposes that he did not recall signing the fee agreement. That he never read the agreement and it was not read to him. He also deposed that he had been led to believe by Balena that his fees and disbursements would be paid by the insurance company.

13 It is the uncontested evidence of Balena that he performed considerable legal work which was unbilled, and for which Balena was prepared not to charge Beck, in view of the April 1, 1999 Agreement which consisted of the following:

a) Balena applied for accident benefits through Royal Insurance. This involved an OIC negotiation settlement meeting in Toronto. This resulted in payment of $85,000.00 to Beck which was received by him on December 20, 1995;

b) Assisting Beck with a change of name application;

c) Preparation of a Power of Attorney;

d) Obtaining a Divorce Decree Nisi;

e) Assisting Beck with truck loan;

f) Assisting Beck with a National Bank loan involving correspondence with the bank respecting assignments of monies;

g) Assistance with default on purchase of vacant land;

h) Assistance respecting house purchase;

i) Assistance regarding payment of private second mortgage;

j) Correspondence with Revenue Canada, answering inquiries and correspondence for Beck;

k) Responding to assistance with unemployment insurance;

l) Assistance with Bank of Montreal loan including execution of assignments of monies payable;

Findings

14 I granted Balena and McMackin leave to argue this application and counter-application notwithstanding their filing of their own affidavits. McMackin argued that Balena did not file affidavit material responding to Beck's counter-application. Balena took the position that his affidavit deposed and refuted all, or substantially all, of the matters raised by Beck and McMackin in their affidavits and it was unnecessary. I agreed with Balena's position on that issue.

15 In order for me to assess the fairness and reasonableness of the Agreement, it is necessary for me to review the trial proceedings.

16 I was assigned to preside at this trial by Senior Regional Justice Logan in the fall of 1996. The action was scheduled for trial in November but was adjourned until January 7, 1997 for trial. The action was pre-tried on two previous occasions. I was informed that a private mediation had been conducted on April 25, 1996 without success. The jury was selected on January 7, 1997. The trial proceeded January 8,9,10,13,15,16,17,20,21,22,23,24. The action was vigorously defended on virtually every issue, although liability for the collision was admitted at trial. Balena called as witnesses, 14 medical experts and used thermographic demonstrative evidence with Dr. Wolford. Mr. Robin Barnett, an investigator, prepared a work re-construction video, which, in my view, was effective in persuading the jury of Beck's activities at work. There was a major dispute between the defence doctors who were called as witnesses and the Plaintiff's medical doctors on the issue of the injuries. The major contention between the parties was to the degree of severity of Beck's head injury. He was diagnosed by the Plaintiff's Neurologist as having a mild brain injury. He was diagnosed by the defence doctors as having a mild head injury and not a

brain injury. The major issue arose during the trial as to the use of a surveillance tape obtained by the defence. Mr. Collier, for the defence, applied to cross-examine Beck on the surveillance tape. Balena objected based on the rule of *Browne v. Dunn* [reported (1893), 6 R. 67 (U.K. H.L.)]. I upheld that objection and informed Collier that he could utilize the surveillance tape when he called his defence.

17 I thought Beck was a good witness. He understood the questions that were asked of him both in chief and in cross-examination and appeared to have no difficulty in his cognitive thinking.

18 Had I been trying this action without a jury, I would have assessed the total damages in the area of $500,000.00. The total award of the jury was $921,007.90, which was reduced on consent because of changes in the deductibility of certain items, loss of future care, past loss of income, a reduction in the management fee. These deductions of $37,426.57 resulted in the Court of Appeal's decision of $883,581.26. Prejudgment interest was calculated on this sum at $67,248.00 for a total of $950,829.26.

19 Since the amount of the costs awarded by Mr. Edwards was $130,487.40, the net amount claimed by Mr. Balena against Mr. Beck is $158.084.67 particularized as follows:

Claim	$250,000.00
Disbursements	$ 21,072.07
GST	$ 17,500.00
Total	$288,572.07
Less assessed costs	$130,487.40
Balance	$158,084.67

20 It is to be remembered that no fees were claimed by Balena against Beck respecting the $85,000.00 recovery from Royal Insurance Company.

21 I considered the trial result as extremely favourable to Beck. The judgment was considerably higher than Beck's offer to settle and was at least forty per cent higher than I would have assessed. It was also 900 times higher than the amount of the defendant's offer.

The Appeal Process

22 The Defendant launched an appeal arguing seventeen points of law. The trial brief consisted of 66 documents, 40 medical reports, 74 exhibits and 1677 pages.

23 Balena brought a motion before the Court of Appeal on April 9, 1997 to obtain the payout of $350,000 from the Stay, which was in effect pending the appeal, Mr. Percival now representing the defence, appealed Justice Doherty's decision, however he abandoned that appeal shortly before it was to be argued. Mr. H. Smith, a solicitor, was retained by Balena to assist him on the appeal in view of its complexities.

24 Balena was 100% successful on the appeal. That court established either new law or clarification of existing law in the use of surveillance tapes, and the clarification of their decision in the case of *Ferraro v. Lee* [reported (1974), 2 O.R. (2d) 417 (Ont. C.A.)].

25 Following Rule 49.10, of the Rules of Civil Procedures, I awarded Beck costs on a party and party basis to December 19, 1996 with solicitor/client costs thereafter. The Court of Appeal costs were awarded on a party and party basis.

26 Had I been asked to fix the costs of this trial, I would have done so. I would have also considered a premium above the hourly rates as was done in the case of *Roberts v. Morana* (1997), 37 O.R. (3d) 333 (Ont. Gen. Div.) at 342. In that case O'Brien J. considered when there was an award which was extraordinary, excellent, beyond

the normal client expectations, when counsel has demonstrated ingenuity and imagination and when counsel has taken a rare and substantial risk, a premium can be ordered.

27 In this case, Balena exhibited ingenuity and imagination respecting the demonstrative evidence that was adduced. He conducted a text-book type of cross-examination of the defendant doctors. He marshaled the evidence extremely well. He was not assisted by an associate, nor a junior nor a law student. Fourteen medical experts were called as witnesses by Balena. Their evidence had to be carefully organized and orchestrated to fill in the gaps in the medical problems and treatment of Beck. There were no gaps or hold-ups in the calling of the medical witnesses. Their evidence was impressive and compelling. For example, Dr. M. Webber, who is somewhat controversial in his opinions demonstrated brain mapping, with coloured images of brain activity. Balena has been a motor vehicle injury expert. His expertise was clearly demonstrated.

28 On three occasions recently, I have, in fixing costs, awarded a counsel fee of $400..00 on a solicitor/client basis and $200.00 on a party and party basis. Counsel for the plaintiffs on those cases was Mr. Oatley and Mr. Bristow. In those cases as in this one counsel were very experienced and achieved an excellent result.

Assessment of Costs by Mr. Edwards

29 On November 29, 1999, Mr. Edwards the Assessment Officer assessed that party and party costs up to December 19, 1996, at $29,750.00 and the solicitor and client costs from December 16, 1996 to February 12, 1997 at $64,860.00. He allowed disbursements at $9,246.81, GST $6,598.20 for a total of $110,455.00. The amount claimed by Balena was $186,464.92.

30 Mr. Edwards assessed the party and party costs at the appeal at $13,750.00 together with GST $962.50 together with disbursements of $5,319.94 for a total of $20,032.40. The amount claimed by Balena for the party and party appeal costs was $44,240.41. Of this sum, $11,492.41 was claimed as a disbursements relating to his hiring of Mr. Smith to assist him on the appeal. This represented a $6,289,61 disallowance of the amount paid by Balena to Smith.

31 It is clear, from the letter of December 6, 1999 by Balena to Beck, that Beck instructed him not to appeal the assessment.

32 On December 8, 1999, a full report was delivered by Balena to Beck.

33 Beck retained A. McMackin on December 9th who prepared an assignment of the settlement funds from Mr. Percival without the knowledge of Balena and without preparing a notice of change of solicitors. Balena's interim account on October 23, 1997 is explained in his letter of December 8, 1999 which is marked as a Exhibit "T" to Balena's affidavit in support of this application.

The Agreement Dated April 1, 1999

34 I accept Balena's sworn evidence that the agreement was signed in his presence and that one of his clerks and it was explained to Beck before he signed the agreement.

35 In Balena's letter to Beck delivered on March 26, 1999, a full report was given to Beck on the monies received and disbursed by Balena with his admonition that his account will follow which I duplicate as follows at p.6:

> I have also taken the liberty of enclosing a statement for you, which outlines monies received by you to date in this legal action. I appreciate that it is easy to lose track of monies that you have received from various sources and I believe that the enclosed statement may assist you in providing you with a bit of an overview as to the total of all monies received.

> Once again, my account will follow as soon as that account has been prepared, as the account is needed in any event to pursue the costs from the defendants, as part of the judgment and appeal.

36 In *Apotex Inc. v. Egis Pharmaceuticals* [reported (1991), 4 O.R. (3d) 321 (Ont. Gen. Div.)] referred to *supra*, "the judge in fixing costs of a proceeding is not assessing costs as if he were performing the functions of a master or officer to whom the court has referred costs to be assessed" Rule 57.01(3) expressly provides that:

> In awarding costs, the court may fix all or part of the costs with or without reference to the Tariffs, instead of referring them for assessment.

37 At p.5 Henry J. rejects the notion that there is a rule of thumb that solicitor and client costs are one third above party and party costs.

> His other submission is to the "formula" concept. He submits that the award inter parties of costs on the solicitor and client scale is a function of the party and party scale.
>
> I do not agree. So far as I can determine there is no such formula or rule of thumb.

38 Although Henry J. was dealing with the significance of solicitor and client award between parties, I adopt his reasoning respecting the circumstances in this case. At p.4 Henry J. held:

> This brings me to a second guiding principle - the judge in fixing costs of a proceeding is not assessing costs as if he were performing the functions of a master or officer to whom the court has referred costs to be assessed. Rule 57.91(3) expressly provides that:
>
> In awarding costs, the court may fix all or part of the cots with or without reference to the Tariffs, instead of referring them for assessment.

39 I have considered the principles contained in rule 57.01(3) in addition to considering the totality of the services rendered.

40 I find that Beck must have known about the amount of this account at least by April 1, 1999.

41 Having regard to the totality of the services rendered by Balena which I have alluded to, I find the agreement is fair and reasonable. I find however that it is unenforceable given the circumstances surrounding its execution. Beck ought to have had the opportunity of reflecting on the amount of the account, and of seeking independent legal advise if he chose to, although that is not necessarily a legal requirement. The amount claimed by Balena from McMackin is $92,528.25 particularized as follows:

Account rendered	$250,000.00
GST	17,500.00
Total	$267,500.00
Account of October 23/97	90,950.00
Net difference	$176,550.00
Adjustment of May 28/98 (rebate)	70,000.00
Balance owing	$246,550.00
Disbursements	21,072.07
Total	$267,622.07
Minus received from trust	$175,093.82
Balance being claimed	$ 92,528.25

42 I specifically find that the account of Smith in his work done in preparation of the appeal and attendance on the appeal was reasonable and necessary given the vital importance of the appeal. Although Mr. Edwards reduced that account to $4,681.25 on a party and party basis, I have no hesitation of allowing it at the amount being paid being $10,174.42.

43 I assess Balena's account for services rendered at $288,572.07 less assessed costs of $130,487.40 for a balance of $158,084.67

44 An order will therefore issue setting aside the appointments for assessments of the bills before Mr. Edwards scheduled on March 1, 2000. A charging order will issue against the monies held in trust by McMackin in the sum of $92,528.25.

45 I do not intend to allow costs of this application in view of my finding that the agreement was unenforceable.

46 I do not allow Balena interest on his account.

47 The application of Beck is dismissed without costs.

Application granted; counter-application dismissed.

Most Negative Treatment: Reversed
Most Recent Reversed: Solicitor, Re | 1973 CarswellOnt 1018, [1973] 1 O.R. 652 | (Ont. C.A., Sep 29, 1973)

1971 CarswellOnt 263
Ontario High Court of Justice

Solicitor, Re

1971 CarswellOnt 263, [1972] 1 O.R. 694

Re Solicitor

Wright, J.

Judgment: October 27, 1971

Counsel: *J. L. McDougall*, for appellant.
H R. Locke, Q.C., for respondent.

Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.2 Jurisdiction and discretion as to costs
Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.b Agreements for fees
IX.5.b.ii Form of agreement
Headnote
Barristers and Solicitors --- Relationship with client — Fees — Agreements for fees — Form of agreement
Practice --- Costs — Jurisdiction and discretion as to costs

***Wright, J.*:**

1 This is an appeal from the report of W. C. McBride, the Taxing Officer at Toronto, dated July 20, 1971, and filed on August 30, 1971. It is based on alleged errors by the Taxing Officer based on his finding that the solicitor worked on an agreed hourly rate. It is alleged that this led the Taxing Officer erroneously

(1) not to assess the solicitor's work on a *quantum meruit* basis;

(2) to relieve the solicitor of the obligation of showing what work was done by him for the client;

(3) to find the onus was on the client to prove that the solicitor did not spend the time claimed, and

(4) to find that the issue was whether the solicitor was dishonest in recording his time.

2 I am satisfied by the materials filed (26 exhibits), by the proceedings before the Taxing Officer, when the solicitor gave evidence on November 30, 1970, March 12, 1971, and June 28, 1971, extending in all to 110 pages, and by the detailed reasons for decision, that the bills were fairly and thoroughly considered. I have no criticism of the amount reported although, as will appear in this case, I would disallow interest.

3 The parties and the Taxing Officer have proceeded on the basis that there was an agreement between the solicitor and the client for payment of the solicitor at an hourly rate for his professional work. Although that agreement was not in writing, the client appears from the record to have waived the protection given in the case of an oral agreement under the *Solicitors Act*, R.S.O. 1970, c. 441, ss. 17 to 35. The matter has been dealt with as an instance of an agreed amount or rate.

4 If that be so, then the procedure followed in the case was wrong both in principle and in practice and the issues raised in the notice of motion do not relate to the law and proper procedure.

5 This basic point was not raised nor argued before me, although it was raised correctly by the Taxing Officer at p. 5 of the evidence. It was not then pursued because the parties professed to be agreed that what they wanted was a taxation of the solicitor's bill in the light of a retainer and agreement at $40 an hour.

6 The taxing officer rightly said:

> . . . if the earlier bills are based entirely on mechanical computation of time and nothing else, unless you have an agreement with the client that that was the basis upon which they were to be calculated, it is open to the client today to say, "we want you to establish your fee on a *quantum meruit* basis". One of the facts to be considered is time, surely not the only one . . . but it seems to me unless it was pursuant to a written agreement, they can still now say, "Well I'm sorry we don't want to pay it on that basis."

7 The client did not accept this opportunity. The taxation proceeded on the basis of how a bill of costs rendered on an agreed hourly basis should be taxed. That is the issue sought to be brought before me.

8 The answer is clear. Where there is a written agreement or where, as here, the agreement is conceded by the client and the requirement of writing waived, s. 33 of the *Solicitors Act* rules the procedure. It says:

> 33. Except as otherwise provided in sections 18 to 32 and sections 34 and 35, a bill of a solicitor for the amount due under any such agreement is not subject to any taxation or to any provision of law respecting the signing and delivery of a bill of a solicitor.

9 I propose now to examine the position of the Court and the Taxing Officer in relation to agreements between solicitors and clients as to compensation. But I should first hold that an agreement by a client to pay a solicitor at an hourly rate is an agreement, if in writing, under s. 18(1) of the *Solicitors Act*. This reads:

> 18(1) Subject to sections 19 to 35 a solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he would otherwise be entitled to be remunerated.

I am of opinion that an agreement to pay an hourly rate is within the section. It is in the same class as a "salary or otherwise". In one aspect, it is a salary by the hour. "Salary" is defined tersely in the Concise Oxford Dictionary as a "fixed periodical payment made to person doing other than manual or mechanical work", and is contrasted to "wages" defined as the "amount paid periodically by the day or week or month for time during which workman or servant is at employer's disposal".

10 The question of compensation for solicitors has long been the anxious concern of the Court, both in the interests of clients and their solicitors. In the 19th century, both in England and Canada, much legislative and judicial activity was directed to the reform and settlement of procedures for fair and reasonable fees under the Court's control. As a result, it can be said that a solicitor's charges in Ontario are, under law, subject in every respect to review and control by the Court acting through its appointed officers and Judges.

11 The solicitors in Ontario enjoy a statutory monopoly which the Law Society of Upper Canada is jealous to justify and maintain. The *Solicitors Act*, R.S.O. 1970, c. 441, makes it clear that there can be no action for recovery on a solicitor's bill until one month after it be rendered. It gives rights to the client to have it taxed. It requires agreements to be in writing and to be fair and reasonable. Where there is such an agreement, the amount due under it is not subject to taxation. It preserves an elaborate but not perfect system, weighted against solicitors, of measures which enable the Court to determine the quantity and quality of the bill. Thus it may be said of the solicitor's profession, that its members cannot set their own individual charges and that there is a procedure for determining in every case where it is invoked, that a solicitor's charges are fair and reasonable. To a degree this is a significant counter-weight to the monopoly, and some assurance against abuse and exploitation.

12 I make these general observations so that it may be evident that the maintenance of a system of independent taxation of fees is a vital factor for the integrity of an independent profession in a free society.

13 What chiefly, in this case, is now my concern, is the law with regard to agreements by solicitors about costs and fees and charges. Prior to the *Attorneys and Solicitors Act*, 1870 (U.K.), c. 28, the law was that agreements as to costs were, upon the application of the client,

> . . . considered and examined by the Courts, and they were not infrequently held to be binding both on the solicitor and the client. The inquiry was always directed to the question whether the agreement was fair and reasonable, and an agreement by the solicitor to take less than the usual remuneration was not looked upon as unfair or unreasonable, but was held binding upon him. We must remember that that was the state of the law in 1870 when we are called upon to construe the Act of that year, an Act which was designed to provide fresh safeguards for the protection of the client and to give the solicitor certain rights which he did not previously possess, provided that he himself complied with the requirements of the Act.

Per Lord Alverstone, C.J., in *Clare v. Joseph* (1907), [1907] 2 K.B. 369 (C.A.) at p. 372.

14 It is true that the 1870 Act was to be limited to contentious business and that it was suggested by Pearson, J., in *Re A Solicitor* (1955), [1955] 3 All E.R. 305, that subsequent English legislation may have impaired the authority of *Clare v. Joseph*. But in Ontario, our present legislation now follows the form of the 1870 Act, after following the 1881 English Act from 1886 until 1909, and *Clare v. Joseph* has been approved in *Fitch v. Fort Frances Pulp & Paper Co.* (1927), 61 O.L.R. 252, [1927] 4 D.L.R. 811 (C.A.). It has been followed in *Solicitor, Re* (1964), 49 D.L.R. (2d) 637 (B.C. S.C.), and is a firm foundation for our law.

15 I will be considering the statutory provisions studied in *Clare v. Joseph, supra*, but I also rely, in all matters concerning solicitors and clients, on the ancient powers and duties of the Court to control its officers and protect the public.

16 What ss. 17 to 35 of the *Solicitors Act* do, in providing the safeguards and rights to which Lord Alverstone referred above, is, so far as I am now concerned:

> (1) To require an agreement respecting the amount and manner of payment of a solicitor's professional compensation to be in writing if it were to be enforced by the solicitor (s. 18(1)) and he has no further claim (s. 23).
>
> (2) Where the agreement covers contentious business, the solicitor cannot receive payment "until the agreement has been examined and allowed by a taxing officer" (s. 19).
>
> (3) Where it appears to the Taxing Officer that the agreement is not fair and reasonable, he may require the opinion of a Court to be taken (s. 20).

(4) The Court may reduce the amount payable or cancel the agreement and order it taxed as if the agreement had not been made (s. 21).

(5) No action shall be brought on the agreement but "every question respecting the validity or effect of it may be examined . . . and it may be enforced or set aside" by the Court (s. 25).

(6) Bills for the amount due under an agreement are not subject to taxation (s. 34).

17 If this law is applied to the facts of this case, there are the following results:

(a) The agreement was not in writing so the solicitor could not, in the normal course, enforce it against the client. He would have had to render bills in the usual way and establish the value of his services as best he could without docket entries. On taxation, what he in fact did would have been examined. In effect, he would have recovered on a *quantum meruit* basis. Generally, the contentions advanced by the client on this appeal would have applied.

(b) As it was presented, the client conceded that there was a retainer for payment at an hourly rate, waived its right to require a written agreement, acceded to the *praecipe* order for taxation taken out by the solicitor contrary to s. 34 (see 6, *supra*), but raised the matters contained in its notice of appeal.

(c) In the sequel, notwithstanding these irregularities, the bills were closely examined by the Taxing Officer, and much material was provided in the course of the proceeding, to inform the Court and enable it to discharge its responsibilities.

18 In my view, there is little merit in the legal issues raised by way of appeal before me, because the parties have not met the requirements of the *Solicitors Act*. So far as the matters of substance are concerned, I am satisfied, as was the Taxing Officer, that bills as rendered were substantially in order under the agreement between the parties and that the solicitor is entitled to be paid in proper proceedings.

19 I started with the proposition that an agreement to pay a solicitor at an hourly rate is an agreement under s. 18 of the *Solicitors Act* subject to the discriminations, protections and, if written, to the privileges set out in the *Solicitors Act*.

20 If, as here, it was not in writing, the client need not recognize it. The solicitor must render signed bills in the normal form, and an order for taxation must be secured. On the taxation, the work done and its value, independent of the agreement, must be shown by the solicitor. No prime question need then arise as to the time spent or the solicitor's honesty in recording it. If the client had sought this protection, given it under the *Solicitors Act*, its contentions on this appeal would have been meet.

21 If the client conceded the validity of the agreement as it did, the solicitor did not have to render bills in the normal form. He had only to certify to his time and ask for his money. What he could not do under s. 38 of the Act (quoted, *supra*) he did.

22 Thus the solicitor had no right to take out the *praecipe* order for taxation. If he were paid, the client had the right under s. 27 of the Act to apply to the Supreme Court to reopen the agreement and order taxation.

23 The procedure to be followed is set out in the *Solicitors Act*. I quote particularly, ss. 19, 20, 25 and 26 as follows:

19. Where the agreement is made in respect of business done or to be done in any court, except a small claims court, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement.

20. Where it appears to the taxing officer that the agreement is not fair and reasonable, he may require the opinion of a court to be taken thereon.

25. No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being a small claims court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Supreme Court.

26. Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the ordinary manner.

24 If, as here, he were not fully paid, the solicitor is entitled, under s. 19 if the agreement was made in respect of business done or to be done in any Court, to have it examined and allowed by a Taxing Officer. By s. 20, if the Taxing Officer thought the agreement was not fair and reasonable, he might require the Court's opinion.

25 If the agreement did not relate to Court business and the solicitor was unpaid, he could apply to the Supreme Court under s. 25 to have the agreement examined and enforced "without action". Under s. 26, the Court is given full power to enforce a fair and reasonable agreement, or to declare an agreement that is not, void, order it cancelled and provide for taxation in the ordinary way. These remedies under ss. 25 and 26 are also open to the client.

26 Had the provisions of the law been followed by the parties in this case, the issues sought now to be raised by the client could have been raised in the ordinary manner. Thus the issues of how a Taxing Officer taxes a bill, where the fees have been set by lawful agreement, would not have arisen. The statute provides that such issues should never arise.

27 A distinction evident in the traditions and organization of the Court and in the statutes is that a Taxing Officer has very little to do where there is a valid solicitor-and-client agreement as to fees. That is not his ordinary business. It is the Court's responsibility.

28 The Taxing Officer's function under the law and the constitution is strictly limited. It is to tax bills of costs, not to enforce or review agreements or do the other work of a Judge. The *Solicitors Act* in Ontario makes that clear in this case, and provides ready access to the Courts if it be followed. In this case, it was not followed and, although generally a fair and reasonable result was attained, much time and effort has been expended in proceedings, authorized or required by no law.

29 The client disputes the award of interest. The Taxing Officer says "The Solicitor is entitled to interest at 5% from 30 days after delivery of the bills to this date." I do not dispute this statement in the proceedings as they appeared before him. But as I consider so much of the taxing procedure at the instance of the solicitor was unjustified and unnecessarily time-consuming, I would and do not approve interest in this case for any delay in payment, nor do I make any order as to costs.

30 Thus I dismiss the appeal. There is no other order I can make on the record before me. The certificate below is of no effect. The parties may take such further proceedings as they are advised in the light of these reasons, but in my view the substance of the matter has been dealt with and they might now prudently compose their differences in peace.

 Original
2016 ONCA 377
Ontario Court of Appeal

Clatney v. Quinn Thiele Mineault Grodzki LLP

2016 CarswellOnt 7878, 2016 ONCA 377, [2016] O.J. No. 2610, 131 O.R. (3d) 511, 265 A.C.W.S. (3d) 1072, 349 O.A.C. 286, 399 D.L.R. (4th) 343, 86 C.P.C. (7th) 1

Mark Clatney, Applicant (Appellant) and Quinn Thiele Mineault Grodzki LLP and Bertschi Orth Solictors and Barristers LLP, Respondents (Respondents)

E.A. Cronk, Gloria Epstein, Grant Huscroft JJ.A.

Heard: November 13, 2015
Judgment: May 19, 2016 *
Docket: CA C60500

Counsel: Paul Auerbach, for Paul Auerbach
William R. Hunter, for Respondent, Quinn Thiele Mineault Grodzki
Cheryl Letourneau, for Respondent, Bertschi Orth Solicitors and Barristers

Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.vi Miscellaneous
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.d Accounting and refunding by lawyer
VIII.5.d.iii Application for assessment, review, or taxation of account
VIII.5.d.iii.A Entitlement to assessment or review

Headnote
Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — Miscellaneous
Consent order — Client retained law firm BO to represent him in action arising from motor vehicle accident, but later hired law firm QT — Client's tort action was settled for $800,000, which included total of $175,000 for client's wife and children — BO obtained charging order against settlement funds — As client was experiencing financial difficulties, he agreed to settle law firms' accounts in fee agreements, which were set out in consent order that provided for release of funds with law firms receiving $310,000 and client receiving $274,142 — Application judge dismissed client's application for order setting aside consent order and referring law firms' accounts to assessment, on basis that he lacked jurisdiction due to consent order — Client appealed — Appeal

allowed — Judge erred in finding that he lacked jurisdiction to consider client's request for order assessing law firms' accounts and in failing to consider request to set aside consent order — It was necessary to set aside consent order to achieve justice between parties — Charging order should not have been granted over entire amount of settlement funds — QT's conduct was problematic, especially given client's vulnerability and financial pressure — Fee agreements were not negotiated in circumstances in which client would have understood impact on amount he would ultimately receive — Law firms would not suffer prejudice if consent order were set aside — Consent order did not promote public interest, ensure public confidence in administration of justice or protect client.

Professions and occupations --- Lawyers — Fees — Accounting and refunding by lawyer — Application for assessment, review, or taxation of account — Entitlement to assessment or review

Consent order — Client retained law firm BO to represent him in action arising from motor vehicle accident, but later hired law firm QT — Client's tort action was settled for $800,000, which included total of $175,000 for client's wife and children — BO learned of settlement and obtained charging order against settlement funds — As client was experiencing financial difficulties, he agreed to settle law firms' accounts in fee agreements, which were set out in consent order that provided for release of funds with law firms receiving $310,000 and client receiving $274,142 — Application judge dismissed client's application for order referring law firms' accounts to assessment pursuant to Solicitors Act — Client appealed — Appeal allowed — Consent order was set aside, and costs, fees, charges and disbursements were to be assessed — It was necessary to set aside consent order to achieve justice between parties — Because amounts agreed upon in fee agreements had been paid, s. 25 of Act applied — Special circumstances existed, as client was vulnerable, under intense financial pressure, and did not have independent legal advice — QT did not protect client's interests, provided erroneous legal advice, and exerted pressure on client to settle — These factors put client in position where he had little choice but to enter into fee agreements — Protection of client's interests and public's confidence in administration of justice required that fee agreements be reopened and assessment be ordered — Consent order did not act as substitute for assessment Solicitors Act, R.S.O. 1990, c. S.15, s 25.

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Cases considered by *Gloria Epstein J.A.*:

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Beetown Honey Products Inc., Re (2003), 2003 CarswellOnt 3755, 46 C.B.R. (4th) 195, 67 O.R. (3d) 511, [2003] O.T.C. 866 (Ont. S.C.J.) — followed

Beetown Honey Products Inc., Re (2004), 2004 CarswellOnt 4316, 3 C.B.R. (5th) 204 (Ont. C.A.) — referred to

Bui v. Alpert (2014), 2014 ONCA 495, 2014 CarswellOnt 8797 (Ont. C.A.) — referred to

Cookish v. Paul Lee Associates Professional Corp. (2013), 2013 ONCA 278, 2013 CarswellOnt 5070, 39 C.P.C. (7th) 227, 305 O.A.C. 359 (Ont. C.A.) — referred to

Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP (2010), 2010 ONCA 709, 2010 CarswellOnt 8065, 92 C.P.C. (6th) 1, 325 D.L.R. (4th) 518, 269 O.A.C. 382, 104 O.R. (3d) 93 (Ont. C.A.) — referred to

Finlay v. Van Paassen (2010), 2010 ONCA 204, 2010 CarswellOnt 1543, 318 D.L.R. (4th) 686, 101 O.R. (3d) 390, 266 O.A.C. 239 (Ont. C.A.) — considered

Garland v. Consumers' Gas Co. (2004), 2004 SCC 25, 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 237 D.L.R. (4th) 385, 43 B.L.R. (3d) 163, 319 N.R. 38, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), 42 Alta. L. Rev. 399, 72 O.R. (3d) 80, 2004 CSC 25 (S.C.C.) — referred to

Guillemette v. Doucet (2007), 2007 ONCA 743, 2007 CarswellOnt 7034, 48 C.P.C. (6th) 17, 230 O.A.C. 202, 88 O.R. (3d) 90, *(*sub nom. *Doucet v. Guillemette)* 287 D.L.R. (4th) 522 (Ont. C.A.) — referred to

Minkarious v. Abraham, Duggan (1995), 129 D.L.R. (4th) 311, 44 C.P.C. (3d) 210, 27 O.R. (3d) 26, 1995 CarswellOnt 1341 (Ont. Gen. Div.) — referred to

Mohammed v. York Fire & Casualty Insurance Co. (2006), 2006 CarswellOnt 829, [2006] I.L.R. I-4482, 21 C.P.C. (6th) 389, 34 C.C.L.I. (4th) 161, 79 O.R. (3d) 354 (Ont. C.A.) — referred to

Mohammed v. York Fire & Casualty Insurance Co. (2007), 2007 CarswellOnt 994, 2007 CarswellOnt 995, 366 N.R. 398 (Note), 229 O.A.C. 399 (note) (S.C.C.) — referred to

Plazavest Financial Corp. v. National Bank of Canada (2000), 2000 CarswellOnt 1081, 47 O.R. (3d) 641, 185 D.L.R. (4th) 78, 44 C.P.C. (4th) 288, 133 O.A.C. 100 (Ont. C.A.) — considered

Price v. Sonsini (2002), 2002 CarswellOnt 2255, 215 D.L.R. (4th) 376, 22 C.P.C. (5th) 1, 60 O.R. (3d) 257, 162 O.A.C. 85 (Ont. C.A.) — considered

R. v. Wilson (1983), [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — referred to

Rick v. Brandsema (2009), 2009 SCC 10, 2009 CarswellBC 342, 2009 CarswellBC 343, 62 R.F.L. (6th) 239, *(*sub nom. *N.R. v. B.B.)* 385 N.R. 85, [2009] 5 W.W.R. 191, 303 D.L.R. (4th) 193, 90 B.C.L.R. (4th) 1, 266 B.C.A.C. 1, 449 W.A.C. 1, [2009] 1 S.C.R. 295 (S.C.C.) — considered

Ruetz v. Morscher & Morscher (1995), 47 C.P.C. (3d) 110, 28 O.R. (3d) 545, 1995 CarswellOnt 906 (Ont. Gen. Div.) — considered

Stoughton Trailers Canada Corp. v. James Expedite Transport Inc. (2008), 2008 ONCA 817, 2008 CarswellOnt 7214 (Ont. C.A.) — referred to

Tsaoussis (Litigation Guardian of) v. Baetz (1998), 1998 CarswellOnt 3409, *(*sub nom. *Tsaoussis v. Baetz)* 112 O.A.C. 78, 165 D.L.R. (4th) 268, 41 O.R. (3d) 257, 27 C.P.C. (4th) 223, 68 O.T.C. 239 (Ont. C.A.) — considered

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

s. 11 — considered

s. 15 — referred to

s. 16 — considered

s. 16(1) — considered

ss. 20-32 — referred to

s. 25 — considered

s. 28.1(10) [en. 2002, c. 24, Sched. A, s. 4] — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 1.04(1) — considered

R. 2.01 — considered

R. 2.01(1) — considered

R. 2.01(2) — considered

R. 14.05 — considered

R. 59.06 — considered

R. 59.06(2)(a) — considered

Authorities considered:

Orkin, Mark M., *The Law of Costs*, 2nd ed. (Toronto: Carswell, 1987) (looseleaf)

***Gloria Epstein J.A.*:**

Overview

1 At the heart of this appeal lies the importance of public confidence in the administration of justice and, in that context, the court's supervisory role over the appropriate compensation for legal services.

2 In March 2008, the appellant was seriously injured in a motor vehicle accident. The respondents are the law firms that represented him in his tort claim. This claim was settled in July 2013 for $800,000, an amount that included Family Law Act, R.S.O. 1990, c. F.3 (“FLA”) claims advanced by the appellant's wife and two teenaged sons. Certain funds were distributed, as will be discussed in further detail below.

3 Under a court order dated August 21, 2013, the settlement monies that then remained, approximately $655,000, were held under a charging order pending resolution of the accounts of the respondent, Bertschi Orth Solicitors and Barristers LLP ("Bertschi Orth"), [1] for fees rendered and disbursements incurred in representing the appellant in the initial stages of his tort action. In November 2013, $70,000 of that $655,000 was paid into court on behalf of the appellant's sons.

4 On December 3, 2013, an order was issued on consent (the "Consent Order”) that provided for the release of the remaining monies, approximately $585,000. The Consent Order specified payment to the respondents of amounts in full satisfaction of their fees and disbursements, with the remainder to the appellant. As a result of this order, the appellant realized a net amount of $274,142.47. The respondents received $310,000, in total.

5 On November 25, 2014, the appellant brought an application for an order referring the respondents' accounts to assessment pursuant to the provisions of the Solicitors Act, R.S.O. 1990, c. S.15. The application judge dismissed the application on the basis that, in the light of the Consent Order, he lacked jurisdiction to hear the matter. The appellant appeals.

6 For the reasons that follow, I am of the view that the application judge had jurisdiction to refer the respondents' accounts to assessment and erred in law in holding otherwise. I would allow the appeal, set aside the Consent Order, and direct the respondents' accounts to be assessed.

The Background Facts

7 At the time of the accident, the appellant was 46. He was then living with his wife and two teenaged sons. Following the accident, the appellant lost his job, and he and his wife separated.

The initial retainer

8 In January 2009, the appellant retained Bertschi Orth to represent him in his tort and accident benefits claims. [2] The appellant entered into a contingency retainer agreement with Bertschi Orth that provided for payment of fees equal to 35% of damages recovered, plus disbursements incurred on his behalf, plus GST. The agreement contained a provision stating that, if the appellant terminated the retainer prior to the resolution of his claim, he would pay Bertschi Orth all fees, disbursements and charges for services rendered by it to the date of termination.

The change in solicitors and the settlement

9 In November 2012, the appellant terminated Bertschi Orth's retainer and hired the respondent, Quinn Thiele Mineault Grodzki LLP ("Quinn Thiele"). Jaimie Noel, a lawyer at Quinn Thiele who had been representing the appellant's sons on their *FLA* claims, agreed to represent the appellant in his tort claim and to continue to represent his sons. She had previously worked at Bertschi Orth.

10 The appellant entered into a contingency fee agreement with Quinn Thiele that provided for payment of fees equal to 30% of damages recovered, plus disbursements incurred, plus HST.

11 No written undertaking was given by Quinn Thiele or by the appellant in relation to Bertschi Orth's fees and disbursements. Correspondence from Bertschi Orth indicates that it was prepared to negotiate the amount owing and recognized the potential need for "a reduction... on a pro rata basis depending upon the settlement amount, the amount recovered for fees, and the time [the] firms spent on the file." Ms. Noel informed Bertschi Orth that she did not have instructions from her client to agree to pay Bertschi Orth's account or disbursements. Her evidence was that she advised the appellant that the fees to be charged by Quinn Thiele pursuant to their retainer agreement were separate from any fees owing to Bertschi Orth.

12 In December 2012, Bertschi Orth delivered a draft account to the appellant setting out $106,000 in fees and over $7,000 in disbursements. The total balance due, including HST, was identified as $117,333.17.

13 Ms. Noel scheduled a mediation of the tort action for July 2, 2013. The mediation proceeded and the action was settled for $800,000 - $625,000 to the appellant, $105,000 to his wife and $35,000 to each of the two children. Of the appellant's $625,000, $20,000 had been received by him in advance and a further $20,000 was paid for costs of one of the co-defendants in the action.

14 Ms. Noel did not obtain written instructions from the appellant confirming his net recovery after payment of fees and disbursements to either of the respondent law firms. The appellant's contemporaneous notes suggest that he expected to receive a net amount of no less than $400,000 from the settlement.

The charging order

15 Later in July 2013, Bertschi Orth learned of the settlement and moved to obtain a charging order against the settlement funds.

16 On August 12, 2013, Smith J. of the Superior Court of Justice endorsed the record requesting a charging order, to the effect that "[n]one of the settlement funds" were to be disbursed until Bertschi Orth's account was assessed and the "respective share of fee[s] between Bertschi Orth and [Quinn Thiele had] been determined".

17 Quinn Thiele had prepared a response on the appellant's behalf to Bertschi Orth's motion for a charging order but the materials were not filed in time. The responding motion record was eventually filed and, on August 14, 2013, Smith J. further endorsed the record to the effect that all settlement funds were to be subject to a charging order until Bertschi Orth's account was assessed.

18 By order dated August 21, 2013, Smith J. revised the August 12 endorsement (as modified by the August 14 endorsement) by providing that "the settlement funds [would] be held in trust by [Quinn Thiele] but not distributed until such time as the completion of the assessment of the [Bertschi Orth] account; and distributed on consent or after a further order [was] obtained" (the "Charging Order").

Fee discussions and correspondence

19 Shortly after the date of the Charging Order, the parties started to address the amounts the appellant owed the respondents for their legal services. [3]

20 On October 7, 2013, Bertschi Orth obtained an order from the Registrar for the assessment of its account. Later, the assessment hearing was set for January 21, 2014.

21 At this point in time, the appellant was experiencing mounting financial pressure, a situation he made clear to Quinn Thiele on several occasions.

22 The first indication that the appellant communicated his financial problems to Quinn Thiele appears in an October 9, 2013 email from the appellant to Ms. Noel. In that email, the appellant requested $34,000 to "resolve debt issues" and stated that he "[would] need to claim bankruptcy". Ms. Noel responded the next day, stating that she would "look into whether payment [could] be issued".

23 In a lengthy email sent on October 23, 2013, Mikolaj Grodzki, a partner at Quinn Thiele, advised the appellant that the firm could not represent him in any assessment of Bertschi Orth's account because Ms. Noel had formerly been an associate at Bertschi Orth. Mr. Grodzki relied on the alleged conflict to urge the appellant to settle Quinn Thiele's account before dealing with Bertschi Orth's account, so that the "obstacle" to negotiating Bertschi Orth's fees could be removed:

> [Quinn Thiele's] interest to protect our earned fees and to assert a claim for them conflicts with the need to represent your interests against [Bertschi Orth] at this time. Accordingly, we need to remove this obstacle and settle our account with you now. This will be an amount that you agree to pay regardless of the outcome of the assessment of the [Bertschi Orth] matter.... lf we can do this, then I can focus entirely on representing your interests against [Bertschi Orth] and not on protecting [Quinn Thiele's] financial interests in the file.

24 Mr. Grodzki went on to advise the appellant that a resolution of Quinn Thiele's account would assist him in the pending assessment of Bertschi Orth's account:

> We would prefer to reach a mutually acceptable amount and consent to have [Quinn Thiele's] account assessed in that amount. This would then also be evidence for the assessment hearing of what you are paying the lawyers who did the work and settled the case. This is a relevant factor in assessing the [Bertschi Orth] law account.

25 In this email, Mr. Grodzki also stressed that the "the assessment process itself [would] be lengthy" and that the legal costs associated with the assessment would be high.

26 On October 29, 2013, Quinn Thiele delivered a form of account to the appellant claiming fees, disbursements and HST totalling $305,159.14. [4] Accordingly, at that point in time, Quinn Thiele and Bertschi Orth were asserting claims of fees and disbursements in an aggregate amount in excess of $422,000 — almost two-thirds of the $695,000 allocated to the appellant and his sons.

27 On November 4, 2013, Quinn Thiele offered to settle its account with the appellant for $215,000.

28 On November 5, 2013, the appellant delivered a Notice of Intention to Act in Person in the assessment of the Bertschi Orth account.

29 On November 13, 2013, the appellant again communicated his financial stress, this time to both firms. He wrote to several individuals at Quinn Thiele and Bertschi Orth, requesting $50,000 to "prevent any further financial hardship, bankruptcy and [to] pay off several long overdue bills." He asked both firms to confirm their agreement, and requested that Quinn Thiele advise what paperwork was required at his end.

30 On November 14, 2013, Cheryl Letourneau, counsel at Bertschi Orth, responded on behalf of the firm indicating that it would consent to the release of $50,000, provided the firm was given $8,175.35 of that amount to cover disbursements. By email that same day, the appellant accepted Bertschi Orth's offer.

31 Quinn Thiele, however, took a different position. On November 16, 2013, Mr. Grodzki emailed the appellant as follows: "Please review the [Charging Order], the Court ordered that both accounts ([Bertschi Orth] and us) have to be settled before any funds released. The consent from [Ms. Letourneau] is useless." The appellant responded the next day, explaining his belief that consent among the parties was sufficient for the funds to be released.

32 On November 19, 2013, the appellant again informed Quinn Thiele that, in his view, a court motion was not required for the release of the requested funds. The appellant requested payment of $8,175.35 to Bertschi Orth, and $41,824.65 to himself. He concluded, highlighting his mounting financial pressures a third time: "I want to stress to the partners HOW URGENT this matter is from a personal and financial matter."

33 Mr. Thiele responded to the appellant on November 20, 2013 in an email saying:

> I note your comment that a Court order is not required, that the consent from Ms. Letourneau is enough. Frankly, that is simply not true. The Court has ordered the proceeds charged and prohibits our dealing with the funds until the assessment. Ms. Letourneau's consent does not carry the same weight as a Court Order and she, (like every other lawyer) does not have the power to over-ride a Judge's order. Only a Judge may undo or change a Judge's order. That being said, with consent, we can fairly quickly get a Judge to make a new order releasing funds etc., so long as there is consent. This is often and normally done on a Friday in express motions court. The earliest that anyone in this office could draft and attend to such a motion would be November 29, 2013.

He noted that it was his understanding that Mr. Grodzki had offered to settle the firm's account with the appellant for $210,000.

The Settlement, the Fee Agreements and the Consent Order

34 The appellant responded at 4:29 a.m. on November 21, 2013, agreeing to take Quinn Thiele's settlement offer of $210,000. He noted that his acceptance came in the light of Quinn Thiele's confirmation that the $50,000 could not be released as a result of the Charging Order and that a failure to accept the $210,000 offer would lead to an assessment hearing with consequent costs and delay. That same day, the appellant signed a settlement agreement with Quinn Thiele.

35 Shortly thereafter, the appellant settled the Bertschi Orth account for $100,000. On November 28, 2013, the appellant signed a release as contemplated by this settlement.

36 These two agreements will collectively be referred to as the "Fee Agreements".

37 Quinn Thiele then obtained the Consent Order. Pursuant to the terms of this order, the Charging Order was set aside and the monies in trust were released to Quinn Thiele for distribution in accordance with the Fee Agreements, with the remainder to the appellant.

38 Quinn Thiele and Bertschi Orth delivered their final accounts to the appellant on December 4, 2013 and December 31, 2013, in the amounts of $264,195.74 and $92,541.35, respectively. Bertschi Orth's December 31 account also included a Trust Statement indicating a payment of $7,458.65 for two additional invoices.

Proceedings below

39 On November 25, 2014, the appellant applied for an order for both accounts to be assessed and, if required, an order setting aside the Consent Order and related settlement documents.

40 The application judge dismissed the application. The entirety of his brief endorsement reads as follows: "By virtue of the [Consent Order] I have no jurisdiction to hear this matter as it is in fact a matter for an appeal to the Court to Appeal subject to leave etc."

Issues

41 The appeal raises two issues:

1. Did the application judge err in concluding that he was unable to consider the application for want of jurisdiction?

2. If the application judge had jurisdiction to consider the matter, should this court order an assessment of the respondents' accounts?

Analysis

(1) Did the application judge err in concluding that he was unable to consider the application for want of jurisdiction?

42 I am of the view that the application judge erred in finding that he lacked jurisdiction to consider the appellant's request for an order directing the respondents' accounts be assessed.

The procedural argument

43 As previously indicated, within his application seeking an order that the Fee Agreements be assessed, the appellant requested an order setting aside the Consent Order.

44 The respondents submit that an order to set aside a court order can only be obtained by way of a motion under r. 59.06 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.[5] The appellant brought an application under r. 14.05. The remedies provided for under this rule do not include the order requested by the appellant. Consequently, the application judge was procedurally barred from considering the request.

45 In my opinion, acceding to this procedural argument would not be consistent with the principles that form the foundation of the *Rules of Civil Procedure.*

46 Rule 2.01(1) provides that a failure to comply with the Rules is an irregularity and does not render a proceeding, or a step in a proceeding, a nullity. The court may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute. Relatedly, r. 2.01(2) provides that the court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

47 Rule 2.01 reflects the general principle outlined in r. 1.04(1), that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." As this court explained in *Finlay v. Van Paassen*, 2010 ONCA 204, 101 O.R. (3d) 390 (Ont. C.A.), at para. 14:

> Rule 1.04(1) and rule 2.01 are intended to do away with overly "technical" arguments about the effect of the Rules and orders made under them. Instead, these provisions aim to ensure that the Rules and procedural orders are construed in a way that advances the interests of justice, and ordinarily permits the parties to get to the real merits of their dispute.

48 In my view, the respondents' procedural argument is "overly technical". The appellant had no choice but to start a new proceeding as the tort action had been dismissed by order dated August 26, 2013. He did so by Notice

of Application seeking an assessment of the respondents' accounts. It was within that valid application that the appellant sought an order setting aside the Consent Order.

49 It is worth noting that this court has previously addressed procedural or technical discrepancies in the context of assessments of solicitors' accounts. In *Price v. Sonsini* (2002), 60 O.R. (3d) 257 (Ont. C.A.), a decision to which I will again refer later in these reasons, Sharpe J.A. said, at para. 19:

> The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities.

50 It is my opinion that, in these circumstances, it was open to the application judge to consider the appellant's request to set aside the Consent Order notwithstanding it was relief sought within an application.

Did the Consent Order deprive the application judge of jurisdiction to order an assessment, if one was warranted?

51 I agree with the application judge's view, expressed in his endorsement, that the Consent Order, as it stood, was a bar to his assuming jurisdiction to consider the request that the Fee Agreements be assessed. While the Consent Order remained in place, an assessment of the Fee Agreements would have allowed the appellant to avoid the consequences of the order issued against him; namely, the final acceptance and payment of the fees and disbursements to the respondents. In such circumstances, an order that the Fee Agreements be assessed would have constituted "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order": *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629(S.C.C.), at para. 71. In short, an assessment order would have amounted to an impermissible collateral attack on the Consent Order.

52 My difficulty with the application judge's view is that, here, the appellant specifically requested that the application judge set the Consent Order aside, removing any collateral attack concerns. In my view, the application judge should have considered this request and his failure to do so constituted an error in law.

Should this court set aside the Consent Order?

53 In *Aristocrat v. Aristocrat* (2004), 73 O.R. (3d) 275 (Ont. C.A.), this court held that r. 59.06 does not confer jurisdiction to hear a motion to set aside an order, at first instance. Here, however, a request to set aside the Consent Order was brought before the application judge. And the application judge considered this request in the face of a complete record and arguments by the parties.

54 I therefore now turn to the question whether this record supports the granting of such an order.

55 The respondents submit that the application judge's comment in the brief hearing before him that there was a lack of evidence of "fraud, slip, [or] mistake" is fatal to the appellant's claim to have the Consent Order set aside. Furthermore, say the respondents, the objectives of finality and certainty would be undermined if the Consent Order were disturbed.

56 I disagree.

57 Courts are, with good reason, cautious about setting aside orders, particularly those made on consent. Finality is important in litigation. And, when dealing with a consent order, the objective that parties be held to their agreements is also an important consideration.

58 However, as this court remarked in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (Ont. C.A.), at p. 272, there are ways, two in fact, by which an individual who would otherwise be bound by a previous order can seek to have that order set aside. First, the party can move in the original proceedings under r.

59.06(2)(a) in cases of "fraud or facts arising or discovered after [the order] was made". Or, the party can bring a separate action to set aside the order.

59 The role of r. 59.06 is to provide an expeditious procedure for setting aside court orders. However, it does not prescribe or delineate a particular test: *Mohammed v. York Fire & Casualty Insurance Co.* (2006), 79 O.R. (3d) 354 (Ont. C.A.), at para. 36, leave to appeal ref'd, (2007), [2006] S.C.C.A. No. 269 (S.C.C.); Tsaoussis, at p. 272. Ultimately, under r. 59.06 or within a separate action, an individual seeking to set aside an order is required to show "circumstances which warrant deviation from the fundamental principle that a final [order], unless appealed, marks the end of the litigation line": Tsaoussis, at p. 266.

60 Thus, a court is not limited to setting aside an order in instances of fraud or facts arising or discovered after the order has been made. This is reflected in a review of this court's decisions, which demonstrates a willingness to depart from finality and set aside court orders where it is necessary in the interests of justice to do so: see *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.*, 2008 ONCA 817 (Ont. C.A.), adopting the principles set out in *Beetown Honey Products Inc., Re* (2003), 67 O.R. (3d) 511 (Ont. S.C.J.), aff'd without comment on this issue, 20043 C.B.R. (5th) 204(Ont. C.A.); *Cookish v. Paul Lee Associates Professional Corp.*, 2013 ONCA 278, 305 O.A.C. 359 (Ont. C.A.).

Application

61 For the following reasons, it is my view that setting aside the Consent Order is necessary to achieve justice between the appellant and the respondents relating to the legal costs associated with the tort action.

62 I return to the background of the Consent Order.

63 There is no suggestion that Bertschi Orth was not entitled to request a charging order to secure payment for services rendered. I do question, however, why the Charging Order was sought and granted over the entire amount of the settlement funds rather than an amount sufficient to protect Bertschi Orth's interests.

64 What is also problematic, in my view, is Quinn Thiele's conduct once the Charging Order was in place.

65 As detailed above, the record demonstrates that Quinn Thiele was well aware of the significant financial pressure the appellant was facing in the fall of 2013.

66 Against that background, Quinn Thiele not once but twice informed the appellant that $50,000 of his own money could not be released to him, even with Bertschi Orth's consent. This advice was incorrect. And all Quinn Thiele had to do to know that this advice was incorrect was to review the Charging Order.

67 Quinn Thiele admits that the position it repeatedly took with the appellant that no money could be released to him, on consent, was not correct. It contends, however, that this error was immaterial for two reasons.

68 First, Quinn Thiele argues that the appellant instructed Ms. Letourneau to stop the process for the release of the funds because he was negotiating a settlement with both firms.

69 I cannot agree with this submission. It is not clear from the record that the appellant gave such instructions to Ms. Letourneau. Although in the appellant's email to Ms. Letourneau on November 21, 2013, he tells her to "put the filing on the back burner", it is unclear whether that comment referred to her earlier commitment to rectify an issue that had arisen with the court file number for the assessment, or her earlier expressed opinion that the parties' consent did not need to be filed in court. Even if the record does support a finding that the appellant made such a request, it was made after Quinn Thiele had erroneously led the appellant to believe that a small portion of the settlement funds could not be released on consent.

70 Second, Quinn Thiele submits that, during the negotiations relating to the settlement of the legal fees, the appellant had access to independent legal advice.

71 A review of the record indicates that this was not the case. The appellant briefly spoke to two lawyers in October 2013. Both lawyers told the appellant that they would require a retainer. To Quinn Thiele's knowledge, the appellant was unable to afford a retainer. He was approaching bankruptcy. He was in the middle of divorce proceedings. He had lost his job as a corporate account executive in 2010, and had achieved limited success at several different jobs thereafter. He had drained his savings and investments.

72 The application judge did not consider whether setting aside the Consent Order was necessary to achieve justice in this case. As such, this court is justified in weighing the relevant considerations and coming to its own conclusion. Having done so, I conclude that the Consent Order should be set aside. This would achieve a just result as it would allow the appellant's request for an assessment to be considered on its merits.

73 My conclusion is based on the cumulative impact of the following:

- In the fall of 2013, the time when his financial obligations to the respondents were being discussed, the appellant was, to the knowledge of the respondents, in a very vulnerable position. He had suffered a traumatic brain injury, the after-effects of which he continued to experience, and was suffering from depression. And, he was in desperate financial straits.

- Quinn Thiele increased the already existing pressure on the appellant in a number of ways.

    - Quinn Thiele did not take steps available to it to ensure that Bertschi Orth's fees and disbursements were protected. While Ms. Noel's correspondence indicated Bertschi Orth did not receive instructions from the appellant to sign an undertaking, there is no evidence that she explained the consequences of this decision to him. This failure to take steps gave rise to the need to obtain the Charging Order. The Charging Order made the Consent Order necessary.

    - There is no indication that, in responding to Bertschi Orth's request for a charging order, Quinn Thiele took the position, on behalf of the appellant, that the scope of the Charging Order should be limited to the amount claimed by Bertschi Orth, and not granted over all the settlement funds.

    - Quinn Thiele gave the appellant erroneous legal advice to the effect that he could not access a relatively small amount of his money. In doing so, Quinn Thiele admits, it misinterpreted the clear legal effect of the Charging Order.

    - Quinn Thiele urged the appellant to settle his account with it, arguing that Quinn Thiele would then assist the appellant in his negotiations with Bertschi Orth thereby saving him the considerable expenditure of time and legal costs associated with an assessment.

- In dealing with the issue of the Charging Order and amounts owed to the respondents, the appellant did not have independent legal advice.

- Quinn Thiele's initial draft account to the appellant was $305,159.14, an amount incorrectly calculated based on 30 percent of $800,000. The base amount should have been significantly lower, subtracting the $105,000 portion for the appellant's then wife, the $20,000 in costs awarded to one of the co-defendants, and the amount for party and party costs. This over-calculation of the amount the appellant may have owed to Quinn Thiele under the contingency agreement presented an inflated starting point for the fee negotiations that took place in the fall of 2013.

• There is no evidence that the Fee Agreements were "negotiated" with the appellant in circumstances in which he would have understood the impact of the Consent Order on the amount he would ultimately receive from the settlement.

• The respondents do not point to any specific prejudice they would suffer if the Consent Order were set aside.

74 Of additional relevance is the fact that the Consent Order pertained to agreements relating to the amount and payment of legal fees and disbursements. As I explain below, agreements of this type involve the public interest in a way other private contractual matters do not. Thus, the interests of justice in this case must be understood in the light of the court's supervisory role over the rendering and payment of legal accounts.

(2) Should this Court order an assessment of the respondents' accounts?

75 The conclusion that the Consent Order should be set aside allows this court to consider whether the Fee Agreements, which, under the terms of the Consent Order, have been paid, should be reopened and an assessment of the accounts rendered further to those agreements, ordered.

76 The respondents submit that the circumstances do not warrant ordering an assessment, primarily on the basis that the appellant willingly participated in the settlement of the amounts he owed the respondents through the Fee Agreements. In so doing, he chose to forego the scheduled assessment of the Bertschi Orth account and the opportunity to have the Quinn Thiele account assessed.

The role of the courts

77 The courts have inherent jurisdiction as well as jurisdiction under the *Solicitors Act* to order lawyers' accounts to be assessed. Both sources of jurisdiction respond to the public interest component of the rendering of legal services and lawyers' compensation, and the importance of maintaining public confidence in the administration of justice.

78 In *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 (Ont. C.A.), at para. 14, Doherty J.A. explained how the public interest informs the court's role in supervising the rendering of legal services and payment of legal fees:

> The rendering of legal services and the determination of appropriate compensation for those services is not solely a private matter to be left entirely to the parties. There is a public interest component relating to the performance of legal services and the compensation paid for them. That public interest component requires that the court maintain a supervisory role over disputes relating to the payment of lawyers' fees. I adopt the comments of Adams J. in *Borden & Elliot v. Barclays Bank of Canada* (1993), 15 O.R. (3d) 352 (Gen. Div.) at pp. 357-58, where he said:
>
> > The *Solicitors Act* begins with s. 1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness: see s. 18 of the *Solicitors Act*.

79 In Price, at para. 19, Sharpe J.A. further elucidated the court's role:

> Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill. As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the process.... In my view, the courts should interpret legislation and procedural rules relating to the assessment

> of solicitors' accounts in a similar spirit. As Orkin argues, "if the courts permit lawyers to avoid the scrutiny of their accounts for fairness and reasonableness, the administration of justice will be brought into disrepute." The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities. [Citations omitted.]

The applicable provisions of the Solicitors Act

80 For context, I start with s. 16(1) of the Solicitors Act, which provides:

> Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated.

81 The term "agreement" includes but is not limited to contingency fee agreements, which, for the purposes of ss. 16 and 20-32, are considered to be "agreements": Solicitors Act, ss. 15, 28.1(10). As Salhany J. explained in *Ruetz v. Morscher & Morscher* (1995), 28 O.R. (3d) 545 (Ont. Gen. Div.), at p. 550, "Section 16 of the Solicitors Act does not require that the agreement take on any particular form. The authorities are clear that all that is required is that the document be an enforceable agreement." In this case, the "agreements" in question were not the initial contingency agreements or the Consent Order, but rather the Fee Agreements entered into in full satisfaction of each respondent's fees and disbursements.

82 Because the amounts agreed upon in the Fee Agreements have been paid, the operative provision for the purposes of reopening the agreements and ordering an assessment is s. 25 of the Solicitors Act:

> Where the amount agreed under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Superior Court of Justice may, upon the application of the person who has paid it if it appears to the court that the special circumstances of the case require the agreement to be reopened, reopen it and order the costs, fees, charges and disbursements to be assessed, and may also order the whole or any part of the amount received by the solicitor to be repaid by him or her on such terms and conditions as to the court seems just.
>
> [Emphasis added.]

Special circumstances

83 The question is, therefore, whether the record supports a finding that special circumstances exist here that require the Fee Agreements to be reopened and an assessment ordered. The jurisprudence reveals limited consideration of the scope of "special circumstances" as expressed in s. 25 of the Solicitors Act, in particular.

84 As noted by courts considering the meaning of "special circumstances" within other provisions of the *Solicitors Act*, however, the language implies that the court has a broad discretion to determine the matter having regard to all the circumstances in the case, but that ordering an assessment after payment will be the exception rather than the rule: *Minkarious v. Abraham, Duggan* (1995), 27 O.R. (3d) 26 (Ont. Gen. Div.), at paras. 47, 51-52; *Guillemette v. Doucet*, 2007 ONCA 743, 88 O.R. (3d) 90 (Ont. C.A.), at para. 4; *Plazavest*, at paras. 29-30, 33; *Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP*, 2010 ONCA 709, 104 O.R. (3d) 93 (Ont. C.A.), at paras. 29, 32; *Bui v. Alpert*, 2014 ONCA 495 (Ont. C.A.), at para. 7.

85 In the s. 11 context, where the payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case appear to require it, this court has noted that "exceptional circumstances

of either a contractual or equitable nature could lead a court to find that an assessment is necessary or essential on general principles or is called for as being appropriate or suitable in the particular case": *Plazavest*, at para. 33. In *Echo Energy*, at paras. 30-31, this court said that "in the context of s. 11, those special circumstances relate to the underlying principle that payment of the account implies that the client accepted that the account was proper and reasonable.... Thus, special circumstances will tend to either undermine the presumption that the account was accepted as proper or show that the account was excessive or unwarranted."

86 With this in mind, I view the authorities and the objectives of the *Solicitors Act* as supporting the following broader test: "Special circumstances" are those in which the importance of protecting the interests of the client and/or public confidence in the administration of justice, demand an assessment.

87 In *The Law of Costs*, loose-leaf, 2nd ed. (Toronto: Canada Law Book, 2015), at para. 306.3, Mark M. Orkin identifies the relevant circumstances as including but not limited to:

- the sophistication of the client;
- the adequacy of communications between solicitor and client concerning the accounts;
- whether there is evidence of increasing lack of satisfaction by the client regarding the services relating to the accounts;
- whether there is overcharging for services provided;
- the extent of detail of the bills;
- whether the solicitor/client relationship is ongoing; and
- whether payments can be characterized as involuntary.

Application

88 The appellant is not unsophisticated but was, at the time he entered into the Fee Agreements, vulnerable. He was permanently impaired by the brain injury he suffered in the car accident. He was under intense financial pressure. The appellant did not have independent legal advice when such was clearly called for. He expressed his dissatisfaction with the legal services rendered by both firms. He terminated his retainer with Bertschi Orth and, when it came to resolving the firms' fees and disbursements, the appellant expressed his frustration with Quinn Thiele. Finally, at the time the Fee Agreements were entered into, detailed accounts had not been rendered by Quinn Thiele.

89 Furthermore, of particular importance is Quinn Thiele's representation of the appellant. I refer to conduct referred to above that; 1) contributed to the need for Bertschi Orth to obtain the Charging Order, 2) resulted in an order that reflected no effort on Quinn Thiele's part to represent the appellant's interests by ensuring that the Charging Order affected him only to the extent necessary, 3) misled the appellant by providing erroneous legal advice and 4) exerted pressure on the appellant to settle — all of which put the appellant in a position in which he had little choice but to enter into the Fee Agreements.

90 In these circumstances, considered cumulatively, the protection of the appellant's interests and the public's confidence in the administration of justice demand that the Fee Agreements be reopened and an assessment be ordered.

Impact of the Consent Order

91 I now turn to a consideration of whether the Consent Order acted to fulfil the purposes of an assessment under the *Solicitors Act*.

92 A consent order "is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent": *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295 (S.C.C.), at para. 64.

93 There is no evidence that Smith J., in granting the Consent Order, did what an assessment officer would do; namely, consider the fairness or reasonableness of the Fee Agreements. In these circumstances, the Consent Order did not act as a substitute for an assessment. It had nothing to do with promoting the public interest, ensuring public confidence in the administration of justice or protecting the appellant. It was issued to elevate the Fee Agreements to an order that would allow the parties to access the monies being held under the Charging Order.

94 The fact that the Consent Order forms part of the background in which the assessment order is being requested does not detract from the conclusion that the special circumstances in this case demand that an assessment be ordered.

Conclusion regarding the Request for an Assessment Order

95 I therefore conclude that, in the circumstances of this case, relief should be granted under s. 25 of the Solicitors Act. The Fee Agreements should be reopened and an assessment of the respondents' fees and disbursements should take place.

Disposition

96 For these reasons, I would allow the appeal, set aside the Consent Order and direct that the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein be assessed.

97 The application judge did not determine the costs of the application. I would award the appellant his costs of the application, fixed in the amount of $10,000, including disbursements and applicable taxes.

98 Further to the parties' written submissions as to costs, I would award the appellant his costs of this appeal in the amount of $15,000, including disbursements and applicable taxes.

***E.A. Cronk J.A.*:**

I agree

***Grant Huscroft J.A.*:**

I agree

Appeal allowed.

Footnotes

* A corrigendum issued by the court on May 24, 2016 has been incorporated herein.

1 Then known as Bertschi Orth Smith LLP.

2 The accident benefit claim was settled by a paralegal firm working out of Bertschi Orth's offices, and is not relevant to this appeal.

3 Any reference in this decision to fees and disbursements owed by the appellant to the respondents encompasses those for services rendered both to the appellant himself and to his children, as the appellant agreed to pay for both sets of fees and disbursements.

4 In an email dated November 20, 2013, Michael Thiele, a partner at Quinn Thiele, revised this amount. He informed the appellant that the total amount of fees and disbursements owed was $264,210.50, more than $40,000 less than the original amount stated.

5 Rule 59.06(2)(a) provides as follows: "A party who seeks to, (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made... may make a motion in the proceeding for the relief claimed."

 Original
2000 CarswellOnt 1081
Ontario Court of Appeal

Plazavest Financial Corp. v. National Bank of Canada

2000 CarswellOnt 1081, [2000] O.J. No. 1102, 133 O.A.C. 100, 185 D.L.R. (4th) 78, 44 C.P.C. (4th) 288, 47 O.R. (3d) 641, 96 A.C.W.S. (3d) 320

Plazavest Financial Corporation, Plazavest Management Inc. and Genpar Corporation of Canada, Applicants/Appellants and National Bank of Canada and Kelly Affleck Greene, Respondents

Doherty, Laskin, Moldaver JJ.A.

Heard: February 28, 2000
Judgment: April 5, 2000
Docket: CA C30641

Counsel: *Bernard Burton*, for Appellants.
Anne C. Sonnen, for Respondent, National Bank.
Kenneth Dekker, for Respondent, Kelly Affleck Greene.

Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.14 Taxation or assessment of costs
XXIV.14.a Right to
XXIV.14.a.i Where bill of costs already paid
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.a Agreements for fees
VIII.5.a.iii Terms of agreement

Headnote
Practice --- Costs — Taxation or assessment of costs — Right to — Where bill of costs already paid
Customer borrowed money from bank — Loan agreement provided that customer would pay bank's legal fees relating to loan transaction — Customer refused to pay bill submitted by bank's law firm when asked to do so by bank — Bank paid bill from funds held in customer's account as permitted by agreement between parties — Customer brought application for order directing bank to deliver copies of law firm's bills to customer and order directing that bills be referred for assessment pursuant to Solicitors Act — Application was dismissed on basis that customer had paid bills prior to seeking assessment and could not demonstrate under s. 11 of Act that special circumstances appeared to require assessment — Customer's appeal allowed — Section 9(1) of Act put customer in same position as bank in so far as assessment of law firm's bill was concerned — Payment of bill was authorized by customer under terms of agreement and constituted payment of bill for purposes of s. 11 of Act —

Section 11 of Act applied so that customer was required to show special circumstances — Fact that agreement between parties required customer to pay all legal expenses actually charged to bank was not determinative of whether special circumstances existed — Agreement between parties said nothing about customer's entitlement to challenge propriety of bank's legal bills — Customer had taken position all along that it did not accept account of bank's law firm as appropriate — Bank refused to provide customer with information concerning work done by law firm prior to paying legal fees from customer's account — Nothing in language of agreement foreclosed customer's resort to independent arbiter to determine whether fees claimed in fact came within description of fees which customer had agreed to pay — Absent assessment by customer there would be no independent review of fees and no way of knowing whether they were truly covered by agreement — Special circumstances justifying assessment existed for purposes of s. 11 of Act — Solicitors Act, R.S.O. 1990, c. S.15, ss. 9, 11.

Table of Authorities

Cases considered by *Doherty J.A.*:

Borden & Elliot v. Barclays Bank of Canada (1993), 15 O.R. (3d) 352, *(*sub nom. *Lorenzetti Development Corp. v. Barclays Bank of Canada)* 106 D.L.R. (4th) 478 (Ont. Gen. Div.) — applied

Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson (1998), 157 D.L.R. (4th) 322, *(*sub nom. *Shapiro, Cohen, Andrews, Finlayson v. Enterprise Rent-A-Car Co.)* 107 O.A.C. 209, 38 O.R. (3d) 257, 80 C.P.R. (3d) 214, 18 C.P.C. (4th) 20 (Ont. C.A.) — referred to

Krigstin v. Samuel (1982), 31 C.P.C. 41 (Ont. H.C.) — referred to

Minkarious v. Abraham, Duggan (1995), 129 D.L.R. (4th) 311, 44 C.P.C. (3d) 210, 27 O.R. (3d) 26 (Ont. Gen. Div.) — applied

Peel Terminal Warehouses Ltd. v. Wootten, Rinaldo & Rosenfeld (1978), 21 O.R. (2d) 857, 10 C.P.C. 160 (Ont. C.A.) — applied

Randell v. Robins & Robins (1979), 22 O.R. (2d) 642 (Ont. H.C.) — considered

Tory, Tory, Deslauriers & Binnington v. Concert Productions International Inc. (1985), 7 C.P.C. (2d) 54 (Ont. H.C.) — considered

Statutes considered:

Solicitors Act, R.S.O. 1970, c. 441

s. 10 — referred to

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

ss. 1-14 — referred to

s. 3(a) — considered

s. 3(b) — considered

s. 9(1) — considered

s. 9(2) — considered

s. 11 — considered

s. 15 — considered

ss. 15-33 — considered

ss. 16-36 — considered

s. 25 — considered

The judgment of the court was delivered by *Doherty J.A.*:

I

1 The appellant ("Plazavest") borrowed money from the respondent, the National Bank of Canada ("National"). As a term of that loan agreement, Plazavest agreed to pay National's legal fees relating to the loan transaction. National retained the respondent, Kelly Affleck Greene ("Kelly Affleck") who provided legal services and eventually submitted their bill to National. National requested that Plazavest pay the bill, and when Plazavest declined, National, pursuant to a term of the loan agreement with Plazavest, paid the bill from funds held in Plazavest's account. Plazavest then brought an application seeking an order directing that National deliver copies of Kelly Affleck's legal bills to Plazavest and an order directing that the bills be referred for assessment pursuant to the *Solicitors Act*, R.S.O. 1990, c. S.15 (the "*Act*").

2 Sanderson J. held that Plazavest had paid the bills prior to seeking an assessment and was required under s. 11 of the *Act* to demonstrate that "the special circumstances of the case... appear to require the assessment." She examined the language of the agreement between Plazavest and National and concluded that as Plazavest was required to pay "all legal expenses actually charged" to National, it could not demonstrate "special circumstances" justifying an order directing an assessment. Having reached this conclusion, it was unnecessary for her to decide whether National should be required to give copies of the legal bills to Plazavest.

3 Plazavest appeals.

4 I agree with Sanderson J. that s. 11 of the *Act* applies and that Plazavest was required to show "special circumstances." With respect, however, I do not agree that the language of the agreement between Plazavest and National was determinative of whether "special circumstances" existed. I think that the entirety of the circumstances, including but not limited to the terms of the agreement, should have been considered in deciding whether Plazavest had established "special circumstances." On the view I take of the entirety of the circumstances, Plazavest demonstrated "special circumstances" and was entitled to an order directing an assessment.

II

5 Plazavest and National initially entered into a loan agreement in 1990. Under the terms of that agreement, Plazavest was required to pay National's "reasonable" legal fees and expenses incurred in relation to the transactions described in the agreement. In April and May of 1997, Plazavest and National entered into a new agreement restructuring Plazavest's loan arrangements with National (the "1997 agreement"). The 1997 agreement called for a loan in the amount of $2,235,000. Under the terms of the 1997 agreement, Plazavest was obligated to pay "the actual fees and expenses" of National's solicitors incurred in relation to the transactions described in the agreement. Under the terms of the 1997 agreement, not only was Plazavest liable to pay the actual legal fees and expenses incurred by National, but National could pay those fees and expenses from funds held in Plazavest's account with National.

6 Kelly Affleck performed legal services in connection with the transactions described in the 1997 agreement between December 1996 and July 1997. It submitted five bills to National totalling $32,564.24. The fifth bill was sent to National in July 1997.

7 On October 21, 1997, National wrote to Plazavest requesting that Plazavest pay the amount owing ($32,564.24) directly to Kelly Affleck at Plazavest's "earliest convenience." A copy of the fifth account (July 15, 1997) in the amount of $1,499.61 was enclosed in the October 21 st letter. That account provided some details of the work done by Kelly Affleck between June 1, 1997 and June 30, 1997. That account also referred to the amounts owing on the four previous accounts that had been submitted to National. The material sent to Plazavest did not, however, provide any details with respect to the four previous accounts other than the amount owing on each account.

8 At some unspecified date after Plazavest received the letter of October 21, 1997, Mr. Phillip Meretsky, the solicitor for Plazavest, asked National for copies of the first four accounts. National refused to provide the copies. Mr. Meretsky advised National that Plazavest could not agree with the quantum of the bills and would assess the accounts if no agreement could be reached.

9 On December 19, 1997, National wrote to Plazavest stating:

> ... Please be advised that we have incurred legal fees in the total amount of $34,000 for the Borrowers' account in respect of this matter. Payment of this amount is requested prior to December 31, 1997, failing which we shall deduct same from the $154,616.10 payment made by the Borrowers in accordance with Article 7.4 of the Loan Agreement.

10 The affidavit of Mr. Kennedy filed by National on the application contains the following assertion:

> The Moving Parties [Plazavest] did not pay the outstanding Kelly Affleck Greene accounts. Accordingly, on December 18, 1998, [1] the Bank applied a portion of monies received by it on account of the Moving Parties' indebtedness, pursuant to the terms of the Loan Agreement, on account of the outstanding Kelly Affleck Greene accounts. The Bank remitted these monies to Kelly Affleck Greene in satisfaction of its accounts.

11 In oral argument, counsel for National indicated that in fact the funds owed to Kelly Affleck had been segregated from the other funds held on behalf of Plazavest as of December 18, 1997, but were not paid to Kelly Affleck until some subsequent unspecified date. I do not read Mr. Kennedy's affidavit as drawing the distinction made by counsel. In my view, the affidavit must be read as indicating that National exercised its rights under the 1997 agreement to pay the amounts owed to Kelly Affleck on December 18, 1997, while at the same time indicating that payment would not be made until December 31 st. It does not appear, however, that National's precipitous action prejudiced Plazavest. There is no suggestion that Plazavest would have moved to assess the bill between December 19 th and December 31 st. This application was not commenced until July 1998.

12 Prior to the return of the application, National did deliver copies of the first four accounts to Plazavest. These accounts provide details of the work done by Kelly Affleck. Several entries in each of the accounts were, however, "blacked-out" in the copies provided to Plazavest. National claimed client-solicitor privilege with respect to the edited entries.

III

13 Counsel for National submitted that the 1997 agreement constituted a waiver by Plazavest of any right it may have had to an assessment of the legal accounts. In advancing this position, she placed considerable reliance on Plazavest's agreement to pay all "actual" legal fees and expenses relating to the transaction. She contrasted this commitment with Plazavest's agreement in 1990 to pay "reasonable" legal fees and expenses. She argued that while a commitment to pay "reasonable" legal fees contemplated a review by a neutral arbiter of the fees claimed, a promise to pay "actual" legal fees did not envision any such review. It does not appear that this argument was made before Sanderson J.

14 The rendering of legal services and the determination of appropriate compensation for those services is not solely a private matter to be left entirely to the parties. There is a public interest component relating to the performance of legal services and the compensation paid for them. That public interest component requires that the court maintain a supervisory role over disputes relating to the payment of lawyers' fees. I adopt the comments of Adams J. in *Borden & Elliot v. Barclays Bank of Canada* (1993), 15 O.R. (3d) 352 (Ont. Gen. Div.) at 357-58, where he said:

> ... The *Solicitors Act* begins with s. 1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the *Act* and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness: see s. 18 of the *Solicitors Act*.

15 The observation of Adams J. that the rendering and payment of legal accounts is not "simply a matter of contract" finds support in a long established line of authority which recognizes, apart entirely from the *Act*, that a superior court has an inherent jurisdiction, as part of its disciplinary authority over lawyers, to direct the assessment of lawyers' fees: *Peel Terminal Warehouses Ltd. v. Wootten, Rinaldo & Rosenfeld* (1978), 21 O.R. (2d) 857 at 861 (Ont. C.A.); *Minkarious v. Abraham, Duggan* (1995), 44 C.P.C. (3d) 210 (Ont. Gen. Div.) at 242.

16 The provisions of the *Solicitors Act* also offer full support for the conclusion reached by Adams J. Sections 16 to 36 of the *Act* recognize that clients and solicitors may enter into written agreements concerning payments for legal services. These sections do not, however, suggest that those agreements oust the assessment process. To the contrary, they provide detailed provisions for the assessment of legal fees rendered pursuant to written agreements between lawyers and their clients.

17 Although I would reject the contention that an agreement between a client and a lawyer may preclude the client from resorting to the *Act* or the inherent power of the court to seek an assessment of the lawyer's fees, I do not mean to suggest that the existence of such a contract and the terms of that contract are of no significance. As Adams J. said, the terms of the agreement may in the end prevail and dictate the fees to be paid. Furthermore, where the party seeking an assessment must show special circumstances, the terms of the agreement may figure prominently in the determination of whether those special circumstances exist: *Borden & Elliot v. Barclays Bank of Canada*, *supra*, at 358-59.

18 The agreement relied on in this case is not between the client (National) and the solicitor (Kelly Affleck), but rather, is between the client (National) and the borrower (Plazavest). Under the terms of that agreement, Plazavest is liable to pay National's actual legal fees and expenses. Section 9(1) of the *Act* is directly applicable to Plazavest. The relevant words provide:

> Where a person, not being chargeable as the principal party, is liable to pay or has paid a bill... to the solicitor,... the person so liable to pay or paying,... may apply to the court for an order referring to assessment as the party chargeable therewith might have done, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable.

19 Section 9(1) of the *Act* puts Plazavest in the same position as National in so far as the assessment of Kelly Affleck's bill is concerned. If an agreement between National and Kelly Affleck to pay the firm's actual fees could not pre-empt an application by National to assess those fees, it must follow that the same agreement between the client and a third party to pay actual legal fees does not place those fees beyond the pale of the assessment process should the third party seek to resort to that process.

20 Apart entirely from the general question of whether those liable to pay legal fees can waive a right to assess a lawyer's bill, the actual terms of the agreement between Plazavest and National do not provide any evidence of a waiver. Plazavest agreed to pay National's actual fees and legal expenses relating to the transactions encompassed in the loan agreement. Certainly, there is no express agreement to waive any right to assess those costs. Nor can I accept that it was implicit in Plazavest's agreement to pay actual legal fees relating to the transactions that it would not challenge whether the fees were "actual" or whether the fees related to transactions encompassed by the loan agreement. An agreement to pay "actual" legal fees cannot be read as an agreement to pay all fees "actually charged." Actual fees refer to fees for work done within the scope of the retainer. For example, if Kelly Affleck's

bill inadvertently included charges for work done on a file unrelated to the 1997 loan agreement, those charges would not be part of the "actual" legal fees referred to in the 1997 agreement even though they would be part of the fees "actually charged" by Kelly Affleck.

21 In my view, the 1997 agreement between Plazavest and National described the scope of Plazavest's obligation to pay National's legal bills, but said nothing about Plazavest's entitlement to challenge the propriety of those bills. Even if Plazavest could waive its right to seek an assessment under the *Act*, it did not do so in the 1997 agreement.

22 In an alternative but related submission, the respondent argued that Plazavest could not seek an assessment under the general provisions of the *Act* (ss. 1-14) as it did, but could only rely on the provisions governing assessment where there is an agreement as to the fee to be paid (ss. 15-33). The respondent contends that the 1997 agreement constitutes an agreement for the purposes of ss. 15-33 of the *Act*. This argument was also not advanced before Sanderson J.

23 Sections 15 to 33 of the *Act* speak to situations in which there is a written agreement between the lawyer and a "client" respecting the manner and amount of payment of the lawyer's fees. While Plazavest is a "client" under the expanded definition of that word in s.15 of the *Act*, there was no written agreement between Kelly Affleck and Plazavest. Nor, for that matter, was there any evidence of a written agreement between Kelly Affleck and National concerning Kelly Affleck's fees. I do not think that ss. 15 to 33 have any application, direct or by analogy, to written agreements to pay legal fees to which the lawyer claiming the fees is not a party. The sections are intended to reflect and manifest the court's supervisory power over agreements involving lawyers for the payments of lawyers' fees. The sections do not reach arrangements between clients and third parties referable to the payment of the client's legal fees. [2]

IV

24 Having concluded that the 1997 agreement did not preclude Plazavest's resort to the *Act*, I must now determine which section of the *Act* applies. By operation of s. 9(1) of the *Act*, Plazavest's entitlement to an assessment is the same as that which would be available to the actual client (National) in the same circumstances.

25 Counsel for Plazavest submitted that s. 3(a) or s. 3(b) of the *Act* applies and that since the application was brought within 12 months of the delivery of the bills, Plazavest is entitled to an assessment and need not demonstrate special circumstances. [3]

26 National and Kelly Affleck submit that the bill was paid prior to, but within 12 months of the application for an assessment, and that s. 11 of the *Act* applies. It provides:

> The payment of a bill does not preclude the court from referring it for assessment, if the application is made within twelve months after payment, and if the special circumstances of the case, in the opinion of the court, appear to require the assessment.

27 It is Plazavest's position that the phrase "the payment of a bill" in s. 11 refers to payments made voluntarily by the party responsible for the payment. It contends that the payment made from Plazavest's account to Kelly Affleck by National was not a voluntary payment, but was in fact made in the face of Plazavest's objection to payment of the bill.

28 Plazavest relies on *Randell v. Robins & Robins* (1979), 22 O.R. (2d) 642 (Ont. H.C.). In *Randell*, the solicitors obtained a judgment for their client. They deducted the amount owing on their fees and remitted the balance of the judgment to the client. After receipt of those funds, the client moved for an assessment of the bill. The law firm argued that the bill had been paid and, therefore, under s. 10 (now s. 11) of the *Act*, the client was required to show "special circumstances" justifying an assessment. While it would appear there was no specific agreement

between the client and the firm permitting the firm to deduct its fees from the judgment, Eberle J. made it clear that it was not suggested that the solicitors acted improperly in doing so.

29 Eberle J. acknowledged that for many purposes, payment of the account had been made. He then said, at p. 643:

> ... However, when I consider the intention of s. 10 [now s. 11], it seems clear to me that the reason why a client who has paid an account is required to show special circumstances in order to have the account taxed, is because the payment of the account indicates that the client accepts the amount of the account as being proper. That is, that payment is an implied acceptance of the reasonableness of the account. Can one make that implication in the circumstances of this case — circumstances of payment which are not uncommon? In my view 'no'; one cannot make that implication, and I am, therefore, driven to the conclusion that although, for many purposes, the solicitors' account has been paid, for purposes of s. 10 a voluntary action on the part of the client on making the payment is required before one can infer an acceptance by the client of the propriety of the bill. Therefore, in my view, the special circumstances required by s. 10 of the *Solicitors Act* where there has been payment of a bill need not here be shown. [Emphasis added.]

30 I agree with Eberle J.'s description of the purpose underlying s. 11 of the *Act*. Payment of the bill is generally seen as an implied acceptance by the payor of the propriety of the bill. Absent special circumstances, the payor should not be allowed to resile from its implied acceptance of the propriety of the bill. I think, however, that the purpose underlying s. 11 is not served by attempting to distinguish between voluntary and involuntary payments. The distinction is not an easy one to make. Plazavest argues that the payment of the bill was not voluntary because National made the payment from Plazavest's account over Plazavest's objection. National argues that Plazavest agreed, as part of the 1997 agreement, that National could unilaterally make the payment. National contends that a payment made pursuant to an agreement, the validity of which is not challenged, is a voluntary payment.

31 I would avoid any attempt to characterize a payment as voluntary and involuntary, but instead distinguish between payments that are authorized by the payor and those that are not authorized. Where the payment is authorized by the payor, I would hold that it is a payment for the purposes of s. 11 of the *Act*. Plazavest agreed that it would pay National's actual legal fees and expenses. It also agreed that National could unilaterally pay those fees and expenses from Plazavest's account if Plazavest did not pay them. These were two terms of a complex bargain struck between National and Plazavest by which Plazavest gained access to financing in excess of $2 million. There is no suggestion that the agreement does not reflect the bargain made between National and Plazavest or that there is any reason why the court should not enforce that bargain. Indeed, I do not understand Plazavest to contend that National was not entitled to pay the bill.

32 In my opinion, the payment was authorized by Plazavest under the terms of the 1997 agreement and is a payment of the bill for the purposes of s. 11 of the *Act*. Plazavest's objection to paying the bill could not make the payment unauthorized since Plazavest had agreed in advance that National could unilaterally make the payment. Plazavest was, therefore, entitled to an assessment only if it could show that the special circumstances of the case appeared to require an assessment.

V

33 Section 11 refers to "special circumstances," which "in the opinion of the court appear to require the assessment." This language clearly implies that assessment after payment will be the exception rather than the rule. It further contemplates that in determining whether to order an assessment, the court has a broad discretion to be exercised on a case-by-case basis and with an eye to all of the relevant circumstances. As was said in *Minkarious v. Abraham, Duggan*, *supra*, at 236:

> ... exceptional circumstances of either a contractual or an equitable nature could lead a court to find that an assessment is necessary or essential on general principles or is called for as being appropriate or suitable in the particular case....

34 In deciding whether special circumstances exist, the court may take into consideration the fact that payment was made by a third party and not by the client. Section 9(2) of the *Act* provides in part:

> ... the court may take into consideration any additional special circumstances applicable to the person making it [the payment], although such circumstances might not be applicable to the party chargeable with the bill [the client] if he, she or it was the party making the application.

35 Section 9(2) of the *Act* reflects the reality that a third party required to pay a legal bill will often not be in as good a position as the client to determine the propriety of that bill. In *Tory, Tory, Deslauriers & Binnington v. Concert Productions International Inc.* (1985), 7 C.P.C. (2d) 54 (Ont. H.C.), Steele J. considered a case in which a borrower committed to pay the lender's legal fees as part of the financing arrangements. The borrower subsequently sought to assess those fees. Steele J. said, at p. 57:

> ... A third party under s. 8 [now s. 9] can be in no higher status than the party itself, and therefore, in my opinion, special circumstances are required to be shown by the applicant herein. However, s. 8(2) [s. 9(2)] allows the court to consider any extra circumstances. A third party is not per se automatically entitled to be said to have special circumstances, although it should be given more favourable consideration than the party who paid the account. The facts in each case must be considered on their merits.

36 Bearing in mind the comments of Steele J. and the need to consider all of the circumstances of the case, three factors are particularly significant in determining whether special circumstances exist here. First, the payment to Kelly Affleck was made on Plazavest's behalf by National over the express objection of Plazavest. Plazavest had made it clear that it did not agree with the amounts claimed in the bills provided to National by Kelly Affleck. In this circumstance, the normal inference concerning the propriety of the bills flowing from the payment of the bills cannot be made. It cannot be said that Plazavest is seeking to challenge legal bills which, by its earlier conduct, it had accepted as appropriate. To the contrary, in bringing this application, Plazavest was maintaining the same position it had taken from the time it was first advised of the amount of the bill. Denying an assessment in these circumstances does not further the purpose underlying s. 11 of the *Act*: see *Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson*, *supra*, at 265.

37 Second, when Plazavest initiated this application, it had virtually no information concerning the work done by Kelly Affleck for which the law firm was claiming fees in excess of $32,000.00. Plazavest was not the client and could not have first hand knowledge of what work Kelly Affleck had done on the relevant transactions. Plazavest requested the bills when National demanded payment. National provided one bill referable to a very small part of the overall amount claimed by Kelly Affleck but refused to provide the remaining bills. In effect, National took the position that Plazavest was obligated to pay the legal fees but was not entitled to any information concerning the work done to earn those fees. National eventually modified its position somewhat and did provide Plazavest with the bills given to it by Kelly Affleck. The bills given to Plazavest were, however, edited on the basis of solicitor-client privilege and gave Plazavest only partial information as to the work done by Kelly Affleck. The edited bills were provided long after National had paid the bill from Plazavest's account.

38 National's refusal to give the bills to Plazavest before paying the legal fees from Plazavest's account, and its subsequent providing of only edited bills to Plazavest are important factors which tells in favour of directing an assessment. A third party who has agreed to pay a client's legal bills is entitled, subject to any sustainable solicitor-client privilege claim, to information in the client's possession which is relevant to the determination of whether the legal bills are properly payable by the third party.

39 I would think that in the normal course, a client in the position of National should provide copies of the legal bills to the third party who was responsible for paying those bills. If the client has legitimate concerns that the bills will reveal information protected by the solicitor-client privilege, the client should provide the third party with a description of the legal work done and the fees charged for that work which will protect the privilege but still allow the third party to make an informed decision as to its obligation to pay that bill.

40 Had National been more forthcoming in providing details as to the services rendered by Kelly Affleck, it may well have avoided this application altogether. At a minimum, it would have been in a much better position to argue that Plazavest could not demonstrate "special circumstances."

41 The third factor to be considered is the wording of the terms of the agreement between Plazavest and National. This was the factor which Sanderson J. regarded as determinative against Plazavest on the special circumstances inquiry.

42 Plazavest argued that a term requiring that the legal fees be reasonable should be implied into the 1997 agreement. I cannot accept that submission. The 1990 agreement referred to "reasonable" legal fees and expenses. The parties chose to change that term in the 1997 agreement and Plazavest agreed to pay "actual" legal fees and expenses. I see no reason why the court should ignore the change in the language made by the parties.

43 I do not, however, accept National's submission that the language of the agreement tells against an assessment. Plazavest agreed to pay actual legal fees and expenses incurred in relation to the transactions arising out of the loan agreement. Given National's position, Plazavest had no way, other than through the assessment process, of determining whether the amounts claimed in the bills met these two criteria. I see nothing in the language of the 1997 agreement which should foreclose Plazavest's resort to an independent arbiter to determine whether the fees claimed in fact came within the description of the fees which Plazavest had agreed to pay. The analysis of Adams J. in *Borden & Elliot v. Barclays Bank of Canada*, *supra*, at 358-59, although directed to an agreement requiring that the third party pay "reasonable" fees, seems to me to have equal application to the 1997 agreement. Plazavest agreed to pay actual legal fees and expenses incurred in relation to the loan transaction. It did not agree to pay any and all fees claimed by Kelly Affleck. The terms of the 1997 loan agreement may well limit the arguments available to Plazavest on an assessment, but in my view they should not preclude that assessment.

44 Plazavest was entitled to satisfy itself that the legal fees and expenses which were claimed met the criteria set out in the 1997 agreement. National chose to deny Plazavest the relevant information and to pay Kelly Affleck's fees from Plazavest's account over Plazavest's express objection. Absent an assessment by Plazavest, there will be no independent review of the fees and no way of knowing whether they are truly covered by the 1997 agreement. In my view, these factors combine to constitute special circumstances within the meaning of s. 11 of the *Act*. This is a case where an assessment should be ordered.

VI

45 As I would order an assessment, I must address the solicitor-client privilege claim made by National. National contends that many of the entries in the bills provided by Kelly Affleck are protected by solicitor-client privilege. National cannot, of course, have the final say on this issue. The unedited accounts should be produced to the assessment officer who may examine them and determine what part, if any, should be protected by the solicitor-client privilege. The assessment officer may also have to consider whether the terms of the 1997 agreement constitute a waiver of any solicitor-client privilege claim in so far as it relates to Plazavest's obligation to pay National's legal bills. Any bill or part of a bill which is not protected by the privilege should be turned over to Plazavest. The assessment officer may, if he or she can do so without compromising the privilege, also provide Plazavest with a summary of any of the information which has been determined to be protected by the solicitor-client privilege.

VII

46 I would allow the appeal, set aside the order below, and direct an assessment subject to the conditions set out above. Plazavest is entitled to its costs here and below.

Appeal allowed.

Footnotes

1 The parties agree that this a typographical error and should be December 18, 1997.

2 Even if ss. 15 to 33 applied, s. 25 would appear to put Plazavest in virtually the same position it would be in if s. 11 applied. Section 25 would allow Plazavest to apply to "re-open" the agreement under which the legal fees were paid. If Plazavest could demonstrate "special circumstances" the court could order the agreement re-opened and the fees assessed.

3 Given the conclusion I have reached, I need not decide whether Plazavest's application does fall within s. 3(a) or s. 3(b) of the *Act*. Arguably, it is an application brought more than one month after delivery of the bill and less than 12 months after delivery of the bill and therefore falls into the "gap" in the *Act* recognized by this court in *Peel Terminal Warehouses Ltd. v. Wootten, Rinaldo & Rosenfeld*, *supra*: see also *Krigstin v. Samuel* (1982), 31 C.P.C. 41 (Ont. H.C.); *Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson* (1998), 38 O.R. (3d) 257 (Ont. C.A.) at 260

Original
2013 ONSC 4194
Ontario Superior Court of Justice

Cassels Brock & Blackwell LLP v. 1578838 Ontario Inc.

2013 CarswellOnt 8989, 2013 ONSC 4194, 107 W.C.B. (2d) 666, 230 A.C.W.S. (3d) 296

In the Matter of the Solicitors Act, R.S.O. 1990, c. S.15

In the Matter of Cassels Brock & Blackwell LLP, also known as Cassels Brock Lawyers

Cassels Brock & Blackwell LLP, also known as Cassels Brock Lawyers, Lawyers and 1578838 Ontario Inc., Client

J.W. Quinn J.

Heard: April 18, 2013
Judgment: June 25, 2013
Docket: St. Catharines 54101/12

Counsel: Helder M. Travassos, for Cassels Brock Lawyers
Marc A. Munro, for Client

Related Abridgment Classifications
Judges and courts
XIX Contempt of court
XIX.4 Forms of contempt
XIX.4.c Disobedience of court
XIX.4.c.iii Order for production of documents
Professions and occupations
VIII Lawyers
VIII.4 Relationship with client
VIII.4.f Miscellaneous

Headnote
Professions and occupations --- Barristers and solicitors — Relationship with client — Miscellaneous
In 2005, mortgagor mortgaged property to bank — Five years later, mortgagor commenced action against bank alleging, among other complaints, negligent performance of banking duties — Bank counterclaimed to enforce mortgage which was in default — Power of sale proceedings were commenced under mortgage in 2011, with law firm acting for bank — Law firm brought motion against mortgagor, asking that order for assessment be declared nullity, as mortgagor was not client under s. 3 of Solicitors Act — Law firm's motion granted — Order for Assessment was so clearly nullity that law firm could not be faulted for initially attempting to deal with matter by corresponding with counsel for mortgagor, rather than immediately moving to set it aside.
Judges and courts --- Contempt of court — Forms of contempt — Disobedience of court — Order for production of documents
In 2005, mortgagor mortgaged property to bank — Five years later, mortgagor commenced action against bank alleging, among other complaints, negligent performance of banking duties — Bank counterclaimed to enforce mortgage which was in default — Power of sale proceedings were commenced under mortgage in 2011, with law firm acting for bank — Mortgagor moved against law firm for finding of contempt, alleging that they have refused to comply with order for assessment — Mortgagor's motion dismissed — Mortgagor had not proven intent

necessary for contempt beyond reasonable doubt — Law firm temporarily formed intention not to comply with order for assessment, while sensibly attempting to convince counsel for mortgagor that order was nullity and, apart from that, too broad — Once it became obvious that attempt would not succeed, law firm brought motion — Temporary intention did not represent deliberateness and wilfulness needed for finding of contempt.

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s. 247 — considered

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Generally — referred to

s. 43 — considered

s. 43(4) — considered

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

s. 3 — considered

s. 3(a) — considered

s. 3(b) — considered

s. 3(c) — considered

s. 6(1) — considered

s. 9 — referred to

s. 9(1) — considered

s. 9(3) — considered

s. 11 — considered

s. 15 "client" — considered

ss. 16-33 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 2.03 — considered

R. 14.05(2) — considered

R. 37.14(1)(c) — considered

R. 39.02(1) — considered

R. 39.03(1) — considered

R. 59.01 — considered

R. 60.05 — considered

R. 60.11(3) — considered

***J.W. Quinn J.*:**

I Introduction

1 In 2005, 1578838 Ontario Inc. ("mortgagor") mortgaged property in Welland, Ontario ("mortgage") to Scotia Mortgage Corporation ("Bank").

2 Five years later, the mortgagor commenced an action ("Action") against the Bank alleging, among other complaints, the negligent performance of banking duties. The Bank counterclaimed to enforce its mortgage which was in default. The Action is ongoing.

3 Power of sale proceedings were commenced under the mortgage in 2011, with the law firm of Cassels Brock & Blackwell LLP, also known as Cassels Brock Lawyers ("Cassels Brock"), acting for the Bank.

4 The Notice of Sale Under Mortgage claimed costs of $155,983.24 from the mortgagor. Additional legal costs of $34,458.02 were incurred in respect of the sale, bringing the total to $190,441.26. It is alleged, on behalf of the mortgagor, that those costs, and more, were charged to the mortgagor and are excessive.

5 Pursuant to s. 3 of the *Solicitors Act*, R.S.O. 1990, c. S.15 ("*Solicitors Act*"), counsel for the mortgagor requisitioned an *ex parte* Order for Assessment from the Registrar requiring Cassels Brock to produce copies of their legal accounts to be assessed. In dispute is what accounts have been charged to the mortgagor. Cassels Brock insists that most of the $190,441.26 in legal fees and disbursements relate to costs incurred in the Action and have not been charged to the mortgagor.

6 There are three motions before me: (1) the mortgagor moves against Cassels Brock for a finding of contempt, alleging that they have refused to comply with the Order for Assessment; (2) Cassels Brock brings a motion against the mortgagor, asking that the Order for Assessment be declared a nullity, as the mortgagor was not a "client" under s. 3 of the *Solicitors Act*; and (3) the mortgagor moves, pursuant to s. 9 of the *Solicitors Act*, for an order that Cassels Brock deliver their power-of-sale accounts for assessment.

7 A swirl of issues surrounds the motions: (1) Was s. 3 of the *Solicitors Act* available to the mortgagor? (This issue leads to considerations of whether the mortgagor is a "client," as contemplated by s. 3, whether the retainer is "disputed" and whether "special circumstances" exist.) (2) If s. 3 was not available to the mortgagor, is the Order for Assessment a nullity? (3) If the Order for Assessment is a nullity, were Cassels Brock obliged to comply? (4) Did Cassels Brock move to set aside the Order for Assessment in a timely manner? (5) Has contempt been established? (In other words: Is the Order for Assessment clear and unequivocal? Was the breach, if any, deliberate and wilful? Has contempt been proved beyond a reasonable doubt?) (6) Is the information-and-belief affidavit in support of the contempt motion improper? (7) What legal accounts of Cassels Brock should be assessed? (8) What procedure should be invoked to make that assessment come about? (9) Does the *Mortgages Act*, R.S.O. 1990, c. M.40 have any application?

II Background

8 The initial background facts relate to the Action.

1. The Action

2010

Oct.13	The mortgage matured and the mortgagor commenced the Action seeking damages from the Bank for "loss of sale" and for "inducing breach of contract, negligent performance of banking duties and tortuous interference with economic relations." Briefly put, the Action concerns the prior refusal of the Bank to consent to a proposed change of use for the property or to a postponement of the mortgage.
Unknown	The Bank served a statement of defence and a counterclaim.

2011

Feb.9	The mortgagor served a defence to the counterclaim and counterclaimed against the Bank [1] for an injunction restraining the Bank "from ... molesting or annoying any individuals that [the mortgagor] does business [with] or rents property to" and "restraining the Bank from Power of Sale or foreclosure proceedings."
Jun.7	Henderson J. heard: a motion by the Bank for (1) summary judgment on its counterclaim against the mortgagor and (2) summary dismissal of the Action; and a motion by the mortgagor for (3) a stay of enforcement of the summary judgment and (4) injunctive relief.—Justice Henderson dismissed (2), (3) and (4) but allowed (1), giving judgment to the Bank for the amount owing on the mortgage and for possession of the property. Costs of the motions were reserved to the trial judge in the Action.—This means that the Action is alive as to the claim for damages against the Bank.
Jun.7	A judgment was taken out by the Bank, in accordance with (1) above, the monetary terms of which required the mortgagor to pay the sum of $1,395,338.21, comprised of "the full amount due under the mortgage, including principal, interest and property tax arrears." Costs were not included. The property taxes were $190,881.61.

2. Notice of Sale Under Mortgage

9 The next relevant background event is the issuance of a Notice of Sale Under Mortgage ("Notice of Sale"):

2011

Jul.27	The Bank, by its solicitors Cassels Brock, issued a Notice of Sale indicating that if the sum of $1,369,981.41 [2] was not paid by September 6, 2011, the Bank would sell the property. The amounts showed as owing in the Notice of Sale were: [Bold emphasis added]

Principal	$1,158,608.62
Accrued interest from Oct. 1, 2010 to July 27, 2011	50,539.27
Tax Certificate	25.00
Property management costs	4,075.28
Legal costs paid	*153,483.24*
Administration costs	750.00
Costs (... up to and including ... this Notice ....)	*2,500.00*
TOTAL:	*$1,369,981.41*

10 Of particular interest in the numbers above are: "Legal costs paid" ($153,483.24); "Costs" ($2,500.00); and "TOTAL" ($1,369,981.41).

11 The combined costs of $155,983.24 ($153,483.24 + $2,500.00) are described by counsel for the mortgagor as "an extraordinary claim for legal costs."

12 However, Cassels Brock maintains that $155,983.24 is part of a larger figure, with the latter representing legal costs incurred in respect of the Action. According to Cassels Brock (and I will address this point later), "the Bank decided that the [larger] sum ... would not be taken from the sale proceeds and charged to the mortgagor," recognizing that "the liability for all legal costs in connection with the Action has been reserved to the trial judge."

2011

Sept.6 This was the due date for payment under the Notice of Sale. The payment was not made.

2012

Apr.16 The sale of the property was completed.

Jun.20 Cassels Brock rendered an account to the Bank for $23,096.64 "re: ... Mortgage Loan to 1578838 Ontario Inc."

Aug.24 Cassels Brock rendered an account to the Bank for $11,361.38 "re: ... Mortgage Loan to 1578838 Ontario Inc."

Sept.17 Cassels Brock provided to counsel for the mortgagor a Power of Sale Accounting which showed "paid legal accounts" of $34,458.02 and a surplus of $797,756.54: [Bold emphasis added]

Power of Sale Accounting

Proceeds of sale		$2,586,267.35
Deposit		100,000.00
Paid tax arrears	$259,685.55	
Paid balance of real estate commission	140,346.00	
Interest on deposit		254.18
Funds from property manager		16,834.42
Insurance refund		6,489.72
Paid first mortgage	1,477,543.81	
Paid water account	55.75	
Paid legal accounts	*34,458.02*	
Surplus	*797,756.54*	
	$2,709,845.67	$2,709,845.67

13 The "Paid legal accounts" of $34,458.02 is the combined total of the accounts dated June 20, 2012 and August 24, 2012 ($23,096.64 + $11,361.38).

14 The accounts of June 20, 2012 and August 24, 2012 are important because Cassels Brock has repeatedly insisted that they (actually, portions thereof) are the only accounts that have been charged to the mortgagor. These two accounts will surface many times in my Reasons.

3. Order for Assessment and Appointment for Assessment

15 Counsel for the mortgagor obtained from the Registrar, pursuant to an *ex parte* requisition, an Order for Assessment, under s. 3 of the *Solicitors Act*, naming Cassels Brock as "lawyers" and the mortgagor as "client." A fundamental issue that arises is whether the mortgagor was a "client" of Cassels Brock and had the right to such an order. Section 3 reads: [Emphasis added]

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

16 The key features of s. 3 are that: (1) it is available only to solicitors or their clients; (2) the retainer of the solicitor must not be "disputed"; and (3) there must be no "special circumstances."

17 Specifically, the Order for Assessment here was obtained pursuant to s. 3(a). [3]

2012

Dec.4 The Order for Assessment was obtained by counsel for the mortgagor from the Registrar at St. Catharines. It reads:

1. IT IS ORDERED THAT the solicitor deliver to the client its accounts within fourteen (14) days in accordance with section 6(1) of the *Solicitors Act*, [4] with respect to the power of sale proceedings regarding Scotia Mortgage Corporation loan to 1578838 Ontario Inc. on the security of 100-304 Brownleigh Avenue, Welland, Ontario, as described in the Power of Sale Accounting attached hereto as Schedules "A" and "B".

2. IT IS ORDERED THAT the accounts of fees, charges and disbursement to be delivered by the said Solicitor to the said client in accordance with paragraph (1) above be referred to an Assessment Officer at St. Catharines to be assessed, the retainer of the solicitor not being in dispute, and there being no special circumstances.

Schedule "A" to the order is as follows: [Bold emphasis added]

Power of Sale Accounting

Proceeds of sale		$2,586,267.35
Deposit		100,000.00
Paid tax arrears	$259,685.55	
Paid balance of real estate commission	140,346.00	
Interest on deposit		254.18
Funds from property manager		16,834.42
Insurance refund		6,489.72
Paid first mortgage	*1,477,543.81*	
Paid water account	55.75	
Paid legal accounts	*34,458.02*	
Surplus	*797,756.54*	
	$2,709,845.67	$2,709,845.67

Schedule "B" to the order is a copy of the actual Notice of Sale and, therefore, shows the amounts that I have set out opposite July 27, 2011 above.

18 The Power of Sale Accounting is the same as that which was provided to counsel for the mortgagor in the letter from Cassels Brock on September 17, 2012.

19 The relevant items in the Power of Sale Accounting are: "Paid first mortgage ($1,477,543.81)"; "Paid legal accounts ($34,458.02)"; and "Surplus ($797,756.54)."

20 The legal accounts in the Power of Sale Accounting (Schedule "A" to the Order for Assessment), are those dated June 20, 2012 ($23,096.64) and August 24, 2012 ($11,361.38), to which I referred earlier. Cassels Brock contends that only $19,621.69 of the $34,458.02 has been charged to the mortgagor.

21 It will be recalled that Schedule "B" to the Order for Assessment (being the Notice of Sale) contains legal costs totalling $155,983.24.

22 Counsel for the mortgagor points out that the sum of $1,477,543.81 is $107,562.40 higher than the sum of $1,369,981.41 in the Notice of Sale; [5] and, he further highlights the fact that the legal costs of $34,458.02 are in addition to the $155,953.24 ($153,483.24 + $2,500.00) in the Notice of Sale, making a total of $190,441.26 for costs.

23 Counsel for the mortgagor goes further and submits that "upon closer scrutiny of the numbers it appears that Cassels Brock may have billed up to $297,503.66." His supporting calculations are:

Gross value of sale	$2,586,267.35
Tax arrears	(259,665.55)

Real estate commission	(140,846.00)
Mortgage without deduction for legal costs	(1,213,998.17)
Water	(55.75)
Surplus without deduction for legal costs	1,095,260.20
Alleged surplus after deduction for legal costs	(797,756.54)
Apparent legal costs	$297,503.66

24 I do not grasp these calculations. For example, I cannot replicate the figure of $1,213,998.17.

2012

Dec.4 An Appointment for Assessment was issued at St. Catharines, returnable January 31, 2013.

Dec.11 The Appointment for Assessment and the Order for Assessment were served upon Cassels Brock. The covering letter from counsel for the mortgagor asked, "Please forward the accounts referred to in the Order for Assessment by December 31, 2012."

4. Cassels Brock letter of December 21, 2012

25 A letter from Cassels Brock, dated December 21, 2012, identifies some of the issues that ultimately found their way to my court:

2012

Dec.21 Having received the letter of December 11{th}, the Appointment for Assessment and the Order for Assessment, Cassels Brock wrote to counsel for the mortgagor and to DH Professional Corporation, [6] saying, in part:

> Re: *Bank of Nova Scotia et al. ats 1578838 Ontario Inc.* Court File No. 1616/10 [7] *Canadian Equity Builders (In Trust) v. 1578838 Ontario Inc.* Court File No. CV-09-376981
> ... With respect to the Order for Assessment, we note that at no time was [the mortgagor] the 'client' of [Cassels Brock] and accordingly the statement that the 'retainer of the solicitor not being in dispute' is inaccurate. This Order appears to have been improperly obtained and notably no notice of such application was provided to our firm ... We would invite [counsel for the mortgagor] to provide an explanation for this and the legal basis ...
> Consequently, at this early date, Cassels Brock correctly identified the problem with the Order for Assessment. Both sides should have been considering their procedural options (Cassels Brock — moving to set aside the Order for Assessment; and, the mortgagor — applying for an assessment under s. 9 of the *Solicitors Act* or arranging for an assessment under the *Mortgages Act*).
> Counsel for the mortgagor was invited to convince Cassels Brock that the Order for Assessment was not improperly obtained.
> The letter continues:
> With respect to the surplus funds, as you are aware, we provided [counsel for the mortgagor] with a Power of Sale Accounting in August 2012 [8] indicating the surplus funds were in the amount of $797,756.54. Our client has at all times been prepared to release such surplus funds ...
> The letter proceeds to make a suggestion as to how the surplus funds should be handled:
> While we can continue to hold the funds in trust ... in the interest of efficiently resolving all matters concerning the surplus funds we have instructions to pay the greater amount of $986,283.88 into [counsel for Canadian Equity Builder's] Trust Account to the credit of [the Second Action]. The amount proposed to be paid includes investment interest of $4,890.99 (to December 19, 2012) as well as the disputed legal fees. In the result, the only legal fees and disbursements charged to the mortgage account are as itemized on Schedule "A" to this letter (with relevant accounts redacted for privilege attached).
> ... Our client's unresolved costs claim [in the Action, including the motions heard by Henderson J.] must be taken into account with respect to the surplus funds ...

> Kindly provide your agreement in writing to the payment of $986,283.88 ... on the terms proposed above ...

26 Schedule "A" to the letter consists of the legal accounts dated June 20, 2012 ($23,096.64) and August 24, 2012 ($11,361.38). However, in Schedule "A" there are redactions (for privilege) and, according to the letter, only a portion of the legal accounts has been charged to "the mortgage account" ($12,689.91 and $6,931.78, respectively, totalling $19,621.69).

27 Cassels Brock contends (and has done so repeatedly) that $19,621.69 is the only sum that has been charged to or paid by the mortgagor, notwithstanding the other, much higher, figures bandied about.

28 Cassels Brock emphasizes that the redacted items in the two accounts "are not in respect of legal fees deducted from the net sale proceeds, but in respect of legal fees incurred [in] the Action and, as a result, are protected by solicitor-client privilege between Cassels Brock and the Bank."

5. Subsequent correspondence

29 Thereafter, the parties engaged in some jousting by correspondence, as Cassels Brock purported to attempt to clarify, or at least identify, the legal accounts captured by the Order for Assessment:

2013

Jan.4 Counsel for the mortgagor wrote to Cassels Brock:

> My client is entitled to assess your legal accounts in accordance with section 9 of the *Solicitors Act*.[9] As in the case of an ordinary assessment of a solicitor's bill, no notice is required to be given to [Cassels Brock]. On the first return date, the practice is that a hearing date will be scheduled for a later date.[10]
>
> I note that in addition to your accounts of June 20 and August 24, 2012, totalling some $34,000.00, the claim for legal costs paid in the amount of $153,483.24 was referred to in the notice of sale under mortgage dated July 27, 2012. We will be requiring the production of *all* accounts for services rendered to your client[11] but charged to mine[12] in connection with the mortgage proceedings. [Emphasis in original]

The letter highlights the dilemma faced by Cassels Brock. The Notice of Sale identifies "legal costs paid" of $153,483.24 (and a further $2,500.00 for "costs"), yet Cassels Brock insists only $19,621.69 has been charged to the mortgagor. Counsel for the mortgagor wants all of the accounts produced that were "charged" to the mortgagor and does not believe the assertion by Cassels Brock that only $19,621.69 is involved.

The letter continues:

> Please comply with the Order for Assessment and forward copies of *all* accounts rendered by your firm in this matter. [Emphasis in original]

This demand does not include the qualifier found earlier in the letter that it is the accounts charged to the mortgagor that are to be produced. Presumably, the qualifier is implied.

The letter concludes:

> With regard to the trust funds, I suggest that the existing court order be complied with.

Jan.10 Cassels Brock sent a letter to counsel for the mortgagor and to the solicitor for the plaintiff in the Second Action:

> ... it appears to me that there remains some confusion as to the legal fees that have been charged to the mortgage debt.[13]
>
> To be clear, Schedule 'A' to my letter of December 21, 2012 identifies two accounts and provides a breakdown of fees, taxes and disbursements deducted from the surplus and charged to the mortgage debt. These amounts total $19,621.69, as indicated. Copies of both accounts, which include a detailed narrative of the work completed, are also attached to this letter. As previously indicated, these are the only legal fees and disbursements charged to the mortgage account and deducted from the sale proceeds.

Separate and apart from the $19,621.69 ... the Bank has incurred additional fees on account of [the Action], as well as the counterclaim brought by the Bank against [the mortgagor] ... Three motions were heard in May 2011 [in the Action] ... and it was ordered that costs be reserved to the judge who ultimately tries the Action.

Consequently, [the Bank] continues to have substantial and unresolved legal costs claims ...

The letter seeks clarification of the accounts to be produced and those to be assessed (I do not know the basis for this distinction):

With reference to [the] letter of January 4, 2013 [from counsel for the mortgagor] and prior correspondence of December 11, 2012 ... it is unclear to me which accounts [the mortgagor] is seeking an assessment of, and which accounts it is seeking production of. [14] Again, copies of the two accounts charged to the mortgage debt were previously provided as an attachment to my letter of December 21, 2012 ... I would be grateful if [counsel for the mortgagor] would clarify as to whether his client is proposing to assess these two accounts ...

Jan.10 Counsel for the mortgagor replied to the above letter from Cassels Brock:

I am content that you pay the surplus to counsel for [the plaintiff in the Second Action, in trust]. With regard to the balance of your letter, it is clear that the bank has already taken payment for legal fees and expenses charged by your firm in connection with the [Action] and the sale proceedings. In other words, you have made the decision of costs reserved to the trial judge a moot point.

Counsel for the mortgagor makes a good point. He is relying on the Notice of Sale and the Power of Sale Accounting which, on their face, suggest that legal fees totalling $190,441.26 ($153,483.24 + $2,500.00 + $34,458.02) were billed to the Bank and charged to the mortgagor.

The letter concludes:

Please disclose *all* of the accounts rendered by your firm to the [Bank] for purposes of assessment. [Emphasis in original]

This demand does not distinguish between accounts billed to the Bank and accounts charged to the mortgagor, which distinction was made in the letter of January 4, 2013.

Jan.14 Cassels Brock responded to the above letter, saying, in part:

... Again, you already have copies of all accounts for services rendered to the [Bank] that have been charged to your client in connection with the mortgage proceedings. [Emphasis in original]

The accounts are attachments to my letter to you of December 21, 2012. As is apparent from the first full paragraph on page 2 of that letter, the decision to pay the greater sum of $986,283.88 into court represents a concession in the interests of resolving the dispute related to the surplus accounting ...

30 In what I will later identify as the Ward affidavit (delivered on behalf of Cassels Brock), the following explanation is given, at paragraph 13, for the decision to increase the surplus from $797,756.54 to $986,283.88:

> 13. In the [letter of December 21, 2012], Cassels Brock explained that the Bank was prepared to pay the surplus amount of $986,283.88 into trust (as opposed to the initially calculated lower surplus amount of $787,756.54), which decision [15] was made subsequent to preparation of the notice of sale/power of sale accounting. Essentially, upon further consideration and in the interests of compromise, the bank agreed not to add litigation fees and disbursements totalling $183,636.35 to the mortgage debt or deduct these from the net proceeds of sale, and instead only deduct the $19,621.69 real estate solicitor fees and disbursements described in the [letter of December 21, 2012]. In doing so, the Bank reserved its rights to claim its costs in relation to the ongoing Action.

31 The figure of $986,283.88 is calculated by Cassels Brock in this manner:

Surplus noted in Power of Sale Accounting	$797,756.54
Legal fees in the Action	153,483.24
Legal fees incurred by Cassels Brock after issuance of Notice of Sale but before the sale of the property	15,316.78
Further legal fees incurred by Cassels Brock in the Action	14,836.33

Investment interest	5,483.92
TOTAL	$986,876.81

32 I do not comprehend these calculations. What happened to the costs of $2,500.00 referred to in the Notice of Sale? And to the accounts of June 20, 2012 and August 24, 2012?

Jan.18 In the Second Action, O'Marra J. ordered that the surplus from the power-of-sale proceeds was to be paid to the solicitors for the plaintiff in the Second Action, in trust.

Jan.18 The surplus from the power-of-sale proceeds, then being the sum of $986,876.81, as calculated by Cassels Brock, was paid in accordance with the order of O'Marra J.

Jan.20 Counsel for the mortgagor wrote to Cassels Brock:
I acknowledge receipt of your letter of January 14 last.
My client is entitled to assess *all* solicitor and client accounts you have rendered to your client and which have been charged to my client's account. This includes accounts for uncontested as well as contested matters.
Please forward copies of *all* accounts. [Double emphasis in original]
Once more, counsel for the mortgagor properly qualifies his request for all accounts by saying that he wants production and assessment of those that have been charged to the mortgagor.

Jan.23 Cassels Brock replied to the letter of January 20{th}:
... I confirm, once again, that you have copies of all Cassels Brock's accounts rendered to the Bank which have been charged to your client's account ...
Cassels Brock, of course, is referring to the accounts dated June 20, 2012 and August 24, 2012.
This letter also addresses an adjournment of the assessment:
As well, kindly advise as to whether or not you intend to proceed with an assessment of the accounts forwarded to you December 21, 2012. If so, I am prepared to discuss dates for such an assessment as I understand from your correspondence of January 4, 2013 that the appointment date is preliminary and that a later hearing date will be scheduled ... I would ask that you provide me with some available dates in February or March.

Jan.30 Cassels Brock, not having received a reply regarding the adjournment of the assessment, again wrote to counsel for the mortgagor:
May I please have a response to my letter of January 23, 2013, copy attached.

6. Appointment for Assessment and the three motions

33 Finally, I come to the first return date of the Appointment for Assessment followed by the three motions now before the court:

2013

Jan.31 On the first return date of the Appointment for Assessment, counsel for the mortgagor attended. Cassels Brock did not attend; neither did anyone on their behalf. The assessment was adjourned to February 28.
[In what I will soon be referring to as "the Ward affidavit," it is explained, at paragraph 19, that "no response to [the Cassels Brock] correspondence [of January 23, 2013 and January 30, 2013] was received ... and Cassels Brock understood that the appointment would not proceed until a new date had been set." Paragraph 20 of the Ward affidavit continues:
20. ... on January 31, 2013, Cassels Brock received a telephone call from [the assessment officer at St. Catharines] and was surprised to learn that the appointment was still scheduled to proceed that morning ... Cassels Brock explained its understanding based on prior correspondence with [counsel for the mortgagor] that the appointment date was going to be rescheduled, and [the assessment officer] adjourned the appointment date to February 28, 2013.]

Feb.28 On this, the adjourned date of the Appointment for Assessment, both sides were present and counsel for the mortgagor asked for an adjournment *sine die*, returnable upon seven days notice, for the purpose of the mortgagor bringing contempt proceedings against Cassels Brock.

Mar.14 The mortgagor served a motion, returnable March 21{st}, seeking an order finding Cassels Brock in contempt for refusing to comply with the Order for Assessment and for an order "that Cassels Brock be fined ... or for such other sanction as this Honourable Court may deem just."
The supporting affidavit for the contempt motion was that of Dawn Allison Gilbert, a law clerk in the offices of counsel for the mortgagor ("Gilbert affidavit").
The contempt alleged is that "Cassels Brock has failed or refused to deliver, within fourteen days, all of its accounts with respect to the power of sale proceedings" as required by paragraph 1 of the Order for Assessment. However, throughout the correspondence, counsel for the mortgagor has acknowledged that only those accounts of Cassels Brock *charged to the mortgagor* were to be produced for assessment. The Order for Assessment does not make such a distinction.
I observe that this contempt motion was brought three months after the Order for Assessment and at a time when the mortgagor should have known that its validity was highly vulnerable.

Mar.15 Cassels Brock wrote to counsel for the mortgagor:
I acknowledge receipt of your motion record seeking a contempt order ... Cassels Brock will retain counsel to respond to the motion ...

Mar.21 This was the first return date of the contempt motion by the mortgagor. It was adjourned to April 4{th}.

Apr.4 The contempt motion of the mortgagor was further adjourned, at the request of Cassels Brock, to permit the latter to deliver responding material and to bring a motion to set aside the Order for Assessment.

Apr.4 Cassels Brock served a responding motion record that included an affidavit from David S. Ward, a lawyer with Cassels Brock ("Ward affidavit"). [16] I already have mentioned the Ward affidavit more than once.

Apr.9 Four months after the Order for Assessment, Cassels Brock served a motion seeking to set it aside and asking for a declaration that it "is a nullity." The notice of motion states that the mortgagor is not the client of Cassels Brock and, accordingly, did not have standing to obtain relief under s. 3 of the *Solicitors Act*.
The supporting affidavit is the Ward affidavit.
The delay in bringing the motion is not expressly explained (although inferences as to the basis for the delay are possible from the contents of the correspondence exchanged between December 21, 2012 and April 9, 2013).
The notice of motion goes on to deal with the availability of s. 9 to the mortgagor, stating that "the mortgagor needed to make an application to a judge of the Superior Court rather than a requisition to a registrar ... an application to a judge ... under s. 9(3) for delivery of a bill and under s. 9(1) for assessment of that bill."
The notice of motion further states that the mortgagor "is using the Order for Assessment, improperly, as a basis for a contempt order against [Cassels Brock]" and "[the mortgagor] can only do so on the basis of a valid order."

Apr.10 The mortgagor served a motion for an order, pursuant to s. 9 of the *Solicitors Act*, directing Cassels Brock "to deliver their accounts with respect to the power of sale proceedings ... and thereafter attend an assessment of the aforementioned accounts."
The motion does not qualify the request for accounts to include only those that have been charged to the mortgagor.
The supporting affidavit is the Gilbert affidavit. [17]
This motion seems to be a reaction to the motion by Cassels Brock, which intimated that the proper course for the mortgagor to follow was to apply to the court under s. 9(3) of the *Solicitors Act* for delivery of a bill or bills and under s. 9(1) for the assessment of same.
The notice of motion also states that "as part of its disciplinary authority over solicitors, this Honourable Court possesses the inherent jurisdiction to direct an assessment of a legal bill should such a reference appear just and reasonable."

Apr.18 The three motions were argued and I reserved my decision. As counsel for Cassels Brock was relying, in part, upon the decision of an assessment officer, I asked both sides for written submissions on the issue of the deference, if any, to be accorded decisions of assessment officers.

Apr.24 Counsel for Cassels Brock delivered written submissions.

Apr.29 Counsel for the mortgagor delivered written submissions.

May 2 Counsel for Cassels Brock delivered additional written submissions.

May 3 Counsel for the mortgagor delivered further written submissions.

May13	I requested submissions on 10 points that I did not have the presence of mind to raise on April 18{th}.
May16	Counsel for Cassels Brock delivered additional written submissions.
May27	Counsel for the mortgagor delivered further written submissions.
May28	Counsel for Cassels Brock delivered additional written submissions.

III The Arguments of Counsel

34 Rather than attempt to paraphrase the positions taken on the issues, I am going to set out the arguments of counsel in their own words wherever possible.

1. Mortgagor

(a) the amount of the legal costs is excessive

• The Notice of Sale contains "an extraordinary claim for legal costs in the amount of $155,983.24."

• In the Power of Sale Accounting (Schedule "A" to the Order for Assessment), "the Bank claimed a further $34,458.02 in legal costs."

• Therefore, "it is clear that Cassels Brock billed a minimum of $190,441.26 [$155,983.24 + $34,458.02]. Yet, upon closer scrutiny of the numbers, it appears that Cassels Brock may have billed up to $297,503.66."

• "The gross amount recovered in the power of sale was $2,586,267.35. According to the Power of Sale Accounting, there is a surplus of $797,756.54. However, when the accounting is considered without any allowance for the payment of legal costs, there is a surplus of $1,095,260.20. Thus, since there is a difference of $297,503.66 between the purported surplus in the accounting and the apparent surplus prior to the deduction of legal costs, it would appear that Cassels Brock billed a total of $297,503.66:

Gross value of sale	$2,586,267.35
Tax arrears	(259,685.55)
Real estate commission	(140,846.00)
Mortgage without deduction for legal costs	(1,213,998.17)
Water	(55.75)
Surplus without deduction for legal costs	1,095,260.20
Alleged surplus after deduction for legal costs	(797,756.54)
Apparent legal costs	$297,503.66" [18]

• "Cassels Brock has only provided accounts totalling $34,458.02."

• "According to Cassels Brock, the legal costs in total are allegedly $203,258.04, being $183,636.35 plus $19,621.69. Yet, this creates an obvious discrepancy of $94,245.62 since the surplus without deduction for legal costs is $1,095,260.20 while the alleged surplus after a deduction for legal costs is $797,756.54."

(b) no steps taken to set aside Order for Assessment

• Cassels Brock did not move to set aside the Order for Assessment until after the contempt motion was brought in March of 2013, "despite being served with the Order for Assessment on or about December 11, 2012."

• Although Cassels Brock "claims that the order is wrong, the law is clear. An order must be complied with until it is set aside. It is not a defence to assert that an order is incorrect, null, or under appeal, and thus ineffective. The order stands, and commands respect, until it is reversed or varied": see *Boily v. Carleton Condominium Corp. 145*, 2013 CarswellOnt 2523 (Ont. S.C.J.), at para. 39.

(c) Cassels Brock is in contempt

• "Pursuant to rule 59.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules of Civil Procedure*"), an order is effective from the date on which it is made, unless it provides otherwise."

• "In accordance with rule 60.05, an order may be enforced, against the person refusing or neglecting to obey, by a contempt order."

• On a contempt motion, "it is not necessary to prove that the respondent intended to disobey the order. The offence consists of the intentional doing of an act which is in fact prohibited by the order. The absence of contumacious intent is not exculpatory, but only a mitigating factor": see *Sussex Group Ltd. v. 3933938 Canada Inc.*, 2003 CarswellOnt 2789 (Ont. S.C.J. [Commercial List]), at para. 52.

• Cassels Brock should be found in contempt, but "with the opportunity to purge their contempt within 10 days, failing which they should be fined $20,000.00 and a further $2,000.00 for each day they remain in breach of the Order for Assessment."

(d) mortgagor is the "client"

• "Pursuant to s. 15 of the *Solicitors Act* ... a 'client' includes a person who is or may be liable to pay the bill of a solicitor for any services." [19]

• The mortgagor is a "client" under s. 3(a) of the *Solicitors Act* and is entitled to an order for assessment on requisition.

(e) deference not owed to decision of an assessment officer

• As for the decision of an assessment officer, "deference ends with issues of law or matters of principle": see *Rabbani v. Niagara (Regional Municipality)*, [2012] O.J. No. 1868 (Ont. C.A.), at para. 6; *Samuel Eng & Associates v. Ho*, [2009] O.J. No. 6405 (Ont. C.A.), at para. 1; and *Howe v. Labelle*, [1996] O.J. No. 759 (Ont. Div. Ct.), at para. 22.

(f) section 9 of the Solicitors Act does not require a court application

• "Under s. 9, where a person has paid a bill they may apply to the court for an order referring to assessment as the party chargeable therewith might have done."

• "Although [Cassels Brock] submits that an assessment order can only be granted by way of application under s. 9 of the *Solicitors Act*, where a statute merely enables a person to 'apply' for specified relief, the law does not mandate one particular form of proceeding": see *Chilian v. Augdome Corp.*, 1991 CarswellOnt 422 (Ont. C.A.), at paras. 38-39.

(g) inherent jurisdiction of the court

• "Legal costs are a matter of public interest. With this in mind, the Court of Appeal has observed that the professional obligations codified within the *Solicitors Act* impose a peremptory obligation upon lawyers to justify the fees charged": [20] see *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d)

641 (Ont. C.A.), at paras. 14-15, 17 and 31; *Teplitsky, Colson v. Daniels*, 2006 CarswellOnt 51 (Ont. S.C.J.), at paras. 12-13; *Raithby v. Fraser & Beatty* (2000), 47 O.R. (3d) 245 (Ont. S.C.J.), at paras. 23-26.

• "This Honourable Court possesses the inherent jurisdiction to direct an assessment of a legal bill should such a reference appear just and reasonable":[21] see *Plazavest Financial Corp. v. National Bank of Canada*, *ibid*; *Teplitsky, Colson v. Daniels*, *ibid*; *Raithby v. Fraser & Beatty*, *ibid*.

• "The Court of Appeal has noted that the proper administration of justice requires that billing disputes are dealt with fairly and equitably. Thus, the inherent jurisdiction of the Superior Court should be exercised whenever procedural gaps or irregularities arise which could hinder the right to assess an account whenever the propriety of a bill is questioned": see *Price v. Sonsini* (2002), 60 O.R. (3d) 257 (Ont. C.A.), at para. 19.

• "The starting point in any dispute over the assessment of an account ought to be the perspective of the client. The basic legislative purpose of the *Solicitors Act* is to counter-balance the privileged position lawyers enjoy within the judicial system ... Thus the assessment provisions within the *Solicitors Act* are, in essence, consumer protection provisions":[22] see *Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP* (2010), 104 O.R. (3d) 93 (Ont. C.A.), at paras. 36-37; *Andrew Feldstein & Associates Professional Corp. v. Keramidopulos*, 2007 CarswellOnt 6193 (Ont. S.C.J.), at paras. 60 and 63; *Plazavest Financial Corp. v. National Bank of Canada*, *supra*, at paras. 15 and 17.

• "In order to maintain public confidence in the administration of justice, this Honourable Court must intervene whenever a client's right to a fair procedure for the assessment of a solicitor's bill is threatened or compromised":[23] see *Price v. Sonsini* , *ibid*; *Javornich v. McCarthy*, 2007 CarswellOnt 4107 (Ont. C.A.), at paras. 22-24; *Andrew Feldstein & Associates Professional Corp. v. Keramidopulos*, *ibid*.

• "The law is clear, Cassels Brock has an obligation to account, but, in breach of this obligation, it has failed to do so."

(h) Mortgages Act

• "In accordance with s. 43 of the *Mortgages Act*, R.S.O 1990, c. M.40, a mortgagee's costs of and incidental to the exercise of a power of sale may, without an order, be assessed by an assessment officer at the instance of any person interested."[24]

2. Cassels Brock

(a) numerical misunderstanding by mortgagor

• The contempt motion "is premised on a fundamental numerical misunderstanding of the Power of Sale Accounting."

• The mortgagor, in using the figure of $1,213,998.17, "appears to have under-calculated the mortgage amount ... by basing its calculation on the Notice of Sale Under Mortgage dated July 27, 2011 ... [when it] ought to have used the Power of Sale Accounting to properly calculate the mortgage amount ($1,308,243.79)."[25]

• "The mortgage amount listed in the Notice of Sale has been updated since July 27, 2011. The property was sold [nine months later, on April 16, 2012] and, as a result, the Notice of Sale fails to take into account any other charges or disbursements incurred by the Bank after July 27, 2011, in connection with the sale of the property, such as accruing interest and appraisal and insurance costs."

• Although the Notice of Sale sets out legal fees of $153,483.24,[26] that amount includes fees and disbursements in the Action, and only $19,621.69 "was charged to the [mortgagor] by the Bank and collected by Cassels Brock from the sale proceeds ..."[27]

• Even when the legal fees had grown to $183,636.35, only $19,621.69 was charged to the mortgagor, the rest being for services rendered for the Bank in the Action.

(b) contempt not established

• The requirements for a finding of contempt are absent: (1) the order that was breached must state clearly and unequivocally what should and should not be done; (2) the party who disobeys the order must do so deliberately and wilfully; and, (3) the evidence must show contempt beyond a reasonable doubt: see *Bell ExpressVu Ltd. Partnership v. Torroni*, [2009] O.J. No. 356 (Ont. C.A.), at para. 21; *Royal Bank v. Yates Holdings Inc.*, [2008] O.J. No. 2343 (Ont. C.A.), at para. 3; *Hobbs v. Hobbs*, [2008] O.J. No. 3312 (Ont. C.A.), at para. 26.

• The burden of proof is on the party seeking to establish contempt: see *Bell ExpressVu Ltd. Partnership v. Torroni*, *supra*, at paras. 21 and 29.

• The party who is alleged to be in contempt is entitled to the most favourable interpretation of the order: see *Melville v. Beauregard*, [1996] O.J. No. 1085 (Ont. Gen. Div.), at para. 13.

• The mortgagor must show that Cassels Brock "deliberately or wilfully or knowingly did some act which was designed to result in the breach of a court order": see *Geremia v. Harb*, [2007] O.J. No. 305 (Ont. S.C.J.), at para. 31.

• "This is a dispute over the production of documents. [The contempt] motion is an attempt to misuse the court's contempt powers to obtain documentary disclosure it is not entitled to."

(c) accounts to be produced and assessed are not specified

• The Order for Assessment "does not specify what accounts are to be produced, it does not denote any invoice numbers, any timeframe that the relevant accounts fall into or the total amount of fees incurred charged to [the mortgagor]."

(d) any further productions would violate solicitor-client privilege

• "Any further production [by Cassels Brock beyond the legal accounts totalling $19,621.69] would necessitate a breach of privilege because the accounts that have not been produced relate to litigation fees incurred by the Bank in connection with the Action."[28]

(e) mortgagor is not the client

• "The only parties who may obtain an Order for Assessment on requisition by the local registrar, in accordance with s. 3 of the *Solicitors Act*, are the client or the solicitor ... [The mortgagor], not being a client of Cassels Brock ..., did not have standing under s. 3 of the *Solicitors Act* to requisition the Order for Assessment."

• The Bank is, and was, the client of Cassels Brock.

• A mortgagor, in power of sale proceedings, is not the client of the solicitors who represented the mortgagee: see *Petersons v. Shepherd, Osyany & King LLP*, [2010] O.J. No. 5636 (Ont. S.C.J.), at para. 7, a decision of an assessment officer; and *James & Associates v. Lall*, [2002] O.J. No. 1592 (Ont. S.C.J.), at para. 3.

(f) section 9 of Solicitors Act should have been utilized

• "Once a mortgagor becomes liable to pay a portion of the mortgagee's legal costs, the correct way to assess the accounts of the lawyer would be to proceed under the *Mortgages Act*, R.S.O. 1990, c. M. 40 or to proceed by way of s. 9 of the *Solicitors Act*."

• The mortgagor, "as a non-client, but as an interested party, ought to have commenced an application before a judge, pursuant to s. 9 of the *Solicitors Act*. Such an application would have required notice and on the return of same, the parties would have had the opportunity to make arguments regarding the scope of production ...": see *James & Associates v. Lall*, [2002] O.J. No. 1592 (Ont. S.C.J.), at para. 4; and *Petersons v. Shepherd, Osyany & King LLP*, [2010] O.J. No. 5636 (Ont. S.C.J.), at para. 7.

• "The effect of s. 9 is to ensure that a lawyer has the opportunity, in court, to defend claims made by a mortgagor or alternatively to seek clarification in regards to the scope of any production order ultimately made."

• The mortgagor, "as a non-client, but a paying party under the mortgage ... could only seek an Order for Assessment pursuant to s. 9 of the *Solicitors Act.*" The mortgagor, "as an interested party, ought to have commenced an application before a judge."

• Under s. 9, the mortgagor could only apply to assess the legal bills of the Bank that the mortgagor "is liable to pay." The Bank "has not charged the mortgagor anything beyond $19,621.69."

(g) deference owed to decision of an assessment officer

• The decision of an assessment officer, on a solicitor-client assessment, "is entitled to considerable deference ... because (i) an appellate judge may only interfere when an assessment officer has made an error in law, misapprehended the evidence, has made a palpable and overriding error on a factual matter or has reached an assessment amount that is so unreasonable that it constitutes an error in principle and (ii) in general, the courts give deference to a specialized administrative tribunal interpreting its own governing statute": see *Rabbani v. Niagara (Regional Municipality)*, [2012] O.J. No. 1868 (Ont. C.A.), at para. 6; *Samuel Eng & Associates v. Ho*, [2009] O.J. No. 6405 (Ont. C.A.), at para. 1; *Howe v. Labelle*, [1996] O.J. No. 759 (Ont. Div. Ct.), at para. 27, leave to appeal to S.C.C. refused, (1997), [1996] S.C.C.A. No. 514 (S.C.C.); and *Canada (Attorney General) v. Mowat*, 2011 SCC 53 (S.C.C.), at para. 16.

(h) contempt affidavit improperly sworn on information and belief

• Subrule 60.11(3) of the *Rules of Civil Procedure* provides that "an affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious ..." The Gilbert affidavit "is based entirely on information and belief with respect to all facts in support of the contempt motion." The statements made in the Gilbert affidavit are contentious and, therefore, "the affidavit is improper and should be struck."

IV Discussion

1. Timeliness in setting aside an order of a Registrar

35 Faced with what they believed to be an invalid order of a Registrar, Cassels Brock had two options: move to set it aside or comply. Either option must be exercised in a timely manner. What is timely in respect of the former?

36 Clause 37.14(1)(c) of the *Rules of Civil Procedure* addresses timeliness in moving to set aside an order of a Registrar:

> 37.14 (1) A party or other person who,
>
> . . . . .
>
> (c) is affected by an order of a registrar,
>
> may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

37 The Order for Assessment came to the attention of Cassels Brock on December 11, 2012, but they did not move to set it aside until April 9, 2013. An explanation for this four-month delay was not expressly offered in the Ward affidavit. But there was a steady stream of correspondence between both sides during those four months, and counsel for the mortgagor knew, as of December 21, 2012, that Cassels Brock took issue with the validity of the Order for Assessment. From that date, until the commencement of the contempt motion, I would categorize the conduct of Cassels Brock as an attempt to convince counsel for the mortgagor that portions of only two accounts (those dated June 20, 2012 and August 24, 2012) had been charged to the mortgagor and that only those two accounts should be produced and assessed.

38 Clause 37.14(1)(c) provides for a timeline that, in my opinion, is too rigid and truncated for this case. Fortunately, flexibility is possible as there is discretion to extend the time under this clause pursuant to rule 2.03: see *Wellwood v. Ontario Provincial Police* (2009), 66 C.P.C. (6th) 48 (Ont. Div. Ct.), reversed on other grounds (2010), 319 D.L.R. (4th) 412 (Ont. C.A.).

39 Rule 2.03 states:

> 2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

40 The delay in moving to set aside the Order for Assessment is attributable to the efforts by Cassels Brock to reason (or, more charitably perhaps, to negotiate) with counsel for the mortgagor.

41 It is noteworthy that the mortgagor has not presented evidence of prejudice caused by the delay.

42 The Order for Assessment was so clearly a nullity that Cassels Brock cannot be faulted for initially attempting to deal with the matter by corresponding with counsel for the mortgagor, rather than immediately moving to set it aside.

43 After considering all of the evidence, I think that the motion to set aside the Order for Assessment was brought with tolerable (and understandable) delay. In the interest of justice, Cassels Brock need not comply with clause 37.14(1)(c).

2. Section 3 of the Solicitors Act

44 The Order for Assessment was obtained pursuant to s. 3(a) of the *Solicitors Act.* I will set out s. 3 again for convenience: [Emphasis added]

3. Where the *retainer of the solicitor is not disputed* and there are *no special circumstances*, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,

(a) by *the client*, for the delivery and assessment of the solicitor's bill;

(b) by the client, for the assessment of a bill already delivered, within one month from its delivery;

(c) by the solicitor, for the assessment of a bill already delivered, at any time after the expiration of one month from its delivery, if no order for its assessment has been previously made.

45 The essential features of s. 3 are that: it is for use by a "solicitor" or by "the client" of that solicitor; the retainer must not be "disputed"; and, there are to be no "special circumstances."

46 I find that the Order for Assessment must be set aside on either of two grounds.

(a) "retainer of the solicitor is not disputed"?

47 There is, and was, no solicitor-client relationship between Cassels Brock and the mortgagor. How it could have been thought otherwise is puzzling. Cassels Brock did not perform any services for the mortgagor and there was no retainer agreement, written or oral, pursuant to which Cassels Brock was required to do so. Although "client" is not defined in s. 3 of the *Solicitors Act*, there is no acceptable definition of that term by which the mortgagor could be construed as the client of Cassels Brock. [29]

48 With the mortgagor not being a client of Cassels Brock, it follows that the retainer of the solicitor is disputed and that s. 3 of the *Solicitors Act* is unavailable for use by the mortgagor. Accordingly, the Order for Assessment must be set aside on that basis alone. (I add here the observation that the Registrar would have had no reason to doubt the assertion of counsel for the mortgagor that the latter was the client of Cassels Brock.)

49 My decision on this point is not without precedent. Counsel for Cassels Brock cites the decision of assessment officer R. Ittleman in *Petersons v. Shepherd, Osyany & King LLP*, [2010] O.J. No. 5636 (Ont. S.C.J.) which involved similar facts. There, a mortgagor obtained an order under s. 3(a) of the *Solicitors Act* for the delivery and assessment of a bill of fees, charges and disbursements of the lawyers for the mortgagee in power of sale proceedings. As a preliminary matter on the assessment (and on consent), the proceedings were reconstituted under s. 43(4) of the *Mortgages Act*, R.S.O. 1990, c. M. 40, with the parties thereafter shown in the title as "mortgagee" and "mortgagor" rather than "lawyer" and "client." Assessment Officer Ittleman stated, at para. 6, "... it goes without saying that a 'client' is a person who has entered into a relationship with a solicitor via a retainer agreement or has otherwise retained the solicitor to perform services" and "only a solicitor and a client may obtain an order on requisition from the Registrar pursuant to s. 3."

50 Although the question-of-law finding by assessment officer Ittleman that a mortgagor, in power of sale proceedings, is not the "client" under s. 3 of the *Solicitors Act*, is not binding upon me, it seems illogical to suggest that one who toils daily in the *Solicitors Act*, his "home statute," should not have the ear of this court. [30]

51 The opinion of the assessment officer in the *Petersons* case commands consideration even if, in law, it does not demand deference.

52 Having a less provocative pedigree is the decision of Hill J. in *James & Associates v. Lall*, [2002] O.J. No. 1592 (Ont. S.C.J.), a brief endorsement of six paragraphs, mined by counsel for Cassels Brock only recently. There, faced with facts similar to those at bar, Justice Hill, a formidable jurist, held, at paragraph 1, that the mortgagee (not the mortgagor) is the client of the solicitors and, therefore, the order obtained on requisition from the Registrar, under s. 3 of the *Solicitors Act*, was set aside.

(b) "no special circumstances"?

53 I have not found a definition of "special circumstances" that is sufficiently precise or on point to be of any use in this case. [31] (The words "special circumstances" also appear in s. 11 of the *Solicitors Act*, [32] but there they have a narrow meaning and "relate to the underlying principle that payment of the account implies that the client accepted that the account was proper and reasonable": see *Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP* (2010), 104 O.R. (3d) 93 (Ont. C.A.), at para. 30.)

54 The discrepancy between the legal accounts that, based upon the Notice of Sale and the Power of Sale Accounting, *appear* to have been charged to the mortgagor and those that, according to Cassels Brock, were *actually* charged raises a pre-assessment issue to be resolved and constitutes a special circumstance (of which the Registrar would have been unaware). On this basis, as well, s. 3 is not applicable here and the Order for Assessment must be set aside.

3. Contempt

(a) supporting affidavit sworn on information and belief

55 On behalf of Cassels Brock, an objection is taken to the Gilbert affidavit.

56 Subrule 60.11(3) of the *Rules of Civil Procedure* provides limitations on the supporting affidavit in contempt proceedings: [Emphasis added]

> 60.11(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief *only with respect to facts that are not contentious*, and the source of the information and the fact of the belief shall be specified in the affidavit.

57 The Gilbert affidavit (delivered in support of the contempt motion) consists entirely of statements made on information and belief. Yet, has the Ward affidavit (delivered on behalf of Cassels Brock) raised any facts that contradict those contained in the Gilbert affidavit? If "yes," only then has subrule 60.11(3) been breached by the mortgagor.

58 The Gilbert affidavit, as I see it, is merely a vehicle for the mortgagor to get before the court the Order for Assessment, the Appointment for Assessment, the Notice of Sale, the Power of Sale Accounting and miscellaneous correspondence, all of which are what they are and say what they say. The Gilbert affidavit does not raise contentious facts as contemplated by subrule 60.11(3).

59 The Gilbert affidavit, therefore, does not offend subrule 60.11(3) and is not improper.

(b) three-pronged test for contempt

60 In *G. (N.) c. Services aux enfants & adultes de Prescott-Russell* (2006), 82 O.R. (3d) 686 (Ont. C.A.), at para. 27, a three-pronged test for contempt was articulated: (1) "the order that was breached must state clearly and unequivocally what should and should not be done"; (2) "the party who disobeys the order must do so deliberately and wilfully"; (3) "the evidence must show contempt beyond a reasonable doubt."

61 Has this test been met?

(c) is the Order for Assessment clear and unequivocal?

62 The following legal principles are two of the more obvious ones that apply when considering whether an order is clear and unequivocal:

• "It must be clear to a party exactly what must be done to be in compliance with the terms of an order": see *Bell ExpressVu Ltd. Partnership v. Torroni* (2009), 94 O.R. (3d) 614 (Ont. C.A.), at para. 22, citing *Hobbs v. Hobbs* (2008), 54 R.F.L. (6th) 1 (Ont. C.A.), at paras. 26-28.

• "The person who is alleged to be in contempt is entitled to the most favourable interpretation of the order": see *Melville v. Beauregard*, [1996] O.J. No. 1085 (Ont. Gen. Div.), at para. 13.

63 Paragraph 1 of the Order for Assessment, stripped to its key provisions, reads:

1. IT IS ORDERED THAT the solicitor deliver to the client its accounts ... with respect to the power of sale proceedings ... as described in the Power of Sale Accounting attached hereto as Schedules "A" and "B".

64 As the reader now knows, Schedule "A" is titled "Power of Sale Accounting" and refers to "paid legal accounts" of $34,458.02. Schedule "B" consists of a copy of the Notice of Sale, which contains $153,483.24 and $2,500 for "legal costs paid" and "costs," respectively.

65 Consequently, the accounts in the Order for Assessment have been specified: they consist of the accounts that make up the sums of $34,458.02, $153,483.24 and $2,500.00. Although the Order for Assessment incorrectly does not distinguish between accounts billed to the Bank by Cassels Brock and accounts so billed but not charged to the mortgagor, it, nevertheless, is clear and unequivocal.

66 In letters such as the one dated January 10, 2013, Cassels Brock purport to be uncertain as to which accounts are sought for assessment and which for production. However, the Order for Assessment, on its face, does not suggest such a distinction.

67 I do not regard the correspondence between the parties as evidence that there is scope for confusion about the requirements of the Order for Assessment. The correspondence, effectively, as I have said, is merely an attempt by Cassels Brock to negotiate a mutually acceptable form of compliance with the Order for Assessment.

(d) deliberate and wilful?

68 Three legal principles are particularly apt at this stage of the contempt discussion:

• "The strength of a finding of deliberate disobedience of an order weakens progressively with the lack of clarity in the terms of the order against which the disobedience must be measured": see *Bell ExpressVu Ltd. Partnership v. Torroni*, *supra*, at para. 24.

• Contempt "consists of the intentional doing of an act which is in fact prohibited by the order. The absence of the contumacious intent is a mitigating but not an exculpatory circumstance:" see *Sheppard, Re* (1976), 12 O.R. (2d) 4 (Ont. C.A.), at p. 8.

• "It is not a defence to argue that an order is wrong or ineffective in law": see *Sussex Group Ltd. v. 3933938 Canada Inc.*, 2003 CarswellOnt 2789 (Ont. S.C.J. [Commercial List]), at para. 54, citing numerous supporting authorities.

69 The Ward affidavit seems to put forth two different defence theories. The first one is that there has been compliance with the Order for Assessment. This is seen, for example, at paragraph 5:

5. Cassels Brock has fully complied with the [Order for Assessment] and has provided accounts totalling a $19,621.69 charge.

This defence has no merit, as the Order for Assessment refers to more than accounts totalling $19,621.69.

70 The second defence theory is that the Order for Assessment is wrong. This is evident at paragraph 6:

> 6. [The Order for Assessment] is premised on an outdated (and subsequently revised and fully explained) notice of sale/power of sale accounting. This has been repeatedly explained to [counsel for the mortgagor] ...

The incorrectness of an order is not a valid excuse for non-compliance.

71 My take on the conduct of Cassels Brock is that they temporarily formed the intention not to comply with the Order for Assessment, while sensibly attempting to convince counsel for the mortgagor that the order was a nullity and, apart from that, too broad. Once it became obvious that the attempt would not succeed, Cassels Brock brought their motion. This temporary intention does not represent the deliberateness and wilfulness needed for a finding of contempt.

(e) has contempt been established beyond a reasonable doubt?

72 The requirement of the criminal burden of proof speaks to the seriousness of a contempt motion.

73 Because of my finding regarding "deliberate and wilful," I am not satisfied that the mortgagor has proved the intent necessary for contempt beyond a reasonable doubt.

4. Section 9 of the Solicitors Act

74 There can be no doubt that s. 9 of the *Solicitors Act* is available to the mortgagor. Section 9(1) reads: [Emphasis added]

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

75 And, where the person liable to pay a legal bill has not been given a copy, this may be ordered under s. 9(3):

> 9(3) For the purpose of such reference [for assessment], the court may order the solicitor, his or her assignee or representative, to deliver to the party making the application a copy of the bill upon payment of the costs of the copy.

76 A mortgagor is eligible to obtain an Order for Assessment, pursuant to s. 9(1), "as the party chargeable to pay the solicitors' bill might have done": see *James & Associates v. Lall*, [2002] O.J. No. 1592 (Ont. S.C.J.), at para. 1. However, "it is apparent that an application pursuant to s. 9(1) ..., by a party properly standing in the place of the immediate client, must be on notice to the solicitor returnable before a judge of the Court or Master, as the case may be": see *James & Associates v. Lall*, *supra*, at para. 4.

77 Further precedential support for the availability of s. 9(1) to the mortgagor is found in the *Petersons* case where, at paragraph 6, the assessment officer, after holding that a mortgagor is not a client who may requisition an Order for Assessment under s. 3, states: "Any other person who is liable to pay the solicitor's bill may apply to the Court pursuant to section 9 for an order referring the bill to an assessment officer for an assessment." And, at paragraph 7: "Upon the obtaining of such an Order from a judge, the assessment is to be conducted in the same fashion as an assessment which is ordered by the Registrar under section 3."

78 Counsel for the mortgagor argues that both Hill J. and the assessment officer mistakenly focused on the verb "apply," in s. 9(1), and erred in holding it to mean an application to the court. It is argued that "apply" does

not require a particular form of proceeding. Counsel states that the mere use of the verb "apply" in a statutory provision does not mandate commencement of a civil proceeding by way of application: see *Chilian v. Augdome Corp.*, 1991 CarswellOnt 422 (Ont. C.A.), at paras. 38-39. [33]

79 I agree that "apply," when mentioned in a piece of legislation, does not necessarily mean an application as defined by the *Rules of Civil Procedure*. However, here it does. (The application would be commenced pursuant to clause 14.05(2) of the *Rules of Civil Procedure*: "A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes.")

80 Counsel for the mortgagor further submits that, in s. 9(1), the phrase, "may apply to the court for an order referring to assessment *as the party chargeable therewith might have done*" [Emphasis added] means that because the party chargeable may obtain an order on requisition under s. 3 then so too may the mortgagor who, although not chargeable as the principal party, is liable to pay the bill of the solicitor.

81 I respectfully disagree with such an interpretation of s. 9(1) of the *Solicitors Act.* The phrase "as the party chargeable therewith might have done," refers to the *right or entitlement* to have an account assessed, not to the *procedure* by which the assessment comes about.

82 Counsel for the mortgagor relies upon *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 (Ont. C.A.), a case where a customer borrowed money from a bank pursuant to a loan agreement by which the customer was obliged to pay the legal fees of the bank related to the loan. The customer refused to pay the bill submitted by the law firm representing the bank. In proceedings commenced by the customer for delivery and assessment of the legal fees it was said, at paragraph 19:

> [19] Section 9(1) of the *Act* puts [the customer] in the same position as [the bank] in so far as the assessment of the [legal fees] is concerned.

83 I do not read this passage as supporting the argument that s. 3 is available to a non-client. It simply means that a non-client is entitled to have the account of a solicitor assessed, a proposition with which Cassels Brock does not disagree. Again, I make the distinction between the *right or entitlement* to have an account assessed and the *procedure* by which the assessment comes about.

84 Cassels Brock are not suggesting that their accounts should be spared an assessment; and I do not understand the other side to be saying that accounts not charged to the mortgagor should be assessed. The contentious point seems to be: what accounts have been charged to the mortgagor? I cannot make that determination based upon the Gilbert affidavit or the Ward affidavit, neither of which was the subject of out-of-court cross-examination. Oral evidence from a representative of the Bank is necessary to resolve that issue. [34]

5. The Mortgages Act

85 Section 43(4) of the *Mortgages Act*, R.S.O. 1990, c. M.40, provides for an assessment of the legal costs of a mortgagee by "any person interested":

> 43(4) A mortgagee's costs of and incidental to the exercise of a power of sale, whether under this Part or otherwise, may, without an order, be assessed by an assessment officer at the instance of any person interested.

86 This provision would seem to be the most logical avenue for a mortgagor to follow but here the mortgagor does not seek an assessment under the *Mortgages Act* and so I will not consider the matter further.

V Conclusion

87 As I have indicated, the motion by Cassels Brock is allowed and the Order for Assessment is set aside. The contempt motion of the mortgagor is dismissed. If the parties are unable to agree on the costs of these two motions, they should advise the trial co-ordinator and, at that time, also propose a timetable for the delivery of written submissions.

88 This leaves outstanding the motion by the mortgagor for an assessment under s. 9 of the *Solicitors Act* ("the s. 9 motion") for which, as I have said, I will require oral evidence from a representative of the Bank.

89 Rather than require the mortgagor to commence an application (for what I consider to be proper compliance with s. 9(1)), it would be more efficient and in the interest of justice if we were to make use of the s. 9 motion which is still before the court. All that must be done is to reconfigure the motion to permit *viva voce* evidence.

90 The mortgagor is entitled to an assessment of all legal accounts rendered to the Bank by Cassels Brock which have been charged to the mortgagor or for which it is said that the mortgagor is responsible in the power of sale proceedings. Those accounts must be identified and the Gilbert and Ward affidavits are insufficient for that purpose.

91 Counsel should obtain a date from the trial co-ordinator for the completion of the s. 9 motion, at which I will require oral testimony from a representative of the Bank to rebut the practical presumption that the legal accounts that appear (from the Notice of Sale and from the Power of Sale Accounting) to have been charged to the mortgagor were so charged.

92 If, beforehand, counsel require an order under subrule 39.03(1) — examining a person as a witness before the hearing of a motion — and it is disputed, they should arrange an attendance before me. I expect counsel for the mortgagor will want to examine a representative of the Bank.

93 Should counsel wish to proceed pursuant to subrule 39.02(1) — by conducting out-of-court cross-examinations on the affidavits delivered — an order is unnecessary.

94 If counsel are unable to agree on the orders needed, or the procedure to follow, they may seek directions and should contact the trial co-ordinator to determine if a personal court attendance is necessary. I remain seized of the s. 9 motion and all needed directions.

Order accordingly.

Footnotes

1 I do not think that this is procedurally possible. How does the mortgagor, the plaintiff in the Action, get to counterclaim against the Bank, a defendant in the Action and plaintiff by counterclaim? For pleadings, is the plaintiff not limited to a statement of claim, a defence to counterclaim and a reply? If there is another remedy sought by the plaintiff, is it not advanced by means of an amendment to the statement of claim? Am I missing something? Should I be wrong, somebody send word.

2 As explained on behalf of Cassels Brock, this amount is less than the summary judgment figure because it does not include outstanding property tax arrears, as they had yet to be paid. I do not understand this explanation because the Notice of Sale figure is $25,356.80 *less* than the summary judgment amount, but the tax arrears were $190,881.61 as of June 7, 2011.

3 I think that an order under s. 3(a) should be described as an "Order for Delivery and Assessment." An order pursuant to s. 3(b) or (c) would be an "Order for Assessment."

4 Section 6(1) states, in part: "Where a client ... obtains an order for the delivery and assessment of a solicitor's bill ... the bill shall be delivered within fourteen days, from the service of the order."

5 This is to be expected. Nine months separated the Notice of Sale and the completion of the sale. The accumulating property tax arrears alone account for $68,803.94 of the increase.

6 I cannot escape this digression. On April 14, 2008, the mortgagor, as vendor, entered into an agreement to sell the property to Canadian Equity Builders (In Trust), as purchaser. The transaction did not close. Canadian Equity Builders (In Trust) sued the mortgagor, in Court File No. CV-09-376981 (the "Second Action"), and obtained default judgment on May 25, 2010. The default judgment was set aside on January 18, 2012 [*Canadian Equity Builders v. 1578838 Ontario Inc.*, 2012 CarswellOnt 559 (Ont. S.C.J.)] by O'Marra J., on terms. One of the terms was that the Bank was directed to pay into court (in the Second Action) the surplus funds from the power of sale of the property. As an alternative, the Bank was permitted to pay those funds either to the mortgagor or to Canadian Equity Builders (In Trust), who then was required to pay the funds into court. Canadian Equity Builders (In Trust) is represented by the law firm DH Professional Corporation.

7 The Action.

8 Actually, it was September 17, 2012.

9 But counsel for the mortgagor obtained his Order for Assessment under s. 3 of the *Solicitors Act*, not s. 9. I do not know why he raised s. 9. He did not move for an order pursuant to s. 9 until April (and then, I suspect, only at the prompting of Cassels Brock).

10 This is an important point, because it is relied upon by Cassels Brock to support their expectation that the assessment would be adjourned on the first return date.

11 A concession that the Bank, not the mortgagor, is the client of Cassels Brock?

12 This appears to be an acknowledgement that only accounts charged to the mortgagor are to be produced for assessment.

13 There is no confusion. Counsel for the mortgagor simply does not believe the statement by Cassels Brock that only $19,621.69 has been charged to the mortgagor.

14 This alleged lack of clarity is relevant to the issue of whether Cassels Brock deliberately and wilfully breached the Order for Assessment. However, I do not regard the Order for Assessment as creating a distinction between accounts to be assessed and accounts to be produced.

15 This decision by the Bank is curious. Certainly, at no point after the judgment of Henderson J. on June 7, 2011 could the Bank have thought that it was proper to charge to the mortgagor legal fees and disbursements associated with the motions in the Action.

16 The Ward affidavit contains a number of paragraphs that lapse into legal argument (including the quoting of statutory provisions). No. No. No. An affidavit must be confined to evidence.

17 The parties are getting good mileage out of the Gilbert and Ward affidavits, with each doing double duty.

18 I explained earlier that I do not grasp these calculations.

19 It is true that, in s. 15 of the *Solicitors Act*, "client" is defined to include "a person who is or may be liable to pay the bill of a solicitor for any services." But the definition applies only to sections 16-33 (which deal with agreements between solicitors and clients). I do not know how counsel for the mortgagor could think that this definition in s. 15 advanced his position.

20 Cassels Brock are quite prepared to "justify the fees charged" once those fees have been properly identified as relevant (with relevant fees being those charged to the mortgagor).

21 Again, Cassels Brock do not oppose an assessment so long as the correct accounts are assessed.

22 Yet this does not mean that lawyers are without rights or that those rights should be trampled in a stampede to protect the public.

23 No one is suggesting otherwise.

24 I do not know why counsel for the mortgagor would make this submission, as the mortgagor has not sought an assessment under the *Mortgages Act.*

25 I thought that the mortgage balance in the Power of Sale Accounting was $1,477,543.81.

26 In fact, the figure from the Notice of Sale is $155,983.24 ($153,483.24 + $2,500.00).

27 But the fees of $153,483.24 were set out in the Notice of Sale as having been paid by the Bank and charged to the mortgagor. The Notice of Sale postdates the judgment of Henderson J. Consequently, the Bank was aware that the costs in the Action were reserved to the trial judge.

28 If there are legal fees that Cassels Brock has billed to the Bank that have not been charged to the mortgagor, their non-production is warranted more because of irrelevance than privilege.

29 I pointed out previously that "client" is defined in s. 15 of the *Solicitors Act*, but this definition is restricted to sections 16-33.

30 Counsel for the mortgagor was dismissive of the importance of a decision of an assessment officer suggesting, effectively, that it is no more binding upon me than an ill-fitting undergarment.

31 For example, statements in *Rooney v. Jasinski*, [1952] O.R. 869 (Ont. C.A.) are too general to be helpful.

32 Section 11 reads: "The payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case, in the opinion of the court, appear to require the assessment."

33 The analysis relied upon in the *Chilian* case was in the context of originating processes and it was held that the right to "apply" for relief under s. 247 of the *Business Corporations Act, 1982*, S.O. 1982, c. 4, included the right to proceed by way of action or application.

34 It seems that the Bank got caught with its hand in the cookie jar. But I am unable to determine, from the affidavits filed, how many cookies were taken and how many were put back.

 Original
2022 ONCA 463
Ontario Court of Appeal

Ilic v. Ducharme Fox LLP (Ducharme Weber LLP)

2022 CarswellOnt 8688, 2022 ONCA 463

Slavko Ilic (Applicant / Appellant) and Ducharme Fox LLP now known as Ducharme Weber LLP and Patrick Joseph Ducharme (Respondents / Respondents)

P. Lauwers, M.L. Benotto, David M. Paciocco JJ.A.

Heard: May 24, 2022
Judgment: June 15, 2022
Docket: CA C69949

Proceedings: reversing *Ilic v. Ducharme Fox LLP.* (2021), 2021 ONSC 6184, 159 O.R. (3d) 3012021 CarswellOnt 13137, E.M. Morgan J. (Ont. S.C.J.)

Counsel: Sean Dewart, Mathieu Bélanger, for Appellant
Patrick J. Ducharme, for Respondents

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.d Accounting and refunding by lawyer
VIII.5.d.iii Application for assessment, review, or taxation of account
VIII.5.d.iii.C Powers and duties of assessment officer

Headnote
Professions and occupations --- Lawyers — Fees — Accounting and refunding by lawyer — Application for assessment, review, or taxation of account — Powers and duties of assessment officer
Applicant client retained respondent solicitor to represent him on drug trafficking charges, and nature of retainer regarding whether parties agreed to block fee or hourly fee, was disputed — Respondents delivered interim accounts to client in September 2009 and October 2009 and final account in February 2010 — Client applied to Superior Court for order allowing assessment proceeding before assessment officer to continue and for directions — Application judge found that client was not caught off guard by requisition deadline of 30 days, because he had been represented by counsel who was alerted to jurisdictional issue by first assessment officer in 2010 — Application judge declined to exercise his jurisdiction to allow assessment to proceed — Applicant appealed — Appeal allowed — Application judge did not take intersecting governing principles into account in deciding that assessment order was nullity — Rather than use Price ruling to facilitate assessment, application judge used it to frustrate assessment — There was no basis on which fairness, as invoked by application judge, could justify bringing assessment proceedings to end in utter absence of any evidence of prejudice to respondents — Application

judge had authority to authorize assessment officer to complete assessment and to issue decision on merits, and his failure to do so was error.

Table of Authorities

Cases considered by *P. Lauwers J.A.*:

Bridgeland Riverside Community Assn. v. Calgary (City) (1982), 19 Alta. L.R. (2d) 361, 135 D.L.R. (3d) 724, 37 A.R. 26, 18 M.P.L.R. 180, 1982 CarswellAlta 82, 1982 ABCA 138 (Alta. C.A.) — considered

Clatney v. Quinn Thiele Mineault Grodzki LLP (2016), 2016 ONCA 377, 2016 CarswellOnt 7878, 86 C.P.C. (7th) 1, 399 D.L.R. (4th) 343, 131 O.R. (3d) 511, 349 O.A.C. 286 (Ont. C.A.) — referred to

Davies, Ward & Beck v. Union Industries Inc. (2000), 2000 CarswellOnt 1726, 48 O.R. (3d) 794, 132 O.A.C. 147, 46 C.P.C. (4th) 83 (Ont. C.A.) — referred to

International Brotherhood of Electrical Workers (IBEW) Local 773 v. Lawrence (2018), 2018 SCC 11, 2018 CSC 11, 2018 CarswellOnt 4370, 2018 CarswellOnt 4371, 420 D.L.R. (4th) 1, 16 C.P.C. (8th) 1, [2018] 1 S.C.R. 267, 2018 C.L.L.C. 220-030 (S.C.C.) — referred to

Lawrence v. IBEW, Local 773 (2017), 2017 ONCA 321, 2017 CarswellOnt 5650, 2017 C.L.L.C. 220-039, 138 O.R. (3d) 129, 420 D.L.R. (4th) 4, 17 C.P.C. (8th) 289 (Ont. C.A.) — referred to

Price v. Sonsini (2002), 2002 CarswellOnt 2255, 215 D.L.R. (4th) 376, 22 C.P.C. (5th) 1, 60 O.R. (3d) 257, 162 O.A.C. 85 (Ont. C.A.) — considered

Speciale Law Professional Corp. v. Shrader Canada Ltd. (2015), 2015 ONCA 856, 2015 CarswellOnt 18586 (Ont. C.A.) — referred to

Speciale Law Professional Corp. v. Shrader Canada Ltd. (2016), 2016 CarswellOnt 7592, 2016 CarswellOnt 7593 (S.C.C.) — referred to

Statutes considered:

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

s. 3(b) — referred to

s. 4(1) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 2.01 — referred to

R. 2.01(1)(a) — considered

R. 2.02(b) — referred to

***P. Lauwers J.A.*:**

I. Overview

1 The application judge dismissed the appellant's application for an order allowing the assessment of the respondent solicitor's accounts to continue before an Assessment Officer. I would allow the appeal for the reasons that follow.

II. Facts

2 In June 2008, the appellant retained Mr. Patrick Ducharme to represent him on drug trafficking charges. The nature of the retainer, that is, whether the parties had agreed to a block fee or an hourly fee, is disputed. The appellant entered a guilty plea in accordance with a plea bargain on December 8, 2009.

3 The respondents delivered interim accounts to the appellant on September 9, 2009 and October 13, 2009 and a final account on February 26, 2010. The total amount charged was $153,388, plus taxes and disbursements.

4 The appellant took out an order for assessment of the final account on April 26, 2010 and another for the assessment of the interim accounts on August 5, 2010. The respondents objected on the basis that the orders were requisitioned from the registrar after the 30-day window for doing so had passed under s. 3(b) of the Solicitors Act, R.S.O. 1990, c. S.15. Because one of the statutory prerequisites to the registrar's authority was absent, the registrar lacked jurisdiction to order an assessment: Davies, Ward & Beck v. Union Industries Inc., (2000), 48 O.R. (3d) 794, [2000] O.J. No. 1769, at paras. 12–13 (Ont. C.A.). This left the assessor without jurisdiction to conduct the assessment. However, Superior Court Justices have inherent jurisdiction to order the assessment of solicitor accounts, even after the 30-day window, and can order an assessment to proceed: *Price v. Sonsini*, 60 O.R. (3d) 257 (2002). Assessment Officer Stevens therefore adjourned the assessment to allow the appellant to bring a motion to a judge of the Superior Court of Justice to determine whether the assessment process should continue.

5 Instead of bringing the motion, the appellant issued a notice of action against the respondents on February 8, 2011 claiming $150,000 in damages. A defence was delivered in 2012. The action did not progress over the course of the next two years.

6 On March 10, 2014, counsel for the appellant wrote to the respondents seeking their consent to assess all the accounts rendered by the respondents and to consolidate the assessment proceeding with the civil action. On April 12, 2014, counsel for the respondents wrote back, stating that the respondents were "agreeable to having [the] account assessed". The parties agreed that the issue underlying the civil action was the assessment of the accounts. They agreed to cancel the scheduled examinations for discovery and proceed with the assessment process. This effectively settled the civil action.

7 On October 1, 2014, counsel for the respondents corresponded with appellant's counsel and noted that: "Notwithstanding anything Mr. Ilic may have done he's entitled to assess his account and to do so fairly. I trust my frankness . . . will enable both parties to complete this process in a fair and timely fashion". Later that day, respondents' counsel stated in an email that he will "do what it takes so that Mr. Ilic gets the review he's entitled to".

8 On November 2, 2014, appellant's counsel suggested abandoning the assessment procedure in Kitchener and re-applying in Toronto to expedite the process. Respondents' counsel acquiesced and noted that appellant's counsel could sign a consent to this effect on his behalf, as agent, if required.

9 On November 20, 2014, appellant's counsel took out an order from the registrar in Toronto to assess all three accounts. This order was served on the respondents the next day.

III. The Ittleman Assessment

10 Assessment Officer Richard Ittleman heard the evidence on the assessment on October 15, 2015, and on March 20 and 21, 2018. The parties made closing submissions in April 2018.

11 More than a year later, on October 11, 2019, the Assessment Officer asked the parties for submissions on the issue of his jurisdiction because the order for assessment had been issued by the registrar after the 30-day statutory window. The respondents argued that the Assessment Officer was without jurisdiction and that the assessment order was accordingly a nullity.

12 Well more than a year later, on February 2, 2021, the Assessment Officer accepted the respondents' argument and found that he did not have jurisdiction to conduct the assessment. He then stayed the matter, pending direction from the Superior Court.

13 I note in passing that it is hard to understand the astonishingly desultory pace of the Ittleman assessment.

IV. The Decision Under Appeal

14 The appellant applied to the Superior Court for an order allowing the assessment proceeding before the Assessment Officer to continue and for directions. In the alternative, the appellant sought an order *nunc pro tunc* referring the respondents' bills to a new assessment under s. 4(1) of the Solicitors Act.

15 The application judge declined to exercise his jurisdiction to allow the assessment to proceed. He found that the appellant was not caught off guard by the requisition deadline of 30 days, because he had been represented by counsel who was alerted to the jurisdictional issue by the first Assessment Officer in 2010. The appellant's failure to cure the procedural defect in the manner proposed by Assessment Officer Stevens weighed against granting the appellant the remedy he sought.

16 The application judge held that even if the respondents could be taken as having consented to proceeding by assessment hearing, consent could not confer jurisdiction where there was none. He held that neither Assessment Officer Ittleman nor any other Assessment Officer had jurisdiction to proceed in this matter. The protracted assessment procedure in which the parties had engaged was a nullity. This left the respondents' three accounts unchanged and enforceable as originally rendered.

V. Issues on Appeal

17 The appellant argues that the application judge made four errors: (i) in failing to consider that the assessment proceeded on consent of both parties and had been completed before the jurisdiction issue arose; (ii) in finding that the respondents were prejudiced by the failure to commence the assessment proceeding within the time required under the *Solicitors Act*, in the absence of any evidence of prejudice; (iii) in failing to consider binding authority on the proper approach to the assessment of solicitor accounts and to nullity in a civil procedure context; and (iv) in failing to consider the appellant's alternative claim for an order for assessment *nunc pro tunc* in the particular circumstances of this case.

18 In my view, the application judge made the first three errors. I next address these and also address the appellant's alternative claim in the disposition.

VI. The Governing Principles

19 There are two sets of governing principles at play in this appeal: those related to the assessment of solicitor accounts and those related to nullities in the civil procedure context.

(1) Principles Governing the Assessment of Accounts

20 Courts should facilitate, not frustrate, the assessment of solicitor accounts. Sharpe J.A. observed that: "As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the process": *Price v. Sonsini*, 60 O.R. (3d) 257 (2002), at para. 19. He added his view that "the courts should interpret legislation and procedural rules relating to the assessment of solicitors' accounts in a similar spirit". The reason for this approach, which Sharpe J.A. quoted from Orkin's *The Law of Costs*, is that, "if the courts permit lawyers to avoid the scrutiny of their accounts for fairness and reasonableness, the administration of justice will be brought into disrepute". Sharpe J.A. held that: "The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures", which "may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities". I cannot improve on Sharpe J.A.'s articulation of these principles.

21 Epstein J.A. added in Clatney v. Quinn Thiele Mineault Grodzki LLP, 2016 ONCA 377, 131 O.R. (3d) 511, at para. 77, that both the legislation and the court's inherent jurisdiction "respond to the public interest component

of the rendering of legal services and lawyers' compensation, and the importance of maintaining public confidence in the administration of justice". Again, I agree.

(2) The Doctrine of Nullity

22 It is time to put the doctrine of nullity out of its misery in relation to civil procedure because it "is difficult to reconcile with modern principles of civil procedure": Lawrence v. International Brotherhood of Electrical Workers (IBEW) Local 773, 2017 ONCA 321, 138 O.R. (3d) 129, at para. 21, per Sharpe J.A., aff'd, 2018 SCC 11, [2018] 1 S.C.R. 267.

23 Professor Garry Watson noted that: "The purpose of rule 2.01 of the Rules of Civil Procedure is, quite simply, to abolish the concept of a nullity in the Rules and to provide as much relief as possible from procedural defects . . . ". [1] Sharpe J.A. took the same approach in Lawrence, at para. 21: "[t]reating procedural flaws or defects as fatal nullities, incapable of amendment" is "inconsistent" with the Rules of Civil Procedure, R.R.O. 1990, Reg. 194." He quoted r. 2.01(1)(a), which states that "[a] *failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity*, and the court, may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute" (emphasis added).

24 In *Lawrence*, Sharpe J.A. quoted with approval the reasons of Kerans J.A. in *Bridgeland Riverside Community Assn. v. Calgary (City)*, 1982 ABCA 138, 37 A.R. 26, which noted, at paras. 27-28: "[N]o concept is more sterile than that which says that a proceeding is a nullity for failure of compliance with a procedural rule and without regard to the effect of the failure". Kerans J.A. added: "[N]o defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute". I cannot improve on this language, so I repeat it.

25 The principles that support the elimination of the concept of nullity from the interpretation and application of the *Rules of Civil Procedure* apply with necessary modification to the law governing the assessment of solicitor's accounts under the *Solicitors Act*.

VII. Application of the Governing Principles

26 The application judge did not take the intersecting governing principles into account in deciding that the assessment order was a nullity. His decision does not accord with the principle that "[p]ublic confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill": *Price* , at para. 19.

27 The application judge focused on the fact that the appellant had been told by the first Assessment Officer in 2010 to remedy the jurisdictional issue. He found the appellant's subsequent actions to be "many steps over the course of many years" taken with the knowledge of the jurisdictional problem, in direct contradiction of r. 2.02(b). In doing so he invoked Sharpe J.A.'s ruling in *Price*, quoted at length above.

28 Rather than use the *Price* ruling to facilitate the assessment, the application judge used it to frustrate the assessment. Although he accepted that the provisions of the *Solicitors Act* "are to be read generously in favour of the client party seeking fairness in challenging his or her solicitor's account", he held that fairness also "defines the limits of this generosity". He relied on *Price* in order to make this point, quoting Sharpe J.A.'s comments, at para. 20 of *Price* , that r. 2.02(b) "limits the right of a party to attack a proceeding or a step, document or order in a proceeding for irregularity if the party has taken a further step in the proceeding after obtaining knowledge of the irregularity".

29 But this turns *Price* on its head. In *Price* the solicitor did not raise the timing issue until five years *after* the assessment order was granted, *after* the solicitor had participated in a lengthy assessment, and *after* a finding was made against him. Sharpe J.A. held that the solicitor's failure to raise a timely objection to the procedure used to obtain the assessment order was "fatal": at para. 17. To allow the solicitor "to nullify the assessment now would be contrary to the law and to common sense". It was in this context that r. 2.02(b) was referenced in *Price* — to impugn the solicitor's decision to attack the assessment procedure after he had continued participating in it with full knowledge of the procedural defect.

30 Understood in their proper context, Sharpe J.A.'s comments in *Price* are much more aligned with the appellant's arguments in this case. Both parties had been made aware of the jurisdictional problem at the very first assessment hearing in 2010. Despite this, the respondents agreed in April 2014 to have the accounts assessed. This is what led to the cancellation of the discoveries scheduled in the civil action. The respondents' consent to an assessment procedure was reiterated in October 2014, when respondents' counsel wrote to the appellant's counsel and said that he will "do what it takes so that Mr. Ilic gets the review he's entitled to". Again, in November 2014 the respondents acquiesced to moving the file to Toronto in order to expedite the assessment process, even allowing the appellant's counsel to sign a consent on their behalf.

31 The respondents then actively participated in the assessment process from October 2015 to April 2018, including final arguments. Only after this lengthy process, in responding to the Assessment Officer's request for submissions on jurisdiction in November of 2019, did the respondents seek to use the issue of jurisdiction to resile from their agreement to the assessment. This was more than five years after agreeing to an assessment process in April 2014.

32 As Sharpe J.A. noted in *Price* , "[f]airness and the orderly administration of justice require that solicitors raise procedural objections in a timely manner. To allow such objections to be raised years later, after a lengthy and costly hearing on the merits, would be to invite chaos": at para. 21. See also, Speciale Law Professional Corp. v. Shrader Canada Ltd, 2015 ONCA 856, at paras. 24–26, leave to appeal refused, [2016] S.C.C.A. No. 56 (S.C.C.) , where a solicitor's involvement in the assessment process was held to be an "attornment" to the jurisdiction of the assessment order that had been issued on the basis of a "technical irregularity".

33 This is precisely what the respondents did in this case. They agreed to the assessment procedure despite knowing of the jurisdictional defect. They participated in the assessment process for the next five years before seizing on the jurisdiction issue as an exit. There is no basis on which fairness, as invoked by the application judge, could justify bringing the assessment proceedings to an end in the utter absence of any evidence of prejudice to the respondents.

34 The application judge had the authority to authorize the Assessment Officer to complete the assessment and to issue a decision on the merits. His failure to do so was an error.

35 Finally, I note that Mr. Ducharme made no substantive arguments touching on the issues. He simply asserted that the retainer agreement was for a block fee.

VIII. Disposition

36 I would allow the appeal. Because this matter has consumed enough of the system's resources, I would not order a new assessment. Assessment Officer Ittleman has heard the evidence and the arguments. I would order that he now issue his decision on the merits without delay.

37 The respondents shall pay costs to the appellant in the amount of $6,000 all-inclusive, as agreed.

***M.L. Benotto J.A.*:**

I agree.

***David M. Paciocco J.A.*:**

I agree.

Appeal allowed.

Footnotes

1 Garry D. Watson and Derek McKay, *Holmested and Watson Ontario Civil Procedure*, loose-leaf, (Toronto: Thomson Reuters, 2022), at para. 14-7.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Samson Cree Nation v. O'Reilly & Associés | 2013 ABQB 350, 2013 CarswellAlta 1065, 564 A.R. 169, [2013] A.W.L.D. 3212, [2013] A.W.L.D. 3220, [2013] A.W.L.D. 3221, [2013] A.W.L.D. 3226, [2013] A.W.L.D. 3274, [2013] A.W.L.D. 3275, 46 C.P.C. (7th) 341, 229 A.C.W.S. (3d) 565 | (Alta. Q.B., Jun 18, 2013)

2005 CarswellOnt 2444
Ontario Superior Court of Justice (Divisional Court)

Borden Ladner Gervais LLP v. Cohen

2005 CarswellOnt 2444, [2005] O.J. No. 2440, 140 A.C.W.S. (3d) 63, 199 O.A.C. 9

Borden Ladner Gervais LLP (Plaintiff / Respondent) and Rodney Cohen (Defendant / Appellant)

Cunningham A.C.J.S.C., Lane, Molloy JJ.

Heard: May 17, 2005
Judgment: June 14, 2005
Docket: 426/04

Proceedings: reversing *Borden Ladner Gervais LLP v. Cohen* (2004), 2004 CarswellOnt 6409 (Ont. S.C.J.); additional reasons at *Borden Ladner Gervais LLP v. Cohen* (2004), 2004 CarswellOnt 6410 (Ont. S.C.J.)

Counsel: Yan David Payne for Appellant
Elissa Goodman for Respondent

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.e Miscellaneous

Headnote
Barristers and solicitors --- Relationship with client — Fees — General
Law firm acted for client in two actions — Law firm brought action against client for recovery of fees — Client counterclaimed for breach of contract, breach of fiduciary duty and in negligence — In counterclaim, client pleaded that facts of litigations and his relationship with law firm constituted 'special circumstances' within Solicitors Act and pleaded that court had jurisdiction to order assessment — Law firm successfully moved for summary judgment to recover fees and dismiss counterclaim — Motion judge held that she was not to assess bills herself as if she was assessment officer and that she would not direct referral to assessment because there was no cross-motion to do so — Client appealed — Appeal allowed — Bills were referred to assessment officer — On motion for summary judgment, pleadings were before court and they contained clear request from client to refer matter for assessment — No cross-motion was necessary as court had authority to refer matter for assessment — Under s. 4(1) of Solicitors Act, client has twelve months from delivery date of bill to refer matter to assessment — Bill for one action was rendered April 30, 2003, and by September firm knew of client's dissatisfaction with their accounts — Period from April to September was well within eleven-month period during which there was no need to show 'special circumstances' for client to obtain referral to assessment — Failure of law firm to advise client of his right to request assessment was sufficient to entitle client to call on inherent jurisdiction of court to refer bills for assessment notwithstanding passage of time.

Table of Authorities

Cases considered:

Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson (1998), 1998 CarswellOnt 707, 157 D.L.R. (4th) 322, *(*sub nom. *Shapiro, Cohen, Andrews, Finlayson v. Enterprise Rent-A-Car Co.)* 107 O.A.C. 209, 38 O.R. (3d) 257, 80 C.P.R. (3d) 214, 18 C.P.C. (4th) 20 (Ont. C.A.) — considered

Fellowes, McNeil v. Kansa Canadian Management Services Inc. (1997), *(*sub nom. *Kansa Canadian Management Services Inc. v. Fellowes, McNeil)* 101 O.A.C. 238, 34 O.R. (3d) 301, 1997 CarswellOnt 2606 (Ont. C.A.) — considered

Minkarious v. Abraham, Duggan (1995), 129 D.L.R. (4th) 311, 44 C.P.C. (3d) 210, 27 O.R. (3d) 26, 1995 CarswellOnt 1341 (Ont. Gen. Div.) — referred to

Nemetz v. Kotsalidis (1995), 1995 CarswellOnt 4529 (Ont. Small Cl. Ct.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15

Generally — considered

s. 4(1) — considered

Decision By The Court:

Rodney Cohen appeals from the judgment of Herman J. dated June 23, 2004, granting summary judgment against him in favour of the plaintiff in the amount of $19,058.15 plus interest and costs and dismissing his counterclaim in which he sought referral of the plaintiffs' claim for unpaid legal fees to an assessment.

BLG acted for the appellant in two actions which, like the motion judge, we will call the POI action and the Amati action.

The POI action was begun in the Superior Court by the appellant's former employer seeking some $17,000 and BLG was retained in July 2000 to defend it. The sum claimed was the total advances made against commissions by POI and the appellant had claims for commissions to set against it of at least $8,000. In September POI admitted it was not owed more than $9563.10. At the pre-trial in October 2001 the judge suggested transferring the action to the Small Claims Court and this was finally done on February 1, 2002 upon terms that after judgment in the Small Claims Court, either party could apply to the Superior Court to deal with the costs of the action. The Small Claims Court directed an accounting reference and during that proceeding a settlement was reached and Mr. Cohen signed minutes recording that he would pay POI $9,000 "inclusive of all costs." The articling student who represented the appellant at the settlement expressed concern to his principal that he had not expressly discussed with the appellant the matter of possible recovery of costs in the Superior Court pursuant to the terms of the transfer to the Small Claims Court. The principal felt that he had made the costs situation clear and the appellant could not think that such a recovery would be possible. The motion judge held that it would have been preferable for the student to have specifically discussed the issue with the appellant but the appellant had read and signed the settlement with its reference to costs. Further he had previously been warned of the possibility that he would not recover all of his costs. There was no negligence on BLG's part.

Following the settlement, the appellant expressed disappointment at the result and that a student had been sent. At a lunch meeting, BLG offered to write off the student's time and their evidence was that the appellant accepted the compromise and agreed to pay the bill so reduced. However, a bill sent April 30, 2003 reflecting the compromise was not paid. In an email, dated September 15, 2003, the appellant told BLG that it was irrelevant whether he had agreed or not to accept the reduction as a final settlement as he could change his mind. The motion judge found that after the April 30 bill was sent, the one month limitation period in the *Solicitors Act* began to run and BLG had no responsibility to advise the appellant of his right to have the bill assessed because they thought it

was agreed to. As to the firm's duty to advise the appellant as to his right to call for an assessment after the firm knew he was dissatisfied, between August 13 2003 (when he copied his complaint to the Law Society to BLG's accounts payable) and September 15, 2003, (when an exchange of emails made the lack of agreement clear) the motion judge reasoned that the appellant would "have been no further ahead" because the one month period had long since passed.

The amount outstanding and sued for was $3740.08, but the appellant asserted that he had paid some $15,000 and so was charged approximately $18,000 to defend the claim.

The Amati application, made pursuant to the *Business Corporations Act*, was commenced in January 2002 by BLG as solicitors for the appellant against his employer Amati Bambu Ltd. and two of its directors, to recover wages, expenses, vacation pay and severance pay of some $187,500. It appears from the evidence that Amati was in financial difficulty in January 2002, and it only got worse. Because of this problem, BLG advised the appellant on February 5, 2002 that he ran a serious risk that if he were successful there would be no money in the company or in the directors. The firm also warned that there would be significant legal fees, as much as $10,000 just to get to the stage of cross-examining the Amati people. There are numerous other messages of the same general tenor in the exhibits. An offer was received to pay $8,000 which BLG recommended that the appellant accept. He did not and negotiated further on his own behalf, obtaining an offer of $11,000, but he received no money because Amati became bankrupt in April 2002. BLG invoiced the appellant $20,198.03 in fees and disbursements in relation to the Amati application of which only the first invoice, $5451.36, was paid.

In his counterclaim, the appellant pleaded that the facts of these two litigations and his relationship with BLG constituted 'special circumstances' within the *Solicitors Act* and pleaded that the Court had jurisdiction to order an assessment. Before the motion judge, the major point argued by counsel for the appellant was that the matter should be referred to assessment. The motion judge held that she was not to assess the bills herself as if she was an assessment officer, and that she would not direct a referral to assessment because there was no cross-motion to do so, nor had the appellant asked for BLG's consent and been refused.

In our view, the motion judge erred in the position that she took as to these points. As to her inquiry being limited to whether the hourly rate was reasonable and whether the hours docketed were actually spent, she relied on *Nemetz v. Kotsalidis*, [1995] O.J. No. 2386 (Ont. Small Cl. Ct.). This was a decision of a Deputy Judge sitting in Small Claims Court and the references relied on to the authority vested in him have simply no application to the authority vested in a Superior Court judge. No doubt as a result of reliance on this case, the motion judge did not consider the matter of "special circumstances" raised by the appellant. On a motion for summary judgment, the pleadings are before the court and they contained a clear request from the appellant to refer the matter for assessment. In our view, no cross-motion was necessary, the court had authority to do so and ought to have considered the issue in the light of the points discussed hereafter.

The counterclaim should have been regarded as a request to refer which clearly was refused by BLG. Long before this litigation began, the appellant sent a copy of his complaint letter to the Law Society to BLG and later sent a second copy with a note asking if they wished to meet or go to assessment. These were opportunities for BLG to consent to an assessment, albeit the appellant did not ask directly for their consent. Ordinarily, solicitors ought to consent to assessment even if it is asked for tardily.

Finally, in dealing with the effect of the passage of the one month time limit, the motion judge reasoned, as noted above, that the appellant did not lose through the failure of BLG to advise him of his right to have the bill assessed because the one month period had already passed. But there is another time period of importance: the twelve month limit provided by section 4(1) of the *Solicitors Act* and the inherent jurisdiction of the court during the eleven months from the end of the first month to the twelfth month. The POI bill was rendered April 30, 2003 and by September the firm knew of the appellant's dissatisfaction with their accounts. That was well within the eleven month period during which there was no need to show 'special circumstances' to obtain a referral to assessment:

see *Fellowes, McNeil v. Kansa Canadian Management Services Inc.* (1997), 34 O.R. (3d) 301 (Ont. C.A.), at 303 , where the court said:

> The Solicitors Act also does not provide for the referral to assessment of unpaid accounts rendered between one and twelve months prior to the application. However, here too, the court has an inherent jurisdiction. In the usual circumstances, little is required for that jurisdiction to be exercised. (emphasis added)

The inherent jurisdiction of the court to refer to assessment unpaid bills rendered in the eleven month period as to which the *Solicitors Act* is silent was also acknowledged in *Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson* (1998), 38 O.R. (3d) 257 (Ont. C.A.) in which the court cited with approval the passage just quoted from *Fellowes*. See also: *Minkarious v. Abraham, Duggan* (1995), 27 O.R. (3d) 26 (Ont. Gen. Div.). In our view, the failure of BLG to advise the appellant of his right to request an assessment played an important role in the development of the controversy over the bills and is sufficient to entitle the appellant to call on the inherent jurisdiction of the court to refer the bills for assessment notwithstanding the passage of time.

The right of a client to have the solicitor's account assessed is an important right and not to be taken away except in compelling circumstances. Its importance is emphasized by the Commentary to Rule 2.08 of the Rules of Professional Conduct:

> A lawyer should inform a client about his or her rights to have an account assessed under the *Solicitors Act*.

In the present case, the motion judge erred in granting summary judgement when the fairness of the accounts was not conceded and was not considered by her for reasons noted already. Solicitor's accounts are subject to the professional obligation of the solicitor to charge only fair and reasonable amounts. Efforts by solicitors to avoid assessment are not to be encouraged and in an action on a solicitor's account, the issues of fairness and reasonableness must be considered if pleaded, as they were here. A Superior Court judge has the jurisdiction to do so, but also has the option of referring the bills for assessment.

For these reasons, the case was not a suitable one for summary judgment. The judgment in appeal is set aside and the bills are referred to the Assessment Officer at Toronto for assessment. The appellant will have his costs here and before the motion judge. If the parties cannot agree the costs, they may make written submissions not exceeding three typed pages within ten days for the appellant and a further ten for the respondent.

Appeal allowed.

Most Negative Treatment: Reversed
Most Recent Reversed: Borden Ladner Gervais LLP v. Cohen | 2005 CarswellOnt 2444, [2005] O.J. No. 2440, 140 A.C.W.S. (3d) 63, 199 O.A.C. 9 | (Ont. Div. Ct., Jun 14, 2005)

2004 CarswellOnt 6409
Ontario Superior Court of Justice

2004 CarswellOnt 6409

Borden Ladner Gervais LLP v. Rodney Cohen

Herman J.

Heard: June 23, 2004
Judgment: June 25, 2004
Docket: 03-CV-259125 SR

Proceedings: additional reasons at *Borden Ladner Gervais LLP v. Cohen* (2004), 2004 CarswellOnt 6410 (Ont. S.C.J.); reversed on other grounds *Borden Ladner Gervais LLP v. Cohen* (2005), 2005 CarswellOnt 2444 (Ont. Div. Ct.)

Counsel: Elissa Goodman for Plaintiff
Yan Payne for Defendant

Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.10 Costs of particular proceedings
XXIV.10.i Motion for judgment
Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.g Miscellaneous

Headnote
Barristers and solicitors --- Relationship with client — Fees — General
Law firm represented client in two separate actions — Both claims involved relatively small amounts of money and amounts charged by law firm were seen by client to be out of proportion to value gained — Law firm brought action against client to recover fees — Client counterclaimed for breach of contract, breach of fiduciary duty and in negligence — Law firm moved for summary judgment for unpaid accounts and for dismissal of client's counterclaim — Motion granted — Client had agreed to pay bill based on $1,300 reduction but subsequently changed his mind — No evidence to support claim that law firm's work was negligent.

Table of Authorities
Cases considered by *Herman J.*:
Atlin v. Stabile (1992), 1992 CarswellOnt 2001 (Ont. Gen. Div.) — followed
Heller v. Labbett Insurance Services Ltd. (1997), 1997 CarswellOnt 3209, 14 C.P.C. (4th) 282 (Ont. Gen. Div.) — considered
Minkarious v. Abraham, Duggan (1995), 129 D.L.R. (4th) 311, 44 C.P.C. (3d) 210, 27 O.R. (3d) 26, 1995 CarswellOnt 1341 (Ont. Gen. Div.) — distinguished

Nemetz v. Kotsalidis (1995), 1995 CarswellOnt 4529 (Ont. Small Cl. Ct.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 76.07 [en. O. Reg. 533/95] — considered

***Herman J.*:**

1 The plaintiff, Borden Ladner Gervais LLP (BLG) moves for summary judgment for unpaid accounts plus interest and for dismissal of Rodney Cohen's counterclaim. Counsel for Mr. Cohen submits that the matter should be referred to an assessment.

2 The claim and counterclaim arise out of the representation of Mr. Cohen by BLG in two separate actions (the "POI" and "Amati" actions). The gist of BLG's claim is that services were performed for Mr. Cohen, those services were competently performed, Mr. Cohen has been billed for the services and money is owing.

3 The difficulty from Mr. Cohen's point of view arises from the fact that both claims involved relatively small amounts of money and the amounts charged by BLG were seen by Mr. Cohen to be out of proportion to the value gained. Mr. Cohen's main complaints are that the fees were excessive and that BLG did not recover costs. He also asserts that he was not advised of his right to have the bills assessed and that BLG did not consent to an assessment when requested. In addition to defending BLG's claim, Mr. Cohen has counterclaimed for damages arising from breach of contract, breach of fiduciary duty and negligence. In the alternative, he seeks an order for assessment.

4 With respect to the POI action, Mr. Cohen was particularly upset that he was unable to recover the Superior Court-related costs of that action. The claim was originally instituted by POI in Superior Court. At the pre-trial, it was ordered to be traversed to Small Claims Court. BLG negotiated a consent order with the other side that "after a judgment has been delivered by the small claims court, either party may apply by way of a motion to this court for a determination with respect to the costs of the action." By e-mail dated October 16, 2002, G. Hendell notes "spoke with Rodney — explained the theoretical possibility of recovering costs, but the practical obstacles (given the convoluted procedure that would apply in this case as per Mossip J's order) and the discretionary element."

5 The POI claim settled at an accounting hearing in the Small Claims Court on March 6, 2003. Mr. Cohen attended that hearing with an articling student from BLG. He signed minutes of settlement for "9,000.00 inclusive of all costs". Subsequent to that hearing, an e-mail from the articling student to his principal indicates concern that he and Mr. Cohen did not discuss the possibility of recovering costs and that Mr. Cohen might be under the impression that he might be able to recover some of his costs by way of motion to the Superior Court. The response from the lawyer to the student was: "Worst case scenario is if Rodney was somehow under the impression that there was still a possibility of him recovering his costs after the settlement. I think I was very clear with him as to how the costs thing worked (if the judgment is lower than our pre-existing offer to settle, then we are entitled to some costs), so I'm not sure how he could theink [sic] that him agreeing to pay them an amount over our settlement number gets him an opportunity to deal with the costs issue."

6 While it would likely have been preferable for the student to have specifically discussed the cost ramifications with Mr. Cohen, I cannot conclude that it was negligent not to do so. Mr. Cohen read and signed the agreement which said "inclusive of costs". He had also been previously advised with respect to the risk that he would not be able to recover all his costs.

7 Mr. Cohen sent Mr. Hendell an e-mail dated March 18, 2003, referring to the "small claims court debacle". He was upset that BLG had sent a student. Mr. Hendell arranged to meet with Mr. Cohen to discuss it. It is BLG's position that, at the meeting, Mr. Hendell agreed to deduct $1300 from the bill representing the student's time and Mr. Cohen agreed to pay the bill. A bill was sent out on April 30, 2003 reflecting the reduction, but was not paid. Mr. Cohen e-mailed Mr. Behrman on September 15, 2003 "Whether I told Garri [Hendell] that I was satisfied or not with the reduction that he told me on the phone is moot; I can change my mind. One thing I am sure of is that he could not have given me a final figure at lunch because he didn't know then how much the reduction would be."

8 Counsel for Mr. Cohen also claims that BLG should have advised Mr. Cohen of his right to an assessment. Under the *Solicitors' Act*, a client can apply to have one's bill assessed within one month after its delivery. The commentary to the Rule 2.08 of the Law Society of Upper Canada's Rules of Professional Conduct provides that lawyers should advise their clients of their right to have their account assessed. However, during the one month period, BLG believed it had an agreement with Mr. Cohen about paying a reduced bill. It is not my view that there was a duty on the part of BLG to advise Mr. Cohen of his right to seek an assessment during the period that they thought that the matter had been satisfactorily resolved.

9 Mr. Cohen subsequently complained to the Law Society who advised him that he could apply for an assessment. Had BLG advised Mr. Cohen of his right to seek an assessment once they were advised that Mr. Cohen was not happy with the resolution of the bill, he would have been no further ahead than he was when the Law Society advised him, that is, he still would have been beyond the one month period provided for in the *Solicitors Act*.

10 The information that the Law Society provided to Mr. Cohen was to the effect that, if he was beyond the one month period, he could either get his lawyer's consent to an assessment or, failing that, he could apply for a judge's order for a late assessment. Counsel for Mr. Cohen submits that BLG should have consented to the assessment when requested by Mr. Cohen. He referred to the case of *Minkarious v. Abraham, Duggan* (1995), 27 O.R. (3d) 26 (Ont. Gen. Div.), in which Edythe MacDonald J. stated that "as a general principle, solicitors should consent to having their accounts assessed when some objection is raised by a client". However, in that case, the evidence was that the client had tried to get an assessment but various law firms failed to act for him and missed limitation dates. This failure to act and the opposition of the solicitor resulted in a denial of the assessment remedy to the client.

11 Those are not the facts in this case. The evidence is that, in the case of one bill, Mr. Cohen hand-wrote a note to G. Hendell on the response he received from the Law Society as follows "They have recommended I proceed to the Assessment office. Do you want to meet to discuss this or go to assessment". With respect to the second matter, Mr. Cohen's handwritten note to the second lawyer on the Law Society's response was: "Copy of my letter to Law Society". I cannot conclude based on these letters that there was, in fact, a request for an assessment which was then refused. At most, Mr. Cohen asked Mr. Hendell whether he wanted to meet to discuss the matter or go to an assessment and, it would appear, that counsel chose to discuss the matter, since discussions did ensue. Unfortunately, the discussions did not successfully resolve the matter.

12 While Mr. Cohen claims that he was not advised of the cost implications or of the possibility that he would not be able to collect costs, the supporting documentation suggests otherwise. There were copies of several e-mails and correspondence appended to the Mr. Behrman's affidavit containing advice with respect to costs. I refer, for example, to an e-mail from Mr. Hendell to Mr. Cohen, dated June 26, 2001, in which Mr. Hendell says, "If this matter settles, I can pretty much guarantee you that it will be on the basis that you (certainly) and the other side (hopefully) forgo recovery of your legal fees. That's the sad truth". Another e-mail from Mr. Hendell to Mr. Cohen says "It really doesn't pay to litigate anything below $50,000. As I reiterated in my March 8, 2001 letter '...any amount up to $10,000 would make economic sense when compared with the costs of defending the claim.'" Other correspondence reflects similar advice.

13 The evidence is also that Mr. Cohen was warned on several occasions of the cost implications in pursuing the Amati claim. I refer, for example, to an e-mail to Mr. Cohen from Ira Nishisato which states: "Our initial advice to you was that you commence a court application for the purpose of bringing pressure to bear. We then advised you to settle the case quickly and without delay for the purpose of exacting as much money as possible from the defendants before their already precarious financial situation worsens. We were concerned that if the defendants went bankrupt or disposed of what assets they have, you might ultimately win a judgment that was worthless. Moreover, the cost of taking any further step in the litigation ...would likely cost you several thousand dollars which would quickly outpace any benefit to you. You are aware that the legal costs to date, relative to the amount of expected recovery, are already very considerable".

14 This is a motion for summary judgment under Rule 76.07 which provides that summary judgment shall be granted unless the judge is unable to decide the issues without cross-examination or it would be otherwise unjust to decide the issues. While Mr. Cohen's counterclaim is framed in negligence, there was nothing in the material before me to support a claim of negligence. The plaintiff submits that in a summary judgment motion of this nature, the mere allegations of the defendant that the work was performed negligently are insufficient in the absence of supporting evidence. Reference was made to the case of *Heller v. Labbett Insurance Services Ltd.*, [1997] O.J. No. 3425 (Ont. Gen. Div.) which involved an accountant suing for unpaid fees. The court held in favour of the accountant on the basis that there was no evidence that the plaintiff's work was incompetent, unauthorized or excessive, apart from the allegations in the defendant's affidavit.

15 The plaintiff referred to authority to the effect that in determining this claim, I am not sitting as an assessment officer. Rather, my inquiry should be limited to whether the hourly rate is reasonable, and whether the number of hours that were claimed to have been spent were, in fact, spent. (*Nemetz v. Kotsalidis*, [1995] O.J. No. 2386 (Ont. Small Cl. Ct.)). Counsel for the defendant does not take issue with the hourly rates that were charged nor with the proposition that the hours claimed to have been spent were spent. However, he contends that this is too narrow a basis on which to determine this case. Rather, he submits that I should refer the matter to an assessment. Indeed, the main submission urged by Mr. Cohen's counsel was not that there was evidence of negligence nor that summary judgment should not be granted because cross-examination was necessary. Rather, the submission was that the matter should be referred to assessment.

16 Counsel for Mr. Cohen suggested that BLG was trying to side-step an assessment. However, as indicated, I have not found that BLG refused a request for assessment nor has Mr. Cohen made a previous application for assessment. There was nothing to indicate that he was seeking an assessment until the counterclaim was filed. There was no countermotion presented to this effect nor, as noted, has any previous application been made to the court for an order. Under these circumstances, it was not illegitimate for BLG to try to recover fees owing by instituting a claim.

17 The case of *Atlin v. Stabile*, [1992] O.J. No. 1195 (Ont. Gen. Div.) is similar to the case before me in that it was a motion for summary judgment on a claim for a solicitor's unpaid fees where the client alleged negligence. Chapnik J. found that the defendant had agreed to pay the outstanding accounts. She also found that the claim for set-off of monies paid to the plaintiffs was unsupported by particulars.

18 On assessing the evidence before me, I find that Mr. Cohen did, indeed, agree to pay the bill based on a $1,300 reduction, but at some point after that, he changed his mind. I find no evidence to support the claim that BLG's work was negligent. The evidence also supports the conclusion that Mr. Cohen was advised on several occasions of the possible cost consequences. I also do not find that Mr. Cohen requested an assessment which was refused by BLG.

19 In the case of *Atlin* , the court was also asked to refer the matter to an assessment. As in this case, the defendant had not taken steps to obtain an assessment, and Chapnik J. refused to refer the matter for assessment

as it "would invite a multiplicity of proceedings which would add additional costs to the claim, while delaying the inevitable". Summary judgment was granted to the plaintiffs. In my view, a referral to an assessment in this case would similarly add to the number of proceedings and costs without appreciably changing the result.

20 I am satisfied on the basis of the materials before me that the plaintiffs have made out their case for summary judgment and that there is nothing to be gained from cross-examination. I am also of the opinion that the evidence does not support the allegation of negligence in the counterclaim. For the reasons given above, it is not my opinion that a referral to an assessment is warranted.

21 Summary judgment is therefore granted to the plaintiff in the amount of $19,058.15, plus the applicable pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*. The counterclaim is dismissed.

22 If the parties cannot agree on costs, they may make written submission to me. The plaintiff's submissions are to be provided within 15 days and the defendant's submissions are to be provided within 15 days after receipt of the plaintiff's submissions.

Motion granted.

Original
2009 ONCA 339
Ontario Court of Appeal

Jean Estate v. Wires Jolley LLP

2009 CarswellOnt 2250, 2009 ONCA 339, [2009] O.J. No. 1734, 177 A.C.W.S. (3d) 35, 265 O.A.C. 1, 310 D.L.R. (4th) 95, 47 E.T.R. (3d) 20, 68 C.P.C. (6th) 1, 96 O.R. (3d) 171

Peter Wong, Estate Trustee of the Estate of Tung Jean, deceased, and Peter Wong (Applicants / Respondents) and Wires Jolley LLP (Respondent / Appellant)

K.M. Weiler, R.G. Juriansz, J. MacFarland JJ.A.

Heard: December 10, 2008
Judgment: April 29, 2009
Docket: CA C48730

Proceedings: reversing *Jean Estate v. Wires Jolley LLP* (2008), 2008 CarswellOnt 1877, 39 E.T.R. (3d) 311, 90 O.R. (3d) 231, 294 D.L.R. (4th) 374, Low J. (Ont. S.C.J.)

Counsel: Graeme Mew for Appellant
Glenn Hainey, Christopher Stanek for Respondents

Related Abridgment Classifications
Alternative dispute resolution
II Submission or agreement to arbitrate
II.4 Variation or exclusion of statutory provisions
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.d Accounting and refunding by lawyer
VIII.5.d.iii Application for assessment, review, or taxation of account
VIII.5.d.iii.A Entitlement to assessment or review

Headnote
Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Application for assessment, review, or taxation of account — Entitlement to assessment or review
Client was executor and sole beneficiary of mother's sizeable estate encompassing assets in several countries and provinces — Client retained solicitor to deal with litigation arising from estate and agreed to solicitor's suggestion of fee agreement whereby solicitor was to receive "success fee" of 10 per cent of value of inheritance after will was probated and estate administered — Dispute arose as to quantum of success fee solicitor was entitled to — Solicitor served notice of arbitration on client pursuant to clause in fee agreement providing that disputes arising from or in relation to success fee were to be resolved by single designated arbitrator — Client's application to strike out solicitor's notice of arbitration was granted — Solicitor appealed — Appeal allowed — Order of application judge striking notice to arbitrate was set aside — Application judge erred in concluding that solicitor and his or her client could not agree to have arbitrator, as opposed to Superior Court judge, hear contingency fee dispute — Public policy prevented parties from contracting out of statutory protections contained in Solicitors Act — While parties were free to select different decision maker than one contemplated in Act, any decision maker appointed to hear dispute must make his decision in accordance with substantive statutory rights.

Alternative dispute resolution --- Submission or agreement to arbitrate — Variation or exclusion of statutory provisions

Client was executor and sole beneficiary of mother's sizeable estate encompassing assets in several countries and provinces — Client retained solicitor to deal with litigation arising from estate and agreed to solicitor's suggestion of fee agreement whereby solicitor was to receive "success fee" of 10 per cent of value of inheritance after will was probated and estate administered — Dispute arose as to quantum of success fee solicitor was entitled to — Solicitor served notice of arbitration on client pursuant to clause in fee agreement providing that disputes arising from or in relation to success fee were to be resolved by single designated arbitrator — Client's application to strike out solicitor's notice of arbitration was granted — Solicitor appealed — Appeal allowed — Order of application judge striking notice to arbitrate was set aside — Application judge erred in concluding that solicitor and his or her client could not agree to have arbitrator, as opposed to Superior Court judge, hear contingency fee dispute — Public policy prevented parties from contracting out of statutory protections contained in Solicitors Act — While parties were free to select different decision maker than one contemplated in Act, any decision maker appointed to hear dispute must make his decision in accordance with substantive statutory rights.

The client was the executor and sole beneficiary of his mother's sizeable estate encompassing assets in several countries and provinces. The client retained the solicitor to deal with litigation arising from the estate and agreed to the solicitor's suggestion of fee agreement whereby the solicitor was to receive a "success fee" of 10 per cent of the value of the inheritance after the will was probated and the estate administered. A dispute arose as to the quantum of the success fee the solicitor was entitled to.

The solicitor served notice of arbitration on the client pursuant to a clause in the fee agreement providing that disputes arising from or in relation to the success fee were to be resolved by a single designated arbitrator. The client's application to strike out the solicitor's notice of arbitration was granted. The solicitor appealed.

Held: The appeal was allowed.

Per Weiler J.A. (MacFarland J.A. concurring): The application judge erred in concluding that a solicitor and his or her client could not agree to have an arbitrator, as opposed to a Superior Court judge, hear a contingency fee dispute. Public policy prevented the parties from contracting out of the statutory protections contained in the Solicitors Act. While the parties were free to select a different decision maker than the one contemplated in the Act, any decision maker appointed to hear the dispute must make his decision in accordance with the substantive statutory rights.

Per Juriansz J.A. (concurring in result): The appeal should be allowed, the order should be set aside, and the parties should be referred to arbitration. Application judge should have declined to entertain the application to strike the notice of arbitration and, instead, should have referred the parties to the arbitrator. The basis upon which the application judge decided to deal with the application was clearly inadequate. The application judge erred in failing to find that referral to arbitration would be best for the arbitration process. If judicial control on the basis of public policy was necessary, that control should be exercised on review of the arbitration award. There was no justification for departure from the general rule of systematic referral to the parties to arbitration.

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Automatic Systems Inc. v. Bracknell Corp. (1994), 1994 CarswellOnt 226, 13 C.L.R. (2d) 171, 18 O.R. (3d) 257, 12 B.L.R. (2d) 132, 113 D.L.R. (4th) 449, 27 C.P.C. (3d) 56, 74 O.A.C. 111 (Ont. C.A.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Bisaillon c. Concordia University (2006), 51 C.C.P.B. 163, *(*sub nom. *Bisaillon v. Concordia University)* 149 L.A.C. (4th) 225, *(*sub nom. *Bisaillon v. Concordia University)* 348 N.R. 201, *(*sub nom. *Concordia v. Bisaillon)* 2006 C.L.L.C. 220-033, 2006 C.E.B. & P.G.R. 8200, 2006 SCC 19, 2006 CarswellQue 3689, 2006

CarswellQue 3690, *(*sub nom. *Bisaillon v. Concordia University)* 266 D.L.R. (4th) 542, [2006] 1 S.C.R. 666 (S.C.C.) — referred to

Borden & Elliot v. Barclays Bank of Canada (1993), *(*sub nom. *Lorenzetti Development Corp. v. Barclays Bank of Canada)* 106 D.L.R. (4th) 478, 1993 CarswellOnt 1071, 15 O.R. (3d) 352 (Ont. Gen. Div.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — referred to

Dalimpex Ltd. v. Janicki (2003), 35 B.L.R. (3d) 41, 64 O.R. (3d) 737, 172 O.A.C. 312, 228 D.L.R. (4th) 179, 2003 CarswellOnt 1998, 35 C.P.C. (5th) 55 (Ont. C.A.) — referred to

Dancap Productions Inc. v. Key Brand Entertainment Inc. (2009), 2009 ONCA 135, 2009 CarswellOnt 710 (Ont. C.A.) — considered

Desputeaux c. Éditions Chouette (1987) inc. (2001), 2001 CarswellQue 699, [2001] R.J.Q. 945, *(*sub nom. *Desputeaux v. Éditions Chouette (1987) Inc.)* 16 C.P.R. (4th) 77 (Que. C.A.) — referred to

Desputeaux c. Éditions Chouette (1987) inc. (2003), *(*sub nom. *Desputeaux v. Éditions Chouette (1987) inc.)* 301 N.R. 220, 223 D.L.R. (4th) 407, 23 C.P.R. (4th) 417, [2003] 1 S.C.R. 178, 2003 SCC 17, 2003 CarswellQue 342, 2003 CarswellQue 343 (S.C.C.) — followed

Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd. (1992), *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Ltd.)* 66 B.C.L.R. (2d) 113, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Inc.)* 22 W.A.C. 145, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Inc.)* 11 B.C.A.C. 145, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Ltd.)* 43 C.P.R. (3d) 390, 1992 CarswellBC 95 (B.C. C.A.) — referred to

Javornich v. McCarthy (2007), 2007 CarswellOnt 4107, 2007 ONCA 484, 225 O.A.C. 201 (Ont. C.A.) — referred to

Muroff c. Rogers Wireless inc. (2007), 36 B.L.R. (4th) 79, 2007 SCC 35, 2007 CarswellQue 6312, 2007 CarswellQue 6313, 44 C.P.C. (6th) 373, 365 N.R. 177, *(*sub nom. *Rogers Wireless Inc. v. Muroff)* 284 D.L.R. (4th) 675, *(*sub nom. *Rogers Wireless Inc. v. Muroff)* [2007] 2 S.C.R. 921 (S.C.C.) — referred to

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R. v. Ulybel Enterprises Ltd. (2001), 2001 SCC 56, 2001 CarswellNfld 239, 2001 CarswellNfld 240, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 45 C.R. (5th) 1, [2001] 2 S.C.R. 867 (S.C.C.) — referred to

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Union des consommateurs c. Dell Computer Corp. (2007), 2007 CarswellQue 6310, 2007 CarswellQue 6311, 2007 SCC 34, 44 C.P.C. (6th) 205, *(*sub nom. *Dell Computer Corp. v. Union des consommateurs)* 284 D.L.R. (4th) 577, *(*sub nom. *Dell Computer Corp. v. Union des consommateurs)* [2007] 2 S.C.R. 801, 34 B.L.R. (4th) 155, *(*sub nom. *Dell Computer Corp. v. Union des consommateurs)* 366 N.R. 1 (S.C.C.) — followed

Cases considered by *R.G. Juriansz J.A.*:

Dalimpex Ltd. v. Janicki (2003), 35 B.L.R. (3d) 41, 64 O.R. (3d) 737, 172 O.A.C. 312, 228 D.L.R. (4th) 179, 2003 CarswellOnt 1998, 35 C.P.C. (5th) 55 (Ont. C.A.) — considered

Dancap Productions Inc. v. Key Brand Entertainment Inc. (2009), 2009 ONCA 135, 2009 CarswellOnt 710 (Ont. C.A.) — considered

Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd. (1992), *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Ltd.)* 66 B.C.L.R. (2d) 113, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Inc.)* 22 W.A.C. 145, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Inc.)* 11 B.C.A.C. 145, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Ltd.)* 43 C.P.R. (3d) 390, 1992 CarswellBC 95 (B.C. C.A.) — considered

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Statutes considered by *K.M. Weiler J.A.*:

Arbitration Act, 1991, S.O. 1991, c. 17

Generally — referred to

s. 2(1) — considered

s. 7(2) — considered

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

Code de procédure civile, L.R.Q., c. C-25

en général — referred to

art. 940.1 [ad. 1986, c. 73, art. 2] — considered

art. 943 — referred to

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

Copyright Act, R.S.C. 1985, c. C-42

s. 37 — referred to

International Commercial Arbitration Act, R.S.O. 1990, c. I.9

Generally — referred to

s. 8 — considered

s. 13 — referred to

Protection du consommateur, Loi sur la, L.R.Q., c. P-40.1

en général — referred to

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

s. 15 "contingency fee agreement" — referred to

s. 16 — considered

s. 17 — referred to

ss. 17-19 — referred to

ss. 17-33 — referred to

s. 18 — referred to

s. 19 — referred to

s. 23 — considered

s. 24 — considered

s. 28.1 [en. 2002, c. 24, Sched. A, s. 4] — considered

s. 28.1(10) [en. 2002, c. 24, Sched. A, s. 4] — considered

s. 28.1(11) [en. 2002, c. 24, Sched. A, s. 4] — considered

s. 28.1(11)(a) [en. 2002, c. 24, Sched. A, s. 4] — considered

Statut professionnel des artistes, des arts visuels, des métiers d'art et de la littérature et sur leurs contrats avec les diffuseurs, Loi sur le, L.R.Q., c. S-32.01

art. 37 — referred to

Statutes considered by *R.G. Juriansz J.A.*:

International Commercial Arbitration Act, R.S.O. 1990, c. I.9

s. 13 — considered

Rules considered by *K.M. Weiler J.A.*:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.03(1) "proceeding" — referred to

Rules considered by *R.G. Juriansz J.A.*:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

Treaties considered by *K.M. Weiler J.A.*:

UNCITRAL Model Law on International Commercial Arbitration, 1985, 24 I.L.M. 1302

Generally — referred to

Article 5 — considered

Article 8 — considered

Article 8 ¶ 1 — considered

Article 16 — considered

Article 16 ¶ 3 — referred to

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 330 U.N.T.S. 3; T.I.A.S. No. 6997

Generally — referred to

Treaties considered by *R.G. Juriansz J.A.*:

UNCITRAL Model Law on International Commercial Arbitration, 1985, 24 I.L.M. 1302

Generally — referred to

Article 8 — referred to

Article 8 ¶ 1 — referred to

Article 16 — considered

Article 16 ¶ 1 — considered

Article 16 ¶ 3 — considered

Article 17 — considered

Article 17 ¶ 1 — considered

Article 34 — referred to

Article 34 ¶ 2(a)(i) — referred to

Article 34 ¶ 2(b)(i) — referred to

Article 34 ¶ 2(b)(ii) — referred to

Article 36 ¶ 1(b) — referred to

***K.M. Weiler J.A.*:**

Overview

1 The appellant, an Ontario law firm, and the respondent, a client who was the estate trustee and sole beneficiary of his mother's estate, entered into a fee agreement that contained a "success fee" respecting litigation over the estate. The "success fee" is a contingency fee, which the parties agreed would be 10 per cent of the value of the assets of the estate. They also agreed that disputes in relation to the contingency fee would be resolved by arbitration.

2 A dispute arose as to which of two dates should be used to value the assets for the purpose of applying the contingency fee. The appellant served a notice of arbitration. The respondent brought an application in the Superior Court to strike it out on the basis that the agreement to arbitrate was unenforceable for reasons of public policy. The application judge agreed and struck out the notice of arbitration.

3 The appellant submits that the application judge erred in assuming jurisdiction to determine whether the dispute was arbitrable. It submits that the application judge should have deferred jurisdiction to the arbitrator. In the alternative, the appellant submits that an agreement to arbitrate a contingency fee dispute between a solicitor and a client is valid and that the agreement with the respondent should be enforced.

4 The respondent's position is that an agreement to arbitrate a contingency fee dispute is an agreement to contract out of the client protection provisions of the *Solicitors Act*, R.S.O. 1990, c. S.15. Accordingly, he submits that the agreement to arbitrate is unenforceable for reasons of public policy and asks this court to uphold the application judge's order striking the notice to arbitrate.

5 This appeal raises two issues. The first is whether the application judge erred by determining the enforceability of the arbitration clause contained in the contingency fee agreement, instead of leaving this determination for the arbitrator. The second is whether she erred in holding that an agreement to arbitrate a contingency fee dispute is prohibited and cannot be enforced on account of public policy.

6 In relation to the first issue, I would hold that the application judge did not err in assuming jurisdiction to decide the enforceability of the arbitration clause in the contingency fee agreement. I acknowledge that, as a general rule, the enforceability of an arbitration clause should be decided by the arbitrator. However, in *Union des consommateurs c. Dell Computer Corp.*, [2007] 2 S.C.R. 801 (S.C.C.) ("*Dell*"), at paras. 84-85, the Supreme Court of Canada recognized that exceptionally a Superior Court judge can assume jurisdiction over the threshold

issue of enforceability when an important question of law is raised and only cursory reference to the evidence is necessary. The Supreme Court added a proviso that the issue must not be raised for purposes of delay: para. 86.

7 Two important questions of law arise in this case which do not require extensive reference to the evidence. The first is whether an arbitrator, as opposed to a judge, can decide a contingency fee dispute. The second is whether the parties can contract out of the statutory protection giving a client the right to an assessment of whether the contingency fee is fair and reasonable. No suggestion of delaying tactics arises on this record. While the application judge did not turn her mind to the requirements in *Dell*, I would hold that, having regard to them, the prerequisites for her to assume jurisdiction at first instance were met in this case.

8 Having decided that the application judge correctly assumed jurisdiction, I must decide whether she correctly determined the questions of law. The application judge was of the opinion that enforcing the arbitration agreement would result in the respondent losing the statutory protections of the *Solicitors Act*. There are two rights in ss. 23 and 24 of the *Solicitors Act*. One is the right to have a Superior Court judge decide a contingency fee dispute. By their agreement the parties chose to have an arbitrator as opposed to a judge resolve any disputes. In *Dell*, at para. 160, the Supreme Court held that the right to arbitration is a substantive right and that the parties' choice should be respected. I would apply *Dell*. The second right contained in ss. 23 and 24 is the right to an assessment of whether the contingency fee is fair and reasonable. The arbitration agreement is silent as to the powers of the arbitrator. If this right was lost, the arbitrator's decision would not be a decision on the merits and the fairness of the result would be compromised. Both the broad public policy favouring the resolution of disputes on the merits and the public policy underlying the remedies given to a client in the *Solicitors Act* militate against this result. I would hold that a party cannot contract out of his or her right to have an independent assessment of whether the contingency fee is fair and reasonable by an independent assessor.

9 Thus, I would hold that the application judge erred in concluding that a solicitor and his or her client could not agree to have an arbitrator, as opposed to a Superior Court judge, hear a contingency fee dispute. However, apart from the decision maker, I would agree with her that public policy prevents the parties from contracting out of the statutory protections contained in the *Solicitors Act* and any arbitration must be conducted in accordance with them.

10 For ease of reference the relevant provisions of the *Solicitors Act* are attached as Appendix A to these reasons.

Facts

11 As the application judge noted, the facts are not in dispute.

12 The respondent Peter Wong's parents died in 1999. The respondent is the executor of his mother's estate and its sole beneficiary. His parents had significant assets in various jurisdictions including China, Hong Kong, British Columbia, Québec, Japan, Singapore and Ontario.

13 Litigation over the assets arose in several jurisdictions. In Ontario, a dispute arose concerning entitlement to an account held jointly by the respondent's parents at the Royal Bank of Canada in Toronto. The respondent retained David Wires and Karen Jolley - at that time members of another firm - to make a claim to the funds. Before the litigation was resolved, Wires and Jolley left to form a new firm, the appellant Wires Jolley LLP. The respondent transferred the file to Wires Jolley.

14 In March 2004, Mr. Wires informed the respondent that he was exploring the possibility of a global mediation of all issues involving the respondent's parents' estates. It was thought that the mediation would be preferable to litigation to resolve the various conflicts of laws issues arising in each jurisdiction. In May 2004, the parties agreed to a mediation to be conducted in Hong Kong.

15 During the preparation for the mediation, the parties discussed a contingency fee arrangement. The parties agreed on a fee arrangement in late August 2004 under which the appellant would receive a fee of 10 per cent of the value of the respondent's inheritance after deducting certain liabilities and expenses in the event that the mediation was successful.

16 The mediation was successful. On September 12, 2005, almost a year after the minutes of settlement were signed, the appellant sent a letter to the respondent setting out two options. Under Option 1, the appellant would assess its accounts before the court using the original retainer agreement. The assessment was to be based on the value of the services. The letter restated the appellant's policy "to charge fees which are fair and reasonable" set out in earlier correspondence and then went on to list the factors that the appellant considered relevant to such an assessment in accordance with the case law.

17 Option 2 proposed a fee of $212,547.27 and a success fee "as discussed and recorded in earlier correspondence" of 10 per cent of the net value of the assets the respondent received or was entitled to receive from the estate. There is no issue that the success fee is a contingency fee agreement within the meaning of the *Solicitors Act*.

18 Option 2 also contained a number of other stipulations including the following arbitration clause:

> Disputes arising from or in relation to the success fee will be resolved by arbitration in Toronto with a single arbitrator from ADR Chambers.

19 After receiving the benefit of independent legal advice, the respondent chose Option 2. He concedes that at the time of entering into the fee agreement, he embraced the idea of keeping the matter private.

20 In July 2007, Mr. Wires met with the respondent in Vancouver to discuss the administration of the estate. Mr. Wires suggested that 10 per cent of the current value of the assets equalled a success fee of $2,000,000. The respondent did not accede to this suggestion as he was of the opinion that the contingency fee should be calculated based on the value of the estate as of January 1999. Based on the January 1999 valuation date, he estimated the contingency fee was approximately $461,115.92. The relationship then became strained.

21 The appellant rendered an account to the Estate of Tung Jean and Peter Wong based on the July 2007 valuation date and claimed a success fee of over $2,000,000. It also served the respondent with a notice of arbitration pursuant to the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 (the "*ICAA*").

22 The respondent replied with an application to the Superior Court to strike the notice on the ground that it was an attempt to oust the Superior Court's jurisdiction under ss. 23 and 24 of the *Solicitors Act*, which provide that a fee agreement will be enforced by the Superior Court if the court is of the opinion that the agreement is fair and reasonable. If not, the agreement will be declared to be void. The respondent also contended that the account submitted by the appellant was not due and owing because he had not received distribution of all the estate assets.

The Application Judge's Reasons

23 The application judge recognized that, as a general rule, an arbitral tribunal can and should determine the existence and extent of its own jurisdiction. She assumed jurisdiction, however, because:

> ...the court also has jurisdiction to determine whether an agreement between a solicitor and client, or a term thereof, is enforceable. The parties are now before the court and there is no practical or theoretical purpose served in deferring the argument to the arbitrator (para. 26).

24 The application judge accepted that private commercial disputes can be left to private arbitration, but she was of the view that "[t]he relationship between members of the legal profession and the members of the public that they serve however, is one which transcends a mere commercial transaction" (para. 28).

25 The application judge held that the arbitration clause was inconsistent with clients' rights under the *Solicitors Act* to have contingency fee agreements assessed by a court to determine whether they are fair and reasonable. In her view, "an agreement to arbitrate is in effect an agreement by the client to relinquish his recourse to the court and ought not to be enforced" (para. 31). The application judge held that a client's right to have judicial supervision over a fee agreement with his or her lawyer is supported by reasons of public policy. At paras. 28-30, she held:

> The relationship between members of the legal profession and the members of the public that they serve... is one which transcends a mere commercial transaction. The profession has a monopoly over the provision of legal services and the occasions upon which lawyers interact with members of the public occur often when the latter are in the most vulnerable of circumstances. There is therefore an overarching public interest to be served in the court's supervision of the profession's monopoly.
>
> One may be entirely confident that the chosen arbitrator in this case ... would act judicially and skillfully in deciding the issues between the parties. There is, however, a residual institutional duty imposed on the court to have regard to the public interest and the broader ramifications of the decision it is to make that is not owed by a private arbitrator resolving a dispute privately...
>
> Because of the profession's monopoly and the imbalance in bargaining power that so often works in the solicitor's favour, it is in the public interest that the court retain a supervisory role to ensure that fee agreements are fair and reasonable and it is for that purpose that the *Solicitors Act* confers access to the court and establishes a mechanism or protocol for the determination of the reasonableness of a solicitor's fees...

26 Accordingly, she ordered that the notice of arbitration served under the *ICAA* by the appellant be struck out.

Issues

27 The issues in this case are:

> 1. In what forum should the question of the enforceability of the arbitration agreement have been decided at first instance?
>
> 2. To what extent is the arbitration agreement in this case enforceable?

28 The respondent has raised, as an additional issue, the question whether the July 2007 account claiming an increase in the success fee was a final account pursuant to the *Solicitors Act*. It is not necessary to resolve this question at this stage of the proceedings.

29 In addition, in oral argument before us, the respondent submitted that the *ICAA* does not apply to this dispute and that, if anything, the *Arbitration Act*, *1991*, S.O. 1991, c. 17 (the "*Arbitration Act*") applies. The *ICAA* has more stringent provisions governing enforceability than the *Arbitration Act.* Given the manner in which I propose to resolve the legal question, it is not necessary for me to decide this issue. Thus, for the purposes of this appeal, I am prepared to assume that the *ICAA* applies.

Analysis

1. In what forum should the question of the enforceability of the arbitration agreement have been decided at first instance?

30 The appellant submits that, based on the provisions governing international arbitrations, the Superior Court judge was obliged to stay the respondent's application and refer the question of whether the arbitration agreement should be enforced to the arbitrator. In order to appreciate the appellant's argument, I must make brief reference to some of the relevant statutory provisions.

31 Section 2(1) of the *Arbitration Act* states:

> This Act applies to an arbitration conducted under an arbitration agreement unless,
>
> (a) the application of this Act is excluded by law; or
>
> (b) the [*ICAA*] applies to the arbitration.

32 As I have indicated, the appellant has chosen to proceed under the *ICAA*.

33 Section 8 of the *ICAA* provides:

> Where, pursuant to article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

34 Article 8(1) of the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), Annex I (the "*Model Law*", attached as a schedule to the *ICAA*), allows a court to refuse to enforce an agreement to arbitrate where the court finds that the agreement is "null and void, inoperative or incapable of being performed." Article 8(1) states:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

35 The appellant submits that article 8(1) of the *Model Law* does not confer jurisdiction on the Superior Court to determine the enforceability of the arbitration clause in this case. According to the appellant, this provision is limited to situations where an "action" has been brought to determine whether the arbitration agreement is null and void, inoperative or incapable of being enforced before the arbitrator has made such a determination. An application, the appellant submits, is not an action.

36 The appellant also submits that article 8(1) must be read with article 16 in mind. Article 16 gives the arbitral tribunal competence to rule on its jurisdiction, "including any objections with respect to the existence or validity of the arbitration agreement", either as a preliminary question or in an award on the merits. If the tribunal rules on a preliminary question that it has jurisdiction, any party may request the court to decide the matter within 30 days of the ruling and there is no appeal from the court's decision: article 16(3). Article 5 of the *Model Law* also states that court intervention in arbitral proceedings is limited to circumstances expressly provided for by the *ICAA*. When this article is applied, the appellant submits that the Superior Court judge ought to have declined jurisdiction.

(i) Does Article 8(1) of the Model Law apply only to an action?

37 Section 23 of the *Solicitors Act* specifies that an application is to be brought to determine the validity of a contingency fee agreement.

38 In urging me to hold that the *Model Law* prevents a court from assessing whether this dispute is arbitrable because the application brought by the respondent is not an "action" within the meaning of Article 8(1) of the *Model Law*, the appellant is urging me to adopt a literal interpretation of the word "action".

39 I do not consider a literal interpretation to be appropriate for two related reasons. The first is the statutory principle of interpretation known as harmonization. Both the *Arbitration Act* and the *ICAA* deal with the same subject matter: arbitrations. Statutory interpretation presumes a harmony, coherence, and consistency between legislation dealing with essentially the same subject matter: *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 (S.C.C.), at para 52 and *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), at para 27. The language in article 8(1) of the *Model Law* can be compared with s. 7(2) of the *Arbitration Act* which provides that a court shall stay a "proceeding" in limited circumstances. In Ontario, a proceeding "means an action or an application": see s. 1.03 of the *Rules of Civil Procedure*. [1] Applying this principle, the word "action" in article 8(1) should be read as including an application.

40 The second reason is that statutes are to be interpreted having regard to their purpose and the context in which the words are used. As I will explain below, the purpose of article 8(1) of the *Model Law* is to grant parties limited access to the courts to resolve jurisdictional disputes of a legal nature due to the court's expertise compared with that of the arbitrator, the desire to avoid multiple legal disputes over the jurisdiction of an arbitral tribunal, and the interests of finality. That purpose ought not to be undermined by an unduly literal interpretation of the proceeding used to initiate the court's process.

41 I find support for both aspects of my position in the Supreme Court of Canada's recent decision in *Dell*, a decision that considered article 940.1 of the *Québec Code of Civil Procedure*, R.S.Q., c. C-25 (the "*Québec CCP*") in light of article 8 of the *Model Act.* Article 940.1 of the *Québec CCP* provides:

> Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll *or it finds the agreement null*. [Emphasis added.]

Deschamps J. recognized that the plain language of article 940.1, allowing courts to depart from the rule of systematic referral to arbitration when an agreement is "null" was more restrictive than that of article 8(1) of the *Model Law* which permits a court to refuse to refer an agreement to arbitration where the agreement is "null and void, inoperative or incapable of being performed."

42 She departed from a literal approach to Article 940.1, recognizing that the Civil Code had to be interpreted in light of the context in which it was enacted. That context was the implementation of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 3, and of its counterpart in the *Model Law*, article 8. Having regard to the context and purpose of Article 940.1, she adopted a broader meaning of "null" so as to conform with the approach laid out in the *Model Law*.

43 Here, the context requires me to depart from the literal meaning of the word "action" in article 8(1). Applying the principle of harmonization and having regard to the purpose and context of the *Model Law*, I would interpret the word "action" as meaning the procedure used to invoke the court's jurisdiction and, in Ontario, this would include an application.

(ii) Irrespective of whether the issue is brought by way of an action or application, does the Model Law prevent a court from assuming jurisdiction to decide the arbitrability of a dispute?

44 *Dell* is instructive on the issue of whether and when a court should assume jurisdiction to decide whether an arbitration clause is enforceable in the face of the *Model Law.* To appreciate the context of the ruling, I will briefly summarize the facts of that case.

45 Dell, a well-known retail computer vendor, erroneously posted a sale price on its website for certain computer models. The error was soon discovered, Dell corrected its mistake and announced it would not honour sales of computers at the erroneous, lower price. Mr. Dumoulin, a Québec consumer, circumvented the measures taken by

Dell to correct its mistake and was able to order a computer at the erroneous price. Other consumers also ordered computers at the erroneous price. When Dell refused to honour the sales, the Union des consommateurs (the "Union") and Mr. Dumoulin filed a motion for authorization to institute a class action. Dell applied for a referral of Mr. Dumoulin's claim to arbitration pursuant to an arbitration clause contained in the terms and conditions of sale and dismissal of Mr. Dumoulin's motion. Dell argued that the arbitrator, rather than the court, had jurisdiction to determine whether the clause was enforceable. The Union contended instead that it was proper for the court to determine the validity of the clause.

46 Writing for the majority, Deschamps J., reaffirmed the basic principles in favour of fostering the arbitration process set out in such cases as *Desputeaux c. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178 (S.C.C.) ("*Desputeaux*"); *Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*, [2005] 2 S.C.R. 401 (S.C.C.); and *Bisaillon c. Concordia University*, [2006] 1 S.C.R. 666 (S.C.C.). She recognized, at para. 3, that "[t]he independence and territorial neutrality of arbitration are characteristics that must be promoted and preserved in order to foster the development of this institution." Later, at paras. 51-52, she remarked that arbitration is "a creature that owes its existence to the will of the parties alone", and that, generally speaking, parties are free to choose "any place, form and procedures they consider appropriate." She also noted that the provision of the *Québec CCP* that was in issue, article 940.1, incorporates the essence of Article 8 of the *Model Law* and that its counterpart, article 943, incorporates article 16 of the *Model Law*, adopting the "competence-competence" principle: para.80.

47 The "competence-competence" principle is one of deference to the arbitrator and means that the arbitrator is competent to determine his or her own jurisdiction and competent to rule on objections to it. In this regard, Deschamps J. observed at para. 75 of her reasons that:

> Some authors argue that the competence-competence principle requires the court to limit itself to a *prima facie* analysis of the application and to refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable[.]

48 Deschamps J. appears to have rejected this argument and adopted a somewhat broader interpretation of the *prima facie* principle in that she recognized two exceptions to it.

49 After reviewing the international and domestic arbitration law of Québec, Deschamps J. laid down a "general rule" that she said was faithful "to the *prima facie* analysis test that is increasingly gaining acceptance around the world" and consistent with the "competence-competence" principle: *Dell* at paras. 83 and 87. The "general rule" is that "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator": *Dell* at para. 84.

50 Deschamps J. then recognized two limited exceptions to the "general rule" of "systematic referral" to the arbitrator within article 940.1 of the *Québec CCP*, which she held was analogous to article 8 of the *Model Law*. Where the challenge to the arbitrator's jurisdiction is based "solely on a question of law" or a question of "mixed law and fact" where the "questions of fact require only superficial consideration of the documentary evidence in the record" as opposed to "the production and review of factual evidence", a court could depart from the general rule of systematic referral: *Dell* at paras. 84-85. These exceptions, under which a court may rule first on questions of law relating to the arbitrator's jurisdiction, recognize that a court can itself find that an agreement is null rather than referring this issue to arbitration: *Dell* at para. 87.

51 Deschamps J. explained the justification for the exception to the rule of systematic referral to the arbitrator respecting questions of law at para. 84:

> A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. *This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral*

and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause. [Emphasis added.]

52 There are three reasons why *Dell* is of assistance in this case. First, the policy considerations mentioned in the above passage are not unique to Québec, but apply equally in Ontario. Courts should have concurrent jurisdiction to resolve questions of law (and, also, questions of mixed law and fact requiring only a superficial examination of the record) based on their comparative expertise in resolving such questions, the rule that an arbitrator's decision can be reviewed by a court, the desirability of attaining finality and the avoidance of duplication of a legal debate.

53 Second, the provision of the *Québec CCP* that was in issue in *Dell*, art. 940.1, incorporates the essence of Article 8 of the *Model Law*: see *Dell* at para. 80. As I have indicated, Article 8 of the *Model Law* also forms part of the law of Ontario pursuant to the *ICAA*.

54 Third, this court's prior jurisprudence on Article 8 of the *Model Law* is consistent with the general rule set out in *Dell*. At para. 82, Deschamps J. referred to *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (Ont. C.A.) and *Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (B.C. C.A.) with apparent approval in the context of a discussion concerning the appropriate degree of scrutiny by the courts in determining the enforceability of an arbitration clause.

55 I pause here to observe that the general rule in *Dell* was recently applied by this court in *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135 (Ont. C.A.). That case concerned an ordinary commercial agreement in which the motions judge ignored the deferential approach to arbitration mandated by prior Ontario jurisprudence, as well as *Dell*. Sharpe J.A. was of the opinion that *Dell* did not change this court's prior jurisprudence to the effect that a court should grant a stay of any court proceedings where it is "arguable" that the dispute falls within the terms of the arbitration agreement: see paras 32-35. *Dancap* did not involve a pure question of law or mixed fact and law requiring only limited reference to the evidence. Rather, as noted by Sharpe J.A. at para 40, "[t]he determination of the scope of the ARA [Additional Rights Agreement] and the arbitration clause will require a thorough review of the parties' complex contractual discussions, understandings, expectations and arrangements, an inquiry that clearly calls for much more than a 'superficial consideration of the documentary evidence in the record.'"

56 Finally, in *Dell*, Deschamps J. also held that, before deciding to assume jurisdiction, the court must be satisfied that resort to its process is not a "delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding." Thus, "even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process": *Dell* at para. 86.

57 The approach set out in *Dell* therefore requires me to answer three questions. First, what is the nature of the challenge to the arbitrator's jurisdiction: is it a question of law, fact or mixed law and fact? Second, if the challenge raises a question of mixed law and fact, does it require a detailed factual inquiry or only a superficial review of the evidentiary record? Third, is the party initiating the jurisdictional challenge doing so for the purpose of delaying the arbitration process?

58 In my view, the central question in this case - the enforceability of the arbitration clause - falls squarely within the exception to systematic referral set out by Deschamps J. in *Dell*. The question whether an agreement to arbitrate disputes over a contingency fee is unenforceable and void for reasons of public policy is very much a question of law. The nature of the question requires an examination and application of the text and judicial

interpretation of the provisions of the *Solicitors Act* together with consideration of the jurisprudence favouring enforcement of arbitration clauses.

59 While the line between questions of law and questions of mixed law and fact is not always clear, an appropriate litmus test was set out by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 37, citing *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 37:

> Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

60 Whether an agreement to arbitrate disputes over a contingency fee is enforceable is very much a question that is of interest to lawyers and judges. Even assuming that the nature of the question is one of mixed law and fact, however, the resolution of the legal issue is not inextricably linked to a detailed consideration of the evidentiary record. Brief consideration of undisputed facts is all that is necessary to resolve the questions at issue in this case.

61 As for the third question in the *Dell* test, the appellant has in no way suggested that the respondent's application was brought as a delaying tactic or so as to unduly impair an arbitration proceeding. As the application judge observed, although the respondent initially embraced the idea of keeping the dispute over the fees private, he then changed his mind and sought to exercise his rights under the *Solicitors Act*. The parties have proceeded throughout on the footing that, since then, he has sought to raise a *bona fide* issue concerning the enforceability of an agreement to arbitrate a dispute over a contingency fee. In my view, the record simply does not support a conclusion that the respondent brought the application as a delaying tactic.

62 Accordingly, I would hold that the application judge properly declined to leave the issue of the enforceability of the arbitration clause to the arbitrator and I would not give effect to the first ground of appeal.

2. Is the arbitration clause unenforceable or can a solicitor and his or her client enter into an agreement to arbitrate a dispute respecting a contingency fee?

63 In order to answer this question, I must first consider the relevant provisions of the *Solicitors Act*. Section 16 of the *Solicitors Act* provides that a solicitor may make an agreement in writing with his or her client for the payment of services "either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated."

64 The right to make an agreement is subject to the provisions of ss. 17-33. The relevant portion of section 23 of the *Solicitors Act* provides:

> .... every question respecting the validity or effect of [a contingency fee agreement] may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement ... by the Superior Court of Justice.

65 Pursuant to s. 28.1(11)(a)[2], a client may apply to the Superior Court of Justice for an assessment of an account 30 days after a final account has been rendered or within one year of its payment.

66 While the application judge acknowledged that the *Solicitors Act* does not contain an express prohibition against contracting out of its provisions, she held that a client has the right to have fee disputes resolved by a Superior Court judge.

67 The appellant contends that existing jurisprudence stands for the proposition that whenever a statute is silent on the issue of arbitrability, the right to arbitration exists. The application judge failed to give sufficient weight to the strong public policy fostering the effectiveness and integrity of the arbitration process by holding parties to their agreement. The appellant says it should not be denied recourse to arbitration, especially in light of the application judge's comment and the parties' apparent agreement that the arbitrator would act "skillfully and judicially" in deciding the issues.

68 The respondent counters that s. 23 of the *Solicitors Act* provides that *every* question regarding the validity or effect of a written retainer agreement may be determined on application to the Superior Court. Moreover, contingency fee agreements are regulated under s. 28.1 of the *Solicitors Act*, which provides a comprehensive code for the assessment of contingency fees. The Superior Court has the exclusive jurisdiction to resolve fee disputes between Ontario solicitors and their clients. The application judge correctly held that public policy does not permit contracting out of the protections of the *Solicitors Act* including who conducts the assessment. While the first option that the appellant gave to the respondents for paying the appellant's costs refers to an assessment of whether the fee is fair and reasonable, option two, containing the contingency fee and the agreement to arbitrate disputes, does not. Nor does the clause specify that the law of Ontario is to apply. Thus, the respondent fears that the arbitrator will not apply the statutory requirements of the *Solicitors Act* and decide whether the contingency fee is fair and reasonable.

69 For the reasons outlined below, I am of the opinion that a balance must be struck between these competing policy interests and that the application judge erred because she did not do so.

70 The majority decision of Deschamps J. in *Dell* did not comment directly on the argument that if a statute is silent on the issue of the arbitrability of a dispute, then arbitration is permissible, even where the statute specifically provides for a judicial dispute resolution mechanism. In dissent, Bastarache and Lebel JJ., at para 221, held that because the *Consumer Protection Act*, R.S.Q. c. P-40.1 (the "*Consumer Protection Act*") and the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*Civil Code*") "are silent as to the arbitrability of a consumer dispute", that silence "suggests its permissibility."

71 The comment by the minority in *Dell* was based on the court's unanimous decision in *Desputeaux*. In that case, at para. 46, LeBel J. articulated the proposition that "[i]f Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so".

72 *Desputeaux c. Éditions Chouette (1987) inc.* involved a dispute concerning the interpretation of licensing agreements relating to the copyright in a fictional character. One of the artists sought to refer the matter to arbitration. Section 37 of the *Copyright Act*, R.S.C. 1985, c. C-42 provided that the Federal Court and provincial courts had concurrent jurisdiction to decide disputes. Section 37 of Québec's *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*, R.S.Q., c. S-32.01 recognized the validity of using arbitration to resolve disputes arising out of copyright matters. The Supreme Court held that s. 37 of the federal *Copyright Act* was sufficiently general that it could be read to include arbitration procedures contemplated by the Québec statute. Accordingly, the Court overturned the decision of the Québec Court of Appeal [2001 CarswellQue 699 (Que. C.A.)] declaring the arbitrator's award a nullity. Lebel J. held, at para. 42, that the mere fact that the legislation in question identified the courts as having jurisdiction over a dispute did not mean that the statute should be interpreted as excluding arbitration. The legislature was merely identifying the courts within the judicial system that would have jurisdiction to hear the dispute; it was not excluding arbitration over a particular subject matter. Arbitration, although not part of a state's judicial system, is still, in a broad sense, part of a legitimate dispute resolution system that has been fully recognized by legislative authorities: see *Desputeaux* at para. 40.

73 Given the strong policy of deference afforded to arbitration agreements, and following the line of reasoning in *Desputeaux*, I would hold that, simply because the *Solicitors Act* refers to a Superior Court judge as having the jurisdiction to protect clients' rights, this does not mean that disputes arising between a solicitor and a client may not be submitted to arbitration. The Act simply identifies the person within the judicial system empowered to make a decision. The right to have an independent decision maker who can interpret the agreement and make a decision respecting a contingency fee dispute is preserved through arbitration and hence the public policy of the Act, the provision of a forum for legitimate dispute resolution, is not undermined.

74 The analysis cannot, however, end here. My review of the jurisprudence leads me to two important interrelated qualifications. First, substantive statutory rights going to the merits of the dispute cannot be affected by the decision to enforce the arbitration clause. Second, the jurisprudence concerning the *Solicitors Act* reflects a strong public policy limiting the parties' freedom of contract that ought not to be ignored. For the sake of completeness, this jurisprudence is discussed below.

(a) Substantive statutory rights not affected

75 In *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (Ont. C.A.), Austin J.A. of this court granted a stay of a construction lien action pursuant to the *ICAA* in view of an agreement between the parties to arbitrate the quantum of a claim under the *Construction Lien Act*, R.S.O. 1990, c. C.30. In so doing, Austin J.A. considered whether resort to arbitration would result in the loss of any right for the lien claimant: p. 263. He concluded that apart from the adoption of a different procedure, no such right would be lost. The decision of Austin J.A. was cited with approval by the Supreme Court of Canada in *Desputeaux*, at para. 46, albeit not on this point.

76 In *Dell*, both the majority and the dissenting opinions of the Supreme Court affirmed that the class action legislation in Québec was merely procedural and did not create new rights: see paras. 105 and 224. As such, it could not oust Dell's right to enforce the arbitration clause, a substantive right that was part of the terms and conditions of the sale of its computers. A similar conclusion was reached in the companion case of *Muroff c. Rogers Wireless inc.*, [2007] 2 S.C.R. 921 (S.C.C.). [3]

77 Thus, in the jurisprudence cited above, the courts ensured that no substantive statutory rights affecting the merits of the dispute were lost when the arbitration agreement was enforced.

(b) Public Policy

78 To properly address the public policy concerns at play in this case, some further reference to the underlying legislative framework is essential.

79 Section 24 provides:

> Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner.

80 The application judge held, and I would agree, that public policy considerations animate the right to an assessment of the fairness and reasonableness of the terms of a contingency fee agreement. In *Raphael Partners v. Lam* (2002), 61 O.R. (3d) 417 (Ont. C.A.), Cronk J.A. discussed the criteria of fairness and reasonableness in the context of the review of a contingency fee agreement, stating at para. 37:

> When a fee agreement is challenged under the Act, the solicitor bears the onus of satisfying the court that the way in which the agreement was obtained was fair and that the terms of the agreement are reasonable. The fairness requirement of s. 24 of the Act is concerned with the circumstances surrounding the making of the agreement and whether the client fully understands and appreciates the nature of the agreement that he or she executed. [Citations omitted.]

81 She continued at para. 50:

> The factors relevant to an evaluation of the reasonableness of fees charged by a solicitor are well established. They include the time expended by the solicitor, the legal complexity of the matter at issue, the results achieved and the risk assumed by the solicitor. The latter factor includes the risk of nonpayment where there is a real risk of an adverse finding on liability in the client's case. [Citations omitted.]

82 The case law supports the respondent's position that a client cannot contract out of the protections in the *Solicitors Act* for reasons of public policy. For example, this court has held that an agreement to raise any disputes concerning accounts within 15 days as opposed to the 30 days provided for under the Act was held to be unenforceable: *Javornich v. McCarthy* (2007), 225 O.A.C. 201 (Ont. C.A.). Similarly, in *Andrew Feldstein & Associates Professional Corp. v. Keramidopulos*, [2007] O.J. No. 3683 (Ont. S.C.J.), Murray J. held at para. 60 that "[t]o permit contracting out of the provisions of the *Solicitors Act* would defeat the whole purpose of those legislative provisions enacted in the public interest and designed to allow a client protection against unwarranted or unreasonable legal fees." Also, in *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 (Ont. C.A.), at para. 14, Doherty J.A. quoted a passage from the judgment of Adams J. in *Borden & Elliot v. Barclays Bank of Canada* (1993), 15 O.R. (3d) 352 (Ont. Gen. Div.), at pp. 357-58, to the effect that the legal profession's monopoly status, coupled with the obligations on the profession in the *Solicitors Act*, make it clear that the rendering of legal services is not simply a matter of contract. He rejected the submission that an agreement between a client and a lawyer could preclude the client from resorting to the *Solicitors Act* or the inherent power of the court to conduct an assessment of the lawyer's fees.

83 However, unlike in the present case, none of these decisions concern an agreement to choose a different forum in which to resolve the dispute, namely, arbitration. Thus, there was no competing public policy to consider other than that contained in the *Solicitors Act.*

(c) Conclusion with regard to the enforceability of the arbitration clause

84 I would hold that the application judge erred in concluding that a solicitor and his or her client could not agree to have an arbitrator, as opposed to a Superior Court judge, hear a contingency fee dispute. However, the two qualifications to the arbitrability of contingency fee disputes examined above lead me to the conclusion that public policy prevents the parties from contracting out of the statutory protections contained in the *Solicitors Act*, and that any arbitration must be conducted in accordance with them. While the parties are free to select a different decision maker than the one contemplated in the *Solicitors Act*, any decision maker appointed to hear the dispute make his decision in accordance with the substantive statutory rights contained in the *Solicitors Act*. There are two reasons for my conclusion. First, the jurisprudence that I have reviewed regarding the enforcement of arbitration clauses has not considered or sanctioned the removal of any substantive statutory right affecting the merits of the underlying dispute. Second, the jurisprudence in relation to the *Solicitors Act* holds that it would be contrary to the public interest to allow solicitors and their clients to contract out of any statutory remedy in relation to the assessment of solicitors' accounts.

85 The jurisprudence is illustrative of broader principles at work. One of the overarching principles that the law recognizes, albeit subject to the value of finality, is the right to have a dispute decided on the merits. No doubt it is for that reason that the jurisprudence respecting enforcement of arbitration clauses considers whether

enforcing the arbitration agreement will affect the merits of the dispute. In addition, freedom of contract, the value recognized in the strong policy enforcing arbitration agreements, is tempered here by the jurisprudence removing the client's freedom to contract out of the remedies contained in the *Solicitors Act* on account of public policy.

Conclusion

86 I would, accordingly, allow the appeal and set aside the order of the application judge striking the notice to arbitrate. However, any arbitrator appointed to make a decision regarding this dispute must make that decision in accordance with the substantive statutory rights contained in the *Solicitors Act*.

87 The panel is indebted to both counsel for their very thorough argument of this issue.

88 As the issue raised on this appeal is a novel issue, and subject to any submissions the party's may wish to make, I would be inclined to order no costs.

***J. MacFarland J.A.*:**

I agree.

***R.G. Juriansz J.A.*:**

89 I have considered the reasons of Weiler J.A. but would conclude that the application judge should have declined to entertain the application to strike the notice of arbitration and, instead, should have referred the parties to the arbitrator. If a question of law and public policy arises before the arbitrator, and if the arbitrator deals with the issue incorrectly, the respondent can seek to set aside the award.

90 I reach this different result because I would attach greater force than does Weiler J.A. to certain passages in *Union des consommateurs c. Dell Computer Corp.* [2007 CarswellQue 6310 (S.C.C.)] and, in particular, the guidelines laid down to determine when a court may intervene in the arbitration process before its completion.

Did the application judge err in determining the issue of arbitrability?

91 The basis upon which the application judge decided to deal with the application was clearly inadequate. She recognized that the arbitrator could decide the question, but observed "the court also has jurisdiction to determine whether an agreement between a solicitor and client, or a term thereof, is enforceable." The reason she gave for the court exercising that jurisdiction was that "[t]he parties are now before the court and there is no practical or theoretical purpose served in deferring the agreement to the arbitrator."

92 Had the application judge asked the right questions, namely, whether the respondent was engaging in delaying tactics and whether deciding the question raised on the application would promote the arbitration process, she would not have come to this conclusion. The text, case law and the Analytical Commentary to the Model Law all endorse a deferential approach to the question of the arbitrability of disputes under the Model Law. Thus, if and when they arise, jurisdictional challenges to the ability of the arbitrator should generally be raised after the arbitrator has rendered a decision through an application to set aside the arbitral award. This approach both fosters the arbitration process and prevents delaying tactics.

93 I first turn to the text of the Model Law. Both the arbitration tribunal and the court have jurisdiction to determine an arbitrator's jurisdiction. Article 16(1) of the Model Law gives the arbitral tribunal the power "to rule on its own jurisdiction, including any objections with respect to the existence of validity of the arbitration agreement." Article 8 is not worded as a grant of jurisdiction to the court, but as a limitation of when the court will exercise the jurisdiction it otherwise possesses. It provides that when a matter which is the subject of an arbitration agreement is brought before the court, the court "shall... refer the parties to arbitration" except in the limited circumstances that "it finds that the agreement is null and void, inoperative or incapable of being performed".

94 The pivotal question is what kind of review should the court engage in before deciding whether the agreement is "null and void, inoperative or incapable of being performed"? In *Dell*, Deschamps J. indicated there are two opposing schools of thought in the debate over the degree of judicial scrutiny of an arbitrator's jurisdiction under an arbitration agreement. She referred to these as the interventionist and the prima facie approaches.

95 Both the interventionist and the *prima facie* approaches seek to promote efficiency and economy in dispute resolution but do so from different perspectives. The interventionist model is based on the concern that costly proceedings can be avoided by the court deciding the matter at the outset, rather than waiting to review the decision made by the arbitrator regarding his or her jurisdiction. The interventionist model will tend to be more efficient and economical in those cases in which the court finds that the arbitrator was without jurisdiction. However, where the court finds the arbitrator has jurisdiction, the arbitration proceedings will have been delayed.

96 The *prima facie* approach also seeks to save the parties the time, cost and effort of litigating the existence and validity of the arbitration agreement in duplicative proceedings. However, this approach is primarily concerned with preventing delaying tactics and protecting the arbitration process from obstruction. Proponents of the *prima facie* approach argue that routine or "systematic" referral to arbitration leads to the ultimate resolution of disputes and best prevents attempts to delay the arbitral process through early challenges to the arbitrator's jurisdiction.

97 The deferential *prima facie* approach, based on the "competence-competence" principle, is more apparent in the Model Law that expressly recognizes the competence-competence principle in art. 16. Article 16 provides:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

98 As noted Deschamps J. in *Dell*, under the *prima facie* test, a court should "limit itself to a *prima facie* analysis of the application and... refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or an applicable". Deschamps J. sets out one articulation of the *prima facie* test at para. 76:

> [TRANSLATION] The nullity of an arbitration agreement will be manifest if it is incontestable... . As soon as a serious debate arises about the validity of the arbitration agreement, only the arbitrator can validly conduct the review... . An apparently valid arbitration clause will never be considered to be manifestly null.
>
> (É. Loquin, "Compétence arbitrale", Juris-classeur Procédure civile, fasc. 1034 (1994), No. 105)

99 The case law of this court supports a deferential or *prima facie* approach to the question of arbitrability. In *Dell*, Deschamps J. cited this court's decision in *Dalimpex Ltd. v. Janicki* (2003), 228 D.L.R. (4th) 179 (Ont. C.A.) and observed that the *prima facie* analysis is applied in Ontario not only to the validity but also the applicability of an arbitration clause. In *Dalimpex*, Charron J.A. adopted the following test articulated by the British Columbia Court of Appeal in *Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd.* (1992), 43 C.P.R. (3d) 390, 66 B.C.L.R. (2d) 113 (B.C. C.A.):

> Considering s. 8(1) in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement, because those are matters within the jurisdiction of the arbitral tribunal. *Only where it is clear that the dispute is outside the terms of the arbitration agreement*, or that a party is not a party to the arbitration agreement, or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

> *Where it is arguable that the dispute falls within the terms of the arbitration agreement* or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement
>
> then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal. [Emphasis added.]

100 As Weiler J.A. points out, in a recent decision, Sharpe J.A. suggested that *Dell* did not change this court's prior jurisprudence regarding the deferential approach to arbitrability. In *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135 (Ont. C.A.), Sharpe J.A. indicated that the Supreme Court endorsed the "competence-competence" principle in *Dell*. He applied that principle as articulated by Charron J.A. in *Dalimpex*, calling for "a deferential approach" allowing the arbitrator to decide whether the dispute is arbitrable, absent a clear case to the contrary.

101 Reference to the Analytical Commentary provides further support for the deferential *prima facie* approach and useful background for interpreting Deschamps J.'s statements regarding dilatory tactics and the integrity of the arbitral process in *Dell*. Section 13 of the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, of which the Model Law is a Schedule, provides that when interpreting the Model Law, recourse may be had to:

> (a) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985); and
>
> (b) the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law, as published in The Canada Gazette, Part I, Vol. 120, No. 40, October 4, 1986, Supplement.

102 The Analytical Commentary discusses art. 16(3) of the Model Law and contrasts it with an earlier draft version which would have provided for concurrent court control. Article 16(3) provides that, where the arbitral tribunal has ruled that it has jurisdiction, that ruling may be contested only in an action for setting aside the arbitral award after it has been rendered. As the Analytical Commentary explains, "judicial control may be sought only after the award on the merits is rendered, namely in setting aside proceedings... [or perhaps] in any recognition or enforcement proceedings)". By contrast, draft art. 17(1) provided:

> (Notwithstanding the provisions of article 16,) a party may (at any time) request the Court specified in article 6 to decide whether a valid arbitration agreement exists and (, if arbitral proceedings have commenced,) whether the arbitral tribunal has jurisdiction (with regard to the dispute referred to it).

103 Thus, draft art. 17(1) would have allowed a party to request the court to determine the arbitral tribunal's jurisdiction at any time, even while the arbitral proceedings have commenced. The Analytical Commentary explains that the draft art. 17 was deleted from the text of the Model Law and Art. 16(3) was added. The change was made "for the purpose of preventing dilatory tactics and abuse of any immediate right to appeal". The Analytical Commentary explains that this solution was chosen even though its disadvantage

> as was pointed out by the proponents of immediate court control, is that it may lead to considerable waste of time and money where, after lengthy proceedings with extensive hearings and taking of evidence, but the Court sets aside the award for lack of jurisdiction.

104 It can be inferred from the Analytical Commentary then, that the Model Law is tilted strongly against tactics that may obstruct and delay arbitration proceedings. The policy of the Model Law is less concerned with individual instances in which applications to find the arbitration clause invalid may be well-founded. The scheme of the Model Law is designed to enhance the efficiency of the arbitration process by deferring judicial control to the setting aside of arbitration awards after they have been rendered.

105 It is against this context that Deschamps J.'s judgment in *Dell* must be understood. Deschamps J. made clear that the court's ability to decide the matter with only a superficial consideration of the record was a necessary but not a sufficient condition for assuming jurisdiction. She then stated, at para. 86:

> Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that *even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process*. [Emphasis added.]

106 While she did not refer to *Dell*, I am prepared to assume that the application judge entertained the application to strike the arbitration notice because she thought she could determine it on a superficial consideration of the record. As well, I accept that in this case only a superficial consideration of the record is necessary to pose the public policy question asserted. The application judge, however, showed no appreciation for the additional requirements that the court must be satisfied that the application is not a delaying tactic and that an immediate court decision as to the arbitrator's jurisdiction would be best for the arbitration process. Had the application judge asked herself these questions, I am satisfied that she would not have departed from the rule of systematic referral to arbitration set out in *Dell*.

107 The respondent made no effort to satisfy the application judge that his application was not a delaying tactic. I recognize that the appellant did not argue before the application judge that the respondent was engaging in delaying tactics. However, given Deschamps J.'s unequivocal statement in *Dell* that the court "must be satisfied" the challenge is not a delaying tactic the application judge was required to turn her mind to that issue. Given the design of the Model Law to avoid delays in the arbitration process and to generally reserve court intervention to the review of the arbitral award, the application judge was required to consider what would be best for the arbitration process.

108 Here, the respondent, after receiving independent legal advice, entered into a contract to arbitrate any fee disputes about his agreement with the appellant. He is liable to the appellants for their legal services, whether the assets of the estate are valued on the date he would choose or on the day the appellants would choose. His application has resulted in the delay of the arbitration process to determine the amount owing to the appellants. Until the arbitration and court proceedings are concluded, the respondent will not be compelled to make any payment in respect of the services performed by the appellant. He did not, as he might have, support his application for court intervention with proof that he had paid the lower undisputed amount. I make no finding that the respondent was seeking to delay. My point is that the respondent in applying for the court's intervention did not file any evidence on which the court could be satisfied his application was not a tactic to delay.

109 The more significant point though, is that the application judge erred in failing to find that referral to arbitration would be best for the arbitration process. At this stage, the issue of public policy raised by the respondent is hypothetical and may or may not become an issue. Whether the issue arises at all depends on the decision of the arbitrator as to the applicable valuation date for the estate assets and liabilities of the estate. If the arbitrator accepts the valuation date asserted by the respondent, or if the arbitrator chooses the valuation date asserted by the appellants but reduces the fee to an amount the respondent accepts as fair and reasonable, the question raised before the application judge will not arise. In my view, allowing an application judge to entertain an application attacking arbitration every time there is an issue of public policy might possibly arise would "unduly impair the arbitration process" and would certainly not be "best for the arbitration process": *Dell* at para. 86.

110 In this case, when the matter first came before the application judge it was at least arguable that the matter was arbitrable. Weiler J.A.'s analysis confirms that is the case. If the judge had applied the *Dalimpex* standard she would have referred the parties to the arbitrator.

111 A question as to the fairness and reasonableness of the fee may not arise before the arbitrator. If it does arise, if the arbitrator addresses it, and if the arbitrator decides it incorrectly, the court can pronounce on matters of public policy in reviewing the arbitrator's award. On a review, the court would have the findings of the arbitrator regarding the nature and complexity of services provided, any risks taken in the retainer, the qualifications of the lawyers, their usual rates, the hours worked and any other information that would be relevant to deciding if the final fee was fair and reasonable.

112 It is worth identifying provisions of the Model Law that allow the court to set aside an arbitration award as incompatible with the State's public policy. Article 34 of the Model Law deals with setting aside an arbitral award after it has been made. An arbitral award may be set aside under art. 34(2)(a)(i) if the agreement is not valid under the applicable law, under art. 34(2)(b)(i) if the subject-matter of the dispute is not capable of settlement by arbitration under the law "of this State", and under art. 34(2)(b)(ii) if "the award or any decision contained therein is in conflict with the public policy of this State". Moreover, art. 36(1)(b) of the Model Law allows a court to refuse to recognize or enforce an arbitral award if it finds that i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State, or ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

113 In conclusion, if judicial control on the basis of public policy is necessary, that control should be exercised on review of the arbitration award. The Model Law, as explained by the Analytical Commentary and as interpreted by the Supreme Court in *Dell* and the jurisprudence of this court, makes clear that the general rule is systematic referral to the parties to arbitration. In this case, there was no justification for a departure from that rule.

114 Therefore, I would hold that the application judge should have refused to entertain the application and should have referred the parties to the arbitrator.

115 I add that I agree with the Weiler J.A. that the respondent was properly before the court. It is no moment that article 8 (1) of the Model Law refers to an "action" brought before the court, whereas in this case the respondent brought an "application". The Model Law is an international instrument that was not drafted with an eye on the Ontario Rules of Civil Procedure. In explaining art. 8, the Analytical Commentary refers to when "a party starts litigation". The word "action" in article 8 is to be interpreted in that sense.

Is the arbitration agreement enforceable?

116 Given my conclusion on the first question, I would not address second question at this stage.

Conclusion

117 I would allow the appeal, set aside the application judge's decision, and refer the parties to the arbitrator.

Appeal allowed.

APPENDIX A

Relevant Provisions of the Solicitors Act

For ease of reference the relevant provisions of the *Solicitors Act* are as follows:

Definitions

15. In this section and in sections 16 to 33, "contingency fee agreement" means an agreement referred to in section 28.1; ("entente sur des honoraires conditionnels")

Agreements between solicitors and clients as to compensation

16. (1) Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated. R.S.O. 1990, c. S.15, s. 16 (1).

Definition

(2) For purposes of this section and sections 20 to 32, "agreement" includes a contingency fee agreement. 2002, c. 24, Sched. A, s. 2.

Approval of agreement by assessment officer

17. Where the agreement is made in respect of business done or to be done in any court, except the Small Claims Court, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by an assessment officer. R.S.O. 1990, c. S.15, s. 17.

Opinion of court on agreement

18. Where it appears to the assessment officer that the agreement is not fair and reasonable, he or she may require the opinion of a court to be taken thereon. R.S.O. 1990, c. S.15, s. 18.

Rejection of agreement by court

19. The court may either reduce the amount payable under the agreement or order it to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be assessed in the same manner as if the agreement had not been made. R.S.O. 1990, c. S.15, s. 19.

Determination of disputes under the agreement

23. No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being the Small Claims Court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Ontario Court (General Division). R.S.O. 1990, c. S.15, s. 23.

Enforcement of agreement

24. Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner. R.S.O. 1990, c. S.15, s. 24.

28.1(1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section. 2002, c. 24, Sched. A, s. 4.

Remuneration dependent on success

(2) A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided. 2002, c. 24, Sched. A, s. 4.

No contingency fees in certain matters

(3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,

> (a) a proceeding under the Criminal Code (Canada) or any other criminal or quasi-criminal proceeding; or
>
> (b) a family law matter. 2002, c. 24, Sched. A, s. 4.

Written agreement

(4) A contingency fee agreement shall be in writing. 2002, c. 24, Sched. A, s. 4.

Maximum amount of contingency fee

(5) If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceeding, the amount to be paid to the solicitor shall not be more than the maximum percentage, if any, prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, how ever the amount or property is recovered. 2002, c. 24, Sched. A, s. 4.

Non-application

(10) Sections 17, 18 and 19 do not apply to contingency fee agreements. 2002, c. 24, Sched. A, s. 4.

Assessment of contingency fee

(11) For purposes of assessment, if a contingency fee agreement,

> (a) is not one to which subsection (6) or (8) applies, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment; or
>
> (b) is one to which subsection (6) or (8) applies, the client or the solicitor may apply to the Superior Court of Justice for an assessment within the time prescribed by regulation made under this section. 2002, c. 24, Sched. A, s. 4.

Footnotes

1 Section 13 of the *ICAA* provides that, for the purpose of interpreting the *Model Law* recourse may be had to aids to interpretation ordinarily available under the law of Ontario.

2 Sections 28.1(10)-(11) set out the procedure for assessment in the case of contingency fee agreements. Section 28.1(10) provides that ss. 17-19 - which require an assessment officer to determine whether a fee agreement for business done in court is fair and reasonable, and permit the officer to solicit the opinion of a court and have that court remedy the situation if the agreement is not fair and reasonable - do not apply to contingency fee agreements. That section, however, must be read in conjunction with s. 28.1(11). Thus, ss. 28.1(10) and (11) were designed to ensure that judges of the Superior Court, rather than assessment officers, are given the authority to review contingency fee agreements according to the standards of fairness and reasonableness: see Mark Orkin, *The Law of Costs*, 2d ed. (Aurora: Canada Law Book,

2008), at para. 308.1(3), and The Joint Committee on Contingency Fees (Ontario), *Report on Contingency Fees* (Report presented to the Attorney General for Ontario), September 2000), at pp. 41-42. Assessment officers cannot interpret agreements.

3 The majority and dissenting opinions of the court further held that legislation amending the *Consumer Protection Act* and prohibiting agreements obliging a consumer to arbitrate a dispute or preventing them from bringing a class action, unless entered into after the dispute arose, was prospective only and of no application.

 Original
2007 ONCA 484
Ontario Court of Appeal

Javornich v. McCarthy

2007 CarswellOnt 4107, 2007 ONCA 484, 159 A.C.W.S. (3d) 289, 225 O.A.C. 201

MARY JAVORNICH (Applicant / Respondent) and TERRI McCARTHY (Respondent / Appellant)

McMurtry C.J.O., P. Rouleau J.A., and R. Juriansz J.A.

Heard: May 3, 2007
Judgment: June 28, 2007
Docket: CA C46093

Proceedings: affirmed *Javornich v. McCarthy* ((March 3, 2006)), 4487/05 ((Ont. S.C.J.))

Counsel: D. Smith for Appellant
Edwin G. Upenieks for Respondent

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.d Accounting and refunding by lawyer
VIII.5.d.iii Application for assessment, review, or taxation of account
VIII.5.d.iii.A Entitlement to assessment or review

Headnote
Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Application for assessment, review, or taxation of account — Entitlement to assessment or review
Client retained solicitor in 2003 for matrimonial matter — Client signed retainer agreement which provided that final bill would be provided as well as interim billing, and that client agreed to voice any concern with bill within 15 days of receipt — On April 15, 2005, client received interim bill, and on April 29, 2005, client advised solicitor that she wished to terminate retainer and requested final account — Employee of solicitor advised that he told client on May 5, 2005 to treat interim account as final, and that bulk of retainer remaining in trust would be returned to her that day — Client sent email to solicitor's office on May 30, 2005 enquiring about final account, and her evidence was that she was advised on June 3, 2005 to treat interim account as final — Client received cheque for reimbursement of balance of retainer later that same day — Client obtained order for assessment of solicitor's account on June 15, 2005 — Solicitor unsuccessfully moved to set aside order for assessment as having been requested more than 30 days after delivery of April 15, 2005 account — Solicitor appealed — Appeal dismissed — Ample evidence existed in support of applications judge's finding that delivery date of final account was June 3, 2005, and client was justified in seeking final bill and waiting for receipt of such before requesting assessment — As June 3, 2005 was date of delivery as found by applications judge, request for assessment was made well within 15 day period stated in contract — Public policy considerations meted in favour of restricting parties' ability to contract out of rights and obligations in Solicitors Act, which gave client 30 days to dispute account — Agreement was subject to review on ground of fairness — Caselaw had stated that public confidence in administration of justice required court to intervene to protect clients right to assessment of account — It was contrary to public

interest to allow solicitors and clients to contract out of statutory rights of clients to have accounts assessed within 30 days.

Table of Authorities

Cases considered by *P. Rouleau J.A.*:

Borden & Elliot v. Barclays Bank of Canada (1993), *(*sub nom. *Lorenzetti Development Corp. v. Barclays Bank of Canada)* 106 D.L.R. (4th) 478, 1993 CarswellOnt 1071, 15 O.R. (3d) 352 (Ont. Gen. Div.) — considered

Plazavest Financial Corp. v. National Bank of Canada (2000), 44 C.P.C. (4th) 288, 2000 CarswellOnt 1081, 47 O.R. (3d) 641, 133 O.A.C. 100, 185 D.L.R. (4th) 78 (Ont. C.A.) — considered

Price v. Sonsini (2002), 2002 CarswellOnt 2255, 162 O.A.C. 85, 22 C.P.C. (5th) 1, 60 O.R. (3d) 257, 215 D.L.R. (4th) 376 (Ont. C.A.) — followed

Statutes considered:

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

s. 3(b) — considered

***P. Rouleau J.A.*:**

1 The appellant, a solicitor, appeals the application judge's decision permitting the assessment of all of her accounts rendered to the respondent client.

2 The appellant takes the position that the motion judge erred in finding that the respondent's requisition for the assessment of the appellant's bills was made within one month of its delivery as required by s. 3(b) of the *Solicitors Act*, R.S.O. 1990, c. S.15 and failed to take into account the terms of the written retainer which required that any concerns regarding an account be voiced within fifteen days of the bill being rendered.

3 For the reasons that follow, I would dismiss the appeal.

Facts

4 The solicitor met with the client in October 2003 to discuss representing the client in matrimonial proceedings. In November 2003, the client signed a retainer agreement which provided for the payment of a retainer that would be held in trust and would be applied to pay accounts as they were rendered, the delivery of regular interim billing, and the issuance of a final account "in which the complexity of the issues, the obstacles met from opposing counsel/client and the result obtained will also be taken into consideration in fixing the amount of the final fee."

5 On April 29, 2005, the client advised the solicitor through email that she was changing solicitors and terminating the retainer. After receiving an interim bill dated April 15, the client requested a final account.

6 The affidavit filed by an employee in the solicitor's office advises that he told the client on May 5, 2005 that she should consider the interim account as being final, that he would be sending her a cheque that same day for the bulk of the retainer remaining in trust, but that he would retain a relatively small sum for several days until he could verify that nothing was owing to the process server on the client's account. The solicitor's office provided no written confirmation of this exchange.

7 The client's evidence was that she expected a final account. She produced an e-mail sent to the solicitor's office on May 30, 2005 in which she enquires about the final bill. According to the client, it was subsequent to this e-mail, on June 3, that she was told that she should treat the April 15 bill as being final. Later that same day, she received the cheque from the solicitor in reimbursement of the balance of the retainer that had been held in trust.

8 On June 13, the client wrote the Assessment Office at the Milton Court House for an assessment of the account. On June 15, the client obtained an order for assessment of the solicitor's account.

9 The solicitor moved to set aside the order for assessment as having been requested more than thirty days after delivery of the April 15 account. The application judge considered the evidence and, based largely on the client's May 30 e-mail to the solicitor, found that it was only after May 30 that the client was told to treat the April 15 interim account as being final.

10 The application judge then used that date as constituting the date of delivery of the final account for purposes of calculating the one month period stipulated in s. 3(b) of the *Solicitors Act* and rejected the solicitor's motion to set aside the order for assessment.

Issues

11 There are two issues raised in this appeal:

1) Did the application judge err in finding that the requisition for assessment was made within one month of delivery of the final account?

2) Did the application judge err in failing to rule that the clause in the retainer agreement stipulating that the client has fifteen days to question the account overrides the statutory one month period within which to requisition an assessment of an account?

12 The solicitor also addressed other sections of the *Solicitors Act*. These submissions only have relevance in the event that the solicitor succeeds on either of the two issues set out above. As I have found against the solicitor on both grounds, I need not address the submissions on the other sections of the *Solicitors Act*.

Analysis

a) Did the application judge err in finding that the requisition for assessment was made within one month of delivery of the final account?

13 The solicitor maintains that the application judge had no basis for finding that, for purposes of s. 3(b) of the *Solicitors Act*, the delivery date of the final account was June 3, 2005.

14 I would reject this ground of appeal. There was ample evidence in support of the application judge's finding. The retainer agreement contemplated the issuance of a final bill within which a final fee would be set. As provided in the retainer agreement, the amount of the final fee would depend on a number of factors other than docketed hours. The client was justified, therefore, in seeking a final bill and in waiting for receipt of this final bill before requesting an assessment.

15 The client's evidence also supported the application judge's finding. Her evidence was that the first time she was told that the April 15 interim account should be treated as the final bill was June 3, 2005. It was also on June 3 that the client received the cheque in reimbursement of the balance of the retainer that had been held by the solicitor in her trust account.

16 Finally, as noted by the application judge, the client's May 30, 2005 email to the solicitor made it clear that at the end of May she was still waiting for a final account.

b) Did the application judge err in failing to rule that the clause in the retainer agreement stipulating that the client has fifteen days to question the account overrides the statutory one month period within which to requisition an assessment of an account?

17 The solicitor submits that the retainer agreement reduced to fifteen days the time period within which the client could seek an assessment pursuant to s. 3(b) of the *Solicitors Act*. The provision in the retainer agreement on which the solicitor relies reads as follows:

> I agree to forthwith advise within fifteen days of any discrepancy, inaccuracy and/or query with respect to the account billed. If no such discrepancy, inaccuracy and/or query is voiced, verbally or in writing, by myself, I accept the terms of the accounts billed for services rendered.

18 The requisition for assessment that is the subject of the challenge by the solicitor was made pursuant to s. 3(b) of the *Solicitors Act* which reads as follows:

> 3. Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,
>
> . . . . .
>
> (b) by the client, for the assessment of a bill already delivered, within one month from its delivery;
>
> . . . . .

19 Because the *Solicitors Act* does not contain a clause specifically prohibiting the parties from contracting out or waving the rights contained therein, the solicitor submits that the terms of the retainer agreement should govern. Because the client did not raise a concern about the April 15 account within the fifteen days agreed to, she should be prevented from now seeking an assessment of the account pursuant to the terms of the *Solicitors Act*.

20 I would reject this ground of appeal and would do so for two reasons.

21 First, on the facts found by the application judge, the April 15 interim account only became the final account on June 3, 2005. The request for assessment of this final account was made on June 15, well within the fifteen day period stated in the contract.

22 Second, there are public policy considerations that mete in favour of restricting the parties' ability to contract out of the rights and obligations created by the *Solicitors Act*. This court in *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 (Ont. C.A.) at para. 14, adopted the comments made by Adams J. in *Borden & Elliot v. Barclays Bank of Canada* (1993), 15 O.R. (3d) 352 (Ont. Gen. Div.) at 357 -58 where he said:

> The *Solicitors Act* begins with s. 1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness: see s. 18 of the *Solicitors Act*.

23 Later in *Plazavest*, this court, while recognizing that the terms of a contract between a solicitor and client are of some significance, rejected "the contention that an agreement between a client and a lawyer may preclude the client from resorting to the Act or the inherent power of the court to seek an assessment of the lawyer's fees".

24 As set out in *Price v. Sonsini* (2002), 60 O.R. (3d) 257 (Ont. C.A.) at para. 19:

> Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill. As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the process.

It would, in my view, be contrary to the public interest to allow solicitors and clients to contract out of the statutory rights granted to clients to have their accounts assessed within the statutory time frame.

Disposition

25 For these reasons, I would dismiss the appeal. I would award the respondent costs fixed at $3,500 inclusive of GST and disbursements.

***McMurtry C.J.O.*:**

I agree.

***R. Juriansz J.A.*:**

I agree.

Appeal dismissed.

 Original
2002 CarswellOnt 2880
Ontario Court of Appeal

McIntyre Estate v. Ontario (Attorney General)

2002 CarswellOnt 2880, [2002] O.J. No. 3417, 116 A.C.W.S. (3d) 527,
164 O.A.C. 37, 218 D.L.R. (4th) 193, 23 C.P.C. (5th) 59, 61 O.R. (3d) 257

RONALD MCINTYRE by his estate representative MAUREEN MCINTYRE (Applicant / Respondent in appeal) and ATTORNEY GENERAL OF ONTARIO (Appellant) and THE ADVOCATES' SOCIETY and THE ONTARIO TRIAL LAWYERS'ASSOCIATION (Interveners)

O'Connor A.C.J.O., Abella, MacPherson JJ.A.

Heard: April 17, 2002
Judgment: September 10, 2002
Docket: CA C36074

Proceedings: reversing *McIntyre Estate v. Ontario (Attorney General)* (2001), 53 O.R. (3d) 137, 198 D.L.R. (4th) 165, 11 C.P.C. (5th) 267 (Ont. S.C.J.)

Counsel: *Janet E. Minor*, *Sean Hanley*, for Appellant
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Terrence J. O'Sullivan, *Rochelle S. Fox*, for Intervener, Advocates' Society
James Vigmond, *Brian Cameron*, for Intervener, Ontario Trial Lawyers' Association

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.a Agreements for fees
VIII.5.a.iv Contingency fees
VIII.5.a.iv.B Statutory provisions
Statutes
II Interpretation
II.3 Rules of interpretation
II.3.a Object and purpose
Torts
II Champerty and maintenance
II.1 Elements
Headnote
Actions --- Champerty and maintenance — General — Agreements between solicitor and client

Client in intended wrongful death action proposed entering into contingency fee agreement with her counsel — Agreement would compensate counsel with percentage of damages and full payment of costs awarded if action was successful — Fees were unrelated to amount of time spent, quality of legal services or other factors usually considered when approving fees — Agreement set no cap or upper limit on amount payable for legal services — Client applied for declaration that agreement was not prohibited by Champerty, Act respecting — Declaration was granted that it was not contrary to public policy to enter into contingency fee agreement and that arrangement must be governed by principle of what is fair and reasonable to be determined at conclusion of action — Respondent contended that statute absolutely prohibited all lawyers' contingency fee agreements — Respondent appealed — Appeal allowed — Declaration was set aside solely because fee structure in agreement made it premature to determine whether fees would be fair and reasonable — Section 1 of Act should be interpreted as incorporating common law requirements relating to who is champertor — Purpose of common law of champerty is to protect administration of justice from abuse by those who wrongfully maintain litigation — Policy underpinning common law is directed to ensuring fair resolution of disputes and protecting vulnerable litigants from abuse — Protection at common law is promoted by examining propriety of motives of those involved in litigation — It was not apparent from historical record that there were abuses not caught by common law to which statute was specifically directed — Interpretation of statute that is consistent with common law would also be harmonious with and promote aim of Act — Although lawyers' contingency fee agreements are not prohibited by Act, it must be determined whether lawyer had improper motive in entering into allegedly champertous agreement — In assessing motive, consideration should be given to fairness and reasonableness of fee structure in contingency fee agreement — Champerty, Act respecting, R.S.O. 1897, c. 397, s. 1.

Barristers and solicitors --- Relationship with client — Fees — Agreements for fees — Contingency fees — Statutory provisions

Client in intended wrongful death action proposed entering into contingency fee agreement with her counsel — Counsel would be compensated with percentage of damages plus full payment of costs awarded if action was successful — Fees were not related to amount of time spent, quality of legal services, level of expertise or other factors usually considered in approving fees — Client applied for declaration that proposed contingency fee agreement was not prohibited by Champerty, Act respecting — Declaration was granted that it was not contrary to public policy to enter into contingency fee agreement and that arrangement must be governed by principle of what is fair and reasonable to be determined at conclusion of action — Respondent contended that any change in law relating to champerty in Ontario must come from Legislature and not courts — Respondent appealed — Appeal allowed — Declaration was set aside because nature of fee structure rendered it premature to assess fairness and reasonableness of agreement — Legislature can reform law of champerty relating to contingency fee agreements but courts can also address this issue as part of their function in developing common law — Historic rationale for absolute prohibition of contingency fee agreements is no longer justified — Potential abuses that once provided rationale can be addressed by appropriate regulatory scheme governing conduct of lawyers and amount of lawyers' fees — Solicitors Act and Rules of Professional Conduct provide comprehensive process for reviewing and assessing reasonableness of lawyers' accounts and enforcing standards of conduct — Whether particular agreement is champertous depends on application of common law elements of champerty to circumstances of case — Court must look at conduct of parties together with propriety of motive of alleged champertor in order to determine if requirements of champerty are present — Considering propriety of motive of lawyer should include nature and amount of fees to be paid in event of success such that lawyer should not be overcompensated nor have windfall — Champerty, Act repecting, R.S.O. 1897, c. 397, s. 1 — Solicitors Act, R.S.O. 1990, c. S.15, s. 28.

Statutes --- Interpretation — Rules of interpretation — Object and purpose

Client in intended action proposed entering into contingency fee agreement with her counsel — Agreement would compensate counsel with percentage of damages and full payment of costs awarded if action was successful — Fees were unrelated to amount of time spent, quality of legal services or other factors usually considered in approving fees — Client applied for declaration that agreement was not prohibited by Champerty, Act respecting — Declaration was granted that it was not contrary to public policy to enter into contingency fee agreement and that arrangement must be governed by principle of what is fair and reasonable to be determined at conclusion

of action — Respondent contended that statute absolutely prohibited all lawyers' contingency fee agreements — Respondent appealed — Appeal allowed — Nature of fee structure made it premature at this stage of litigation to determine whether fees that might become payable would be fair and reasonable — Solely for that reason, declaration that proposed agreement does not contravene statute was set aside — Emphasis should be on context in which provision was enacted and on underlying aim of legislation rather than on literal meaning of words of Act because of antiquity of statute language — Section 1 of Act does not contain clear and unequivocal intention to change common law — Section 1 of Act should be interpreted as incorporating common law requirements relating to who is champertor — Common law purpose of champerty is to protect administration of justice from abuse by those who wrongfully maintain litigation — Origins are in policy to ensure fair resolution of disputes and protect vulnerable litigants from abuse — Common law protection is promoted by examining propriety of litigant's motives — It is not apparent from historical record that there are abuses not caught by common law to which statute is specifically directed — Interpretation of Act consistent with common law would be harmonious with and promote aim of Act — Champerty, Act respecting, R.S.O. 1897, c. 397, s. 1.

Table of Authorities

Cases considered by *O'Connor A.C.J.O.*:

Awwad v. Geraghty & Co. (1999), [2000] 1 All E.R. 608 (Eng. C.A.) — referred to

Bayer AG v. Apotex Inc., 1998 CarswellOnt 3777, *(*sub nom. *Bayer Aktiengesellschaft v. Apotex Inc.)* 113 O.A.C. 1, *(*sub nom. *Bayer Aktiengesellschaft v. Apotex Inc.)* 82 C.P.R. (3d) 526 (Ont. C.A.) — followed

Bergel & Edson v. Wolf, 2000 CarswellOnt 3388, 50 O.R. (3d) 777, 49 C.P.C. (4th) 131 (Ont. S.C.J.) — referred to

Buday v. Locator of Missing Heirs Inc., 16 O.R. (3d) 257, 1 E.T.R. (2d) 237, 22 C.P.C. (3d) 318, *(*sub nom. *Ollmann Estate v. Locator of Missing Heirs Inc.)* 108 D.L.R. (4th) 424, 68 O.A.C. 97, 1993 CarswellOnt 480 (Ont. C.A.) — considered

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Cohen v. Kealey & Blaney, 10 O.A.C. 344, 26 C.P.C. (2d) 211, 1985 CarswellOnt 376 (Ont. C.A.) — considered

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Colville v. Small, 22 O.L.R. 426, 17 O.W.R. 745, 1910 CarswellOnt 594 (Ont. C.A.) — referred to

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Davidson Tisdale Ltd. v. Pendrick, 106 O.A.C. 241, 1997 CarswellOnt 4791, 18 C.P.C. (4th) 131 (Ont. Div. Ct.) — considered

Davidson Tisdale Ltd. v. Pendrick, 1998 CarswellOnt 4881, 116 O.A.C. 53, 31 C.P.C. (4th) 164 (Ont. Div. Ct.) — referred to

Findon v. Parker (1843), 152 E.R. 976, 11 M. & W. 675 (Eng. Ex. Div.) — considered

Finlayson v. Roberts, 2000 CarswellOnt 3754, 6 M.V.R. (4th) 193, 136 O.A.C. 271 (Ont. C.A.) — referred to

Fischer v. Kamala Naicher (1860), 2 L.T. 94, 8 W.R. 655, 19 E.R. 495, 8 Moo. Ind. App. 170 (England P.C.) — considered

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Frind v. Sheppard, [1940] 4 D.L.R. 455, [1940] O.R. 448, 74 C.C.C. 386 (Ont. C.A.) — considered

Frind v. Sheppard, [1941] S.C.R. 531, [1941] 4 D.L.R. 497, 1941 CarswellOnt 82 (S.C.C.) — considered

Galati v. Edwards Estate, 1998 CarswellOnt 4022, 21 R.P.R. (3d) 151, 27 C.P.C. (4th) 123 (Ont. Gen. Div.) — considered

Giles v. Thompson, [1993] 3 All E.R. 321, [1994] 1 A.C. 142 (Eng. C.A.) — considered

Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610, 56 D.T.C. 1060, 4 D.L.R. (2d) 1, 1956 CarswellNat 247 (S.C.C.) — considered

Hughes v. Kingston Upon Hull City Council (1998), [1999] Q.B. 1193 (Eng. Q.B.) — referred to

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McIntyre Estate v. Ontario (Attorney General), 2001 CarswellOnt 575, 53 O.R. (3d) 137, 198 D.L.R. (4th) 165, 11 C.P.C. (5th) 267 (Ont. S.C.J.) — considered

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Monteith v. Calladine, 49 W.W.R. 641, 47 D.L.R. (2d) 332, 1964 CarswellBC 150 (B.C. C.A.) — considered

Neville v. London Express Newspaper Ltd. (1918), [1919] A.C. 368, [1918-1919] All E.R. Rep. 61 (U.K. H.L.) — considered

Newswander v. Giegerich, 39 S.C.R. 354, 1907 CarswellBC 42 (S.C.C.) — considered

R. v. Goodman, [1939] S.C.R. 446, [1939] 4 D.L.R. 361, 72 C.C.C. 305, 1939 CarswellQue 41 (S.C.C.) — considered

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Robinson v. Cooney, 1999 CarswellOnt 1047, 29 C.P.C. (4th) 72 (Ont. Gen. Div.) — referred to

S. (J.E.) v. K. (P.), 55 O.R. (2d) 111, 10 C.P.C. (2d) 252, 1986 CarswellOnt 379 (Ont. Dist. Ct.) — considered

Smythers v. Armstrong, 67 O.R. (2d) 753, 57 D.L.R. (4th) 174, 1989 CarswellOnt 741 (Ont. H.C.) — considered

Solicitor, Re (1907), 10 O.W.R. 226, 1907 CarswellOnt 85, 14 O.L.R. 464, [1907] O.J. No. 159 (Ont. Weekly Ct.) — considered

Stribbell v. Bhalla, 73 O.R. (2d) 748, 42 C.P.C. (2d) 161, 1990 CarswellOnt 353 (Ont. H.C.) — considered

Thai Trading Co. v. Taylor, [1998] Q.B. 781 (Eng. C.A.) — considered

Trendtex Trading Corp. v. Credit Suisse (1979), [1980] 3 All E.R. 721, [1980] Q.B. 629 (Eng. C.A.) — referred to

Trepca Mines Ltd. (No. 2), Re (1962), [1963] 1 Ch. 199, [1962] 3 All E.R. 351 (Eng. C.A.) — considered

Wallersteiner v. Moir (No. 2), [1975] 1 All E.R. 849, [1975] 1 Q.B. 373, [1975] 2 W.L.R. 389, 119 Sol. Jo. 97 (Eng. C.A.) — considered

Wylie v. Coxe (1853), 15 How. 415 (U.S.S.C.) — considered

Statutes considered:

Access to Justice Act, 1999, c. 22

Generally — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Champerty, Act respecting, R.S.O. 1897, c. 327

Generally — considered

s. 1 — considered

s. 2 — considered

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 33(1) — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

Courts and Legal Services Act, 1990, c. 41

s. 58 — considered

Criminal Law Act, 1967, c. 58
Generally — referred to

s. 13(1) — referred to

s. 13(2) — referred to

s. 14 — referred to
Legal Practice Act, 1996, No. 35 (Vic.), 1996
s. 98 — referred to
Legal Profession Act, 1987, No. 109 (NSW), 1987
s. 187(2) — referred to

s. 187(3) — referred to

s. 187(4) — referred to
Solicitors Act, R.S.O. 1990, c. S.15
Generally — considered

s. 28 — considered
Statute Concerning Conspirators, 1305 (33 Edw. 1), St. 2
Generally — considered
Rules considered:
Rules of Practice 1994, 1994, No. 229 (Tas)
R. 92(1) — referred to
Words and phrases considered

champerty and maintenance

[Per O'Connor A.C.J.O. (Abella and MacPherson JJ.A. concurring)]:Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty . . .

. . . . .

In summary, I discern the following four general principles from a review of the common law of champerty and maintenance:

• Champerty is a subspecies of maintenance. Without maintenance, there can be no champerty.

• For there to be maintenance the person allegedly maintaining an action or proceeding must have an improper motive which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.

• The type of conduct that has been found to constitute champerty and maintenance has evolved over time so as to keep in step with the fundamental aim of protecting the administration of justice from abuse.

• When the courts have had regard to statutes such as the *Champerty Act* [*Champerty, Act respecting*] R.S.O. 1897, c. 397] and the *Statute Concerning Conspirators*, [1305 (33 Edw. 1), St. 2] they have not interpreted those statutes as cutting down or restricting the elements that were otherwise considered necessary to establish champerty and maintenance at common law.

CONTINGENCY FEE AGREEMENTS

[Per O'Connor A.C.J.O. (Abella and MacPherson JJ.A. concurring)]: Contingency fee agreements may take a variety of forms, but the one element common to all of them is that the client only becomes liable to pay the lawyer's fees in the event of success in the litigation.

for to have . . . part of the gains

[Per O'Connor A.C.J.O. (Abella and MacPherson JJ.A. concurring)]: In addition, I do not accept the Attorney General's submission that the language in s. 1 [of *Champerty, Act respecting* R.S.O. 1897, c. 397] clearly excludes a consideration of the motive of an alleged champertor. It seems to me that the use of the preposition "for", preceding the words "to have . . . part of the gains", leaves open an argument that one should examine the motive for which the alleged champertor is seeking to become involved in the litigation. Such an examination of motive is in keeping with the historical requirements for a finding of champerty. One can envision an argument that the existence of a justifiable motive or purpose for moving a lawsuit in addition to the motive of recovering part of the gains should take an alleged champertor outside the reach of the section. I put this point no higher than indicating that the use of the word" for" in s. 1 leaves open arguments in support of more than one interpretation of the section.

move . . . or cause to be moved

[Per O'Connor A.C.J.O. (Abella and MacPherson JJ.A. concurring)]: There are two aspects of the language used in s. 1 [of *Champerty, Act respecting* R.S.O. 1897, c. 397] that, in my view, are neither clear nor unequivocal. The first is the use of the words "move . . . or cause to be moved" to describe the conduct that renders one a champertor. *The Oxford English Dictionary*, 2d ed., prepared by J.A. Simpson & E.S.C. Weiner, (Oxford: Clarendon Press, 1989) Vol. X at 31-34, provides many different meanings for the word "move", some of which would buttress the Attorney General's position that the word applies to a lawyer who provides legal services to a client bringing a suit or action with nothing more. For example, the definition of "move" includes "to plead (a cause or suit) in court and bring (an action at law)". Other meanings found in the dictionary, however, support an interpretation that the word "move" in s. 1 is intended to capture more than simply providing assistance to a party in an action. "Move" is also defined to mean "to stir up or excite, to provoke" or "to urge a person to do something", concepts which incorporate aspects of what was in 1897 and continues to be required at common law for maintenance and champerty — officious intermeddling or other improper motive. The many definitions of the word "move" found in the dictionary simply make the point that "move" can have more than one meaning, some of which could make sense in the context of s. 1 of the *Champerty Act*.

***O'Connor A.C.J.O.*:**

1 This appeal raises the important question of whether lawyers and their clients are prohibited from entering into contingency fee agreements in relation to civil lawsuits in Ontario. Contingency fee agreements may take a variety of forms, but the one element common to all of them is that the client only becomes liable to pay the lawyer's fees in the event of success in the litigation.

2 The respondent has commenced an action seeking damages against Imperial Tobacco and Venturi Inc. (the "defendants") for the wrongful death of Ronald McIntyre. At the outset of the litigation, the respondent sought a declaration that a proposed contingency fee agreement with her lawyers is not prohibited by *An Act Respecting Champerty*, R.S.O. 1897, c. 327 (the" *Champerty Act*".) In a judgment dated March 1, 2001, Wilson J. granted the

declaration, but held that in doing so she was not approving the fee structure set out in the proposed agreement. It is implicit in her reasons that the reasonableness and fairness of the fee structure did not inform her analysis of whether the proposed agreement is champertous.

3 The Attorney General, who was named as the respondent in the application below, appeals the judgment arguing that the *Champerty Act* constitutes an absolute prohibition of all lawyers' contingency fee agreements. For the reasons that follow, I agree with the applications judge's main conclusion that lawyers' contingency fee agreements are not *per se* prohibited by the *Champerty Act*. However, in my view, that does not end the analysis that is required to determine if a particular agreement is champertous. It remains to be decided whether the lawyer had an improper motive in entering into the allegedly champertous agreement. In assessing the lawyer's motive, a court should consider, among other things, the reasonableness and fairness of the fee structure in the contingency fee agreement.

4 In this case, the fee structure in the proposed agreement is based on a percentage of the damages that may be recovered from the defendants. The fees are not related to the amount of time spent by the lawyers, the quality of the legal services or the many other factors that would normally be taken into consideration when determining the appropriateness of a lawyer's fees. Moreover, there is no cap or upper limit on the amount that may become owing for legal services. Because of the nature of the fee structure, it is premature at this early stage of the litigation to assess whether the fees that may become payable under the proposed agreement will be reasonable and fair. For that reason alone, I would allow the appeal and set aside the declaration that the proposed agreement does not contravene the *Champerty Act*. Given the nature of the fee structure, a determination of whether the proposed agreement is champertous will likely have to await the outcome of the underlying litigation.

Background

5 The respondent, the estate of Ronald McIntyre represented by his widow, Maureen McIntyre, has instituted an action against the defendants alleging responsibility for the illness and death of Mr. McIntyre, who died from lung cancer. It is alleged that Mr. McIntyre's death was caused by smoking cigarettes manufactured and marketed by the defendant, Imperial Tobacco, and it is further alleged that the defendant, Venturi Inc., was negligent and deceitful in its marketing of a plastic cigarette attachment, used by Mr. McIntyre, by stating that the device reduces tar and nicotine from cigarette smoke.

6 Mr. McIntyre began smoking at the age of sixteen and soon after became addicted to nicotine. In spite of efforts to stop smoking, he was unable to do so. In July 1998 he was diagnosed with lung cancer and in December 1999 he died.

7 After her husband's death, Mrs. McIntyre contacted the Canadian Cancer Society for advice and was eventually referred to her present lawyers, the law firm of Rochon, Genova, to represent her husband's estate in any legal action arising from her husband's death. Mrs. McIntyre decided to bring an action against the defendants to recover the damages resulting from Mr. McIntyre's death. It was apparent that the proposed action would involve complex product liability allegations and likely would be vigorously defended. Mrs. McIntyre was unable to prosecute an action of this nature without the assistance of counsel.

8 Mrs. McIntyre works in the medical records department of a local hospital and is a person of modest means. The applications judge found that she would be unable to finance the proposed litigation other than on a contingency fee basis.

9 On behalf of her husband's estate, Mrs. McIntyre entered into a contingency fee agreement with Rochon, Genova, which agreement was made conditional upon court approval. The McIntyre estate is only liable to pay the law firm's fees in the event that the litigation is successful. If there is no recovery, then the estate and Mrs. McIntyre will not be liable for the payment of any legal fees. In the event of success, the compensation for the

lawyers is based on a percentage of the damages recovered. The estate would be required to pay to the law firm 33 percent of compensatory damages, 40 percent of punitive, aggravated or exemplary damages, 100 percent of costs recovered from the defendants in the action and 100 percent of any disbursements not otherwise recovered from the defendants.

10 Although not explicitly stated in the agreement, the law firm implicitly agrees to provide the legal services necessary to conduct the litigation and to pay the disbursements necessary to support the action.

11 The respondent brought an application in the court below requesting three declarations:

> a) A declaration that the proposed agreement between the applicant and her solicitors does not offend the *Champerty Act*.
>
> b) In the alternative, a declaration that the *Champerty Act* is of no force and effect, and is contrary to the *Canadian Charter of Rights and Freedoms*, and the *Constitution Act, 1867*.
>
> c) In the further alternative, an order providing a constitutional exemption, allowing the respondent to retain counsel, notwithstanding the provisions of the *Champerty Act*.

12 The respondent named only the Attorney General of Ontario as a respondent to the application in the court below. The defendants in the underlying litigation were not named as respondents and did not participate in the proceeding before the applications judge.

13 The application was heard on December 7, 2000 and by judgment dated March 1, 2001, reported at (2001), 53 O.R. (3d) 137 (Ont. S.C.J.), the applications judge made a declaration that the proposed agreement between the respondent and her solicitors does not offend the *Champerty Act*. In addition, she held that it was premature to approve the proposed agreement and that the court should decide whether to approve any contingency fee agreement at the conclusion of the litigation. Because of the conclusion she reached, the applications judge did not find it necessary to address the alternative declarations sought by the respondent.

14 The Attorney General appealed the judgment. On July 26, 2001, Osborne A.C.J.O. dismissed a motion by Imperial Tobacco for leave to intervene in the appeal as an added party and to adduce evidence before this court. See [2001] O.J. No. 3206 (Ont. C.A.). On September 14, 2001, the Advocates' Society and the Ontario Trial Lawyers' Association were granted leave to intervene in the appeal as friends of the court. Both interveners appeared on the argument of the appeal and made submissions in favour of upholding the decision of the court below.

Issue

15 The single issue that needs to be addressed on this appeal is whether the applications judge erred in granting a declaration that the proposed agreement between the respondent and her lawyers does not offend the *Champerty Act*. Because I conclude that it is premature to determine whether the proposed agreement offends the *Champerty Act*, it is unnecessary to address the *Charter* relief sought by the respondent.

Analysis

16 The *Champerty Act* has only two sections. The complete text is as follows:

> 1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
>
> 2. All champertous agreements are forbidden, and invalid.

17 I have divided my analysis into the following five sections:

a) History of the *Champerty Act*;

b) The common law of champerty and maintenance;

c) The interpretation of s. 1 of the *Champerty Act*;

d) Lawyers' contingency fee agreements; and

e) Application of the law to this case.

***(a) History of the* Champerty Act**

18 The *Champerty Act* was enacted by the Ontario legislature in 1897 [1]. Section 1 is based on a provision found in an English statute which was first enacted in 1305 and which is cited as 33 Edw.1, Stat. 2. The English statute was entitled *Statutum de Conspiratoribus* or as it came to be known, the *Statute Concerning Conspirators*. It is not clear whether the predecessor language to what became s. 1 in the *Champerty Act* was included in the *Statute Concerning Conspirators* when it was originally enacted or whether it was added at some later point in time. See *A New Abridgement of the Law by Matthew Bacon*, 7th ed., Corrected (London: A Strahan, 1832) Vol. II at 27, 29. It is apparent, however, that the section finds its origins in medieval times.

19 The relevant section in the English statute, like the sections in several other medieval statutes, addressed abuses that were known in the common law as champerty and maintenance. Legal historians tell us that these medieval statutes were passed with a view to prohibiting particular practices that were prevalent in English medieval society. In those times, there existed a practice of assigning doubtful or fraudulent claims to Royal officials, nobles and other persons of wealth and influence who would be expected to receive a more favourable hearing in court than the assignors. Typically, these arrangements provided that the assignee maintain the action and that the proceeds of success would be shared between the assignor and assignee. Over time, as conditions in the administration of justice improved with the emergence of an impartial and independent judiciary, the circumstances that gave rise to the enactment of what is now s. 1 of the *Champerty Act* no longer existed. However, new and different abuses arose and were included within what the common law labelled as champerty and maintenance.

20 A reprint of the *Statute Concerning Conspirators*, published in 1763 in *The Statutes at Large*, Vol. 1, prepared by Owen Ruffhead, esq., used what was then more current language than that found in the original text. When the legislature in Ontario enacted the *Champerty Act* in 1897, it incorporated as s. 1 the identical language to that found in the 1763 reprint of the *Statute Concerning Conspirators*. The Ontario legislature added s. 2, providing that all champertous agreements are forbidden and invalid.

21 In 1967, the Parliament of the United Kingdom repealed the various medieval statutes which had until then prohibited either or both of champerty and maintenance. See *Criminal Law Act 1967*, 1967, c. 58, ss. 13(1), (2), 14. Included among the statutes then repealed was the *Statute Concerning Conspirators*. However, the *Champerty Act*, as enacted in 1897, remains in effect in Ontario.

(b) The common law of champerty and maintenance

22 The Attorney General argues that this appeal is concerned solely with the interpretation of s. 1 of the *Champerty Act* and that the concept of champerty found in the common law is of no assistance to the proper interpretation of that section. I agree that the interpretation of s. 1 of the *Champerty Act* is at the heart of this appeal. However, for the reasons that are developed in subsection (c) below, I am of the view the common law regarding what constitutes champerty is essential to a proper interpretation of the section. For that reason, before turning

to the interpretation of s. 1 of the *Champerty Act*, it is useful to briefly review the common law of champerty. In doing so, it is also necessary to review the common law of maintenance because as I point out below, champerty is one type or a subspecies of maintenance.

23 The doctrines of champerty and maintenance played an important role in the common law in protecting the administration of justice from a variety of real or perceived abuses. At common law, champerty and maintenance were both crimes and torts and the presence of either was capable of rendering contracts unenforceable as being contrary to public policy.

24 The common law crimes and torts of champerty and maintenance were abolished by statute in the United Kingdom in 1967. The abolition of criminal and civil liability for champerty and maintenance, however, did not put an end to the use of the concepts in English law. The 1967 Act left open the possibility that champerty and maintenance could still render contracts unenforceable as being contrary to public policy and because of that, the English courts continued to address issues relating to the enforceability of lawyers' contingency fee agreements until they were expressly permitted by statute in 1998.

25 In 1954, the Canadian Parliament abolished all common law crimes, including those of champerty and maintenance. However, champerty and maintenance continue to be actionable in tort in Ontario upon proof of special damages. See *Frind v. Sheppard*, [1940] 4 D.L.R. 455 (Ont. C.A.), rev'd [1941] 4 D.L.R. 497 (S.C.C.); and *Davidson Tisdale Ltd. v. Pendrick* (1997), 18 C.P.C. (4th) 131 (Ont. Div. Ct.) (leave to appeal); (1998), 31 C.P.C. (4th) 164 (Ont. Div. Ct.). In addition, in Ontario, the *Champerty Act* specifically provides that champertous agreements are forbidden and invalid.

26 Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty: *Findon v. Parker* (1843), 11 M. & W. 675 (Eng. Ex. Div.), at 682, (1843), 152 E.R. 976 (Eng. Ex. Div.), at 979; *Fischer v. Kamala Naicher* (1860), 8 Moo. Ind. App. 170 (England P.C.), at 187; *Newswander v. Giegerich* (1907), 39 S.C.R. 354 (S.C.C.), at 359, 362-63; *Colville v. Small* (1910), 22 O.L.R. 33 (Ont. H.C.), at 34, aff'd (1910), 22 O.L.R. 426 (Ont. C.A.); *Neville v. London Express Newspaper Ltd.* (1918), [1919] A.C. 368 (U.K. H.L.), at 378-79, 382-83; *R. v. Goodman*, [1939] S.C.R. 446 (S.C.C.), at 449, 453-54; *Monteith v. Calladine* (1964), 47 D.L.R. (2d) 332 (B.C. C.A.), at 342; *S. (J.E.) v. K. (P.)* (1986), 55 O.R. (2d) 111 (Ont. Dist. Ct.), at 118, 121; and *Smythers v. Armstrong* (1989), 67 O.R. (2d) 753 (Ont. H.C.), at 756-57. See also *Giles v. Thompson*, [1993] 3 All E.R. 321 (Eng. C.A.), at 357.

27 The courts have made clear that a person's motive is a proper consideration and, indeed, determinative of the question whether conduct or an arrangement constitutes maintenance or champerty. It is only when a person has an improper motive which motive may include, but is not limited to, "officious intermeddling" or "stirring up strife", that a person will be found to be a maintainer.

28 In *Buday v. Locator of Missing Heirs Inc.* (1993), 16 O.R. (3d) 257 (Ont. C.A.), at 267-68, Griffiths J.A. quoted with approval the following extract from *Monteith v. Calladine*, *supra*, at 342:

> It would appear, therefore, that champerty is maintenance plus an agreement to share in the proceeds, and that while there can be maintenance without champerty, there can be no champerty without maintenance. There must be present in champerty as in maintenance an officious intermeddling, a stirring up of strife, or other improper motive. [Emphasis in original.]

29 Similarly, Fogarty D.C.J. in *S. (J.E.) v. K. (P.)*, *supra*, at 117, summarized the need for an improper motive as follows:

> I must conclude that the motive of the party who interests himself in the suit of another is most relevant to determine whether maintenance is made out. If the motive is genuine and arises out of concern for the litigant's rights, it is not maintenance. Similarly if that interest of such party arises genuinely from an interest in the outcome, it is not maintenance and this is not restricted to blood relationships. . . .

30 The English courts also routinely held that champerty and maintenance require the element of an improper motive. See *Neville v London Express, supra*, at 378-79, 382-83, 411-12, 414-15; *Trepca Mines Ltd. (No. 2), Re* (1962), [1963] 1 Ch. 199 (Eng. C.A.), at 219-20; *Giles v. Thompson*, *supra*, at 328-29, 332; and at 360; and *Thai Trading Co. v. Taylor*, [1998] Q.B. 781 (Eng. C.A.), at 786-90.

31 In the same vein, the courts have allowed exceptions to what constitutes champerty or maintenance when there has been the presence of a justifying motive or excuse: *Galati v. Edwards Estate* (1998), 27 C.P.C. (4th) 123 (Ont. Gen. Div.); *S. (J.E.) v. K. (P.)*, *supra*; *Goodman*, *supra*; *Stribbell v. Bhalla* (1990), 73 O.R. (2d) 748 (Ont. H.C.); and *Buday*, *supra*. Lord Denning M.R. in *Trepca Mines Ltd. (No. 2)*, *supra*, said the following at 219:

> Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time the limits of "just cause or excuse" were very narrowly defined. But the law has broadened them very much of late . . . and I hope they will never again be placed in a strait waistcoat.

32 The fundamental aim of the law of champerty and maintenance has always been to protect the administration of justice from abuse. However, over time, that which has been considered to be champerty and maintenance has evolved. As they have done with many other common law concepts, the courts have shaped the rules relating to champerty and maintenance to accommodate changing circumstances and the current requirements for the proper administration of justice. In *Giles v. Thompson*, *supra*, at 360, Lord Mustill described this process as follows:

> As Steyn LJ has demonstrated, the law of maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose. . . . I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants.

33 It is interesting to note that when addressing issues of champerty and maintenance, the courts have had little regard to the definitions and prohibitions found in the *Champerty Act* in Ontario or in the medieval statutes relating to champerty and maintenance in England. Moreover, when the courts have referred to those statutes, they have not interpreted them in a manner that would restrict or cut down the scope of what was considered necessary to constitute champerty and maintenance at common law. In *Buday v. Locator of Missing Heirs Inc.*, *supra*, at 267, Griffiths J.A. stated:

> Whatever its historical origin, the authorities, both English and Canadian, have consistently treated champerty as a form of maintenance requiring proof not only of an agreement to share in the proceeds but also the element of encouraging litigation that the parties would not otherwise be disposed to commence. I recognize that the 1897 statute respecting champerty does not speak of officious intermeddling but the term champerty used in the statute has always by definition been regarded as a species of maintenance. [Emphasis added.]

34 In summary, I discern the following four general principles from a review of the common law of champerty and maintenance:

- Champerty is a subspecies of maintenance. Without maintenance, there can be no champerty.

• For there to be maintenance the person allegedly maintaining an action or proceeding must have an improper motive which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.

• The type of conduct that has been found to constitute champerty and maintenance has evolved over time so as to keep in step with the fundamental aim of protecting the administration of justice from abuse.

• When the courts have had regard to statutes such as the *Champerty Act* and the *Statute Concerning Conspirators*, they have not interpreted those statutes as cutting down or restricting the elements that were otherwise considered necessary to establish champerty and maintenance at common law.

35 The above constitute the general principles relating to champerty and maintenance found in the common law. Historically, the courts applied these principles very strictly to contingency fee agreements between lawyers and clients, holding that such agreements were *per se* champertous without the need to show a specific improper motive. I discuss the evolution of the case law as it relates to contingency fee agreements in subsection (d) below.

***(c) The interpretation of s. 1 of the* Champerty Act**

36 The Supreme Court of Canada has described the modern approach to statutory interpretation as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in the entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (S.C.C.), at 41, adopting the words of Elmer Driedger in *Construction of Statutes* (2d ed. 1983) at 87.

37 I start the analysis of s. 1 of the *Champerty Act* by noting again that the section is based on a provision that is hundreds of years old and upon the precise wording that was developed at least 240 years ago. Because of the antiquity of the language, this court should exercise some caution in attaching too much weight to the literal meaning of the words used. Clearly, the task of interpreting words from another era when some language may have been used differently than it is today can present difficulties not present when interpreting statutes enacted in modern times. Common sense suggests that when analyzing a provision from another era, like s. 1 of the *Champerty Act*, a court should pay particular regard to the context within which the provision was enacted and to the underlying aim of the legislation. This is particularly so where the language used is unfamiliar or awkward to the modern reader.

38 Let me then turn to the language used in s. 1 of the *Act*. The Attorney General submits that the language in s. 1 is clear and unequivocal, defining a champertor as one who moves a lawsuit or causes to move a lawsuit and in exchange receives a portion of the recovery. This language, it is argued, applies to a lawyer who is a party to a contingency fee agreement like that proposed in this case and who assists the plaintiff in bringing the action in exchange for fees to be paid from the recovery in the action. Because the language is clear, it is submitted, there is no reason to resort to the common law for assistance in interpreting who should be considered a champertor within the meaning of s. 1. The importance of this last point, from the Attorney General's standpoint, is that the common law requirement for champerty and maintenance that there be an improper motive is not explicit in the words of s. 1 of the *Champerty Act*. Nor, the Attorney General argues, is it open from the language in the section for an alleged champertor to raise as an answer that there was a justifying motive or excuse.

39 The effect of the Attorney General's argument is that the *Champerty Act* would create a different and more expansive class of champertors than that known to the common law. Even though one may not have an improper

motive, that person would nonetheless be caught within the prohibition in the *Champerty Act* if he or she moved or caused to be moved an action in exchange for part of the recovery.

40 In my view, the Attorney General's argument must fail for two reasons. First, I do not agree that the language in s. 1 is clear and unequivocal. Moreover, the argument completely ignores the context in which the *Champerty Act* was enacted by the Ontario legislature in 1897.

41 There are two aspects of the language used in s. 1 that, in my view, are neither clear nor unequivocal. The first is the use of the words "move . . . or cause to be moved" to describe the conduct that renders one a champertor. *The Oxford English Dictionary*, 2d ed., prepared by J.A. Simpson & E.S.C. Weiner, (Oxford: Clarendon Press, 1989) Vol. X at 31-34, provides many different meanings for the word "move", some of which would buttress the Attorney General's position that the word applies to a lawyer who provides legal services to a client bringing a suit or action with nothing more. For example, the definition of "move" includes "to plead (a cause or suit) in court and bring (an action at law)". Other meanings found in the dictionary, however, support an interpretation that the word" move" in s. 1 is intended to capture more than simply providing assistance to a party in an action. "Move" is also defined to mean" to stir up or excite, to provoke" or "to urge a person to do something", concepts which incorporate aspects of what was in 1897 and continues to be required at common law for maintenance and champerty — officious intermeddling or other improper motive. The many definitions of the word "move" found in the dictionary simply make the point that "move" can have more than one meaning, some of which could make sense in the context of s. 1 of the *Champerty Act*.

42 In addition, I do not accept the Attorney General's submission that the language in s. 1 clearly excludes a consideration of the motive of an alleged champertor. It seems to me that the use of the preposition "for", preceding the words "to have . . . part of the gains", leaves open an argument that one should examine the motive for which the alleged champertor is seeking to become involved in the litigation. Such an examination of motive is in keeping with the historical requirements for a finding of champerty. One can envision an argument that the existence of a justifiable motive or purpose for moving a lawsuit in addition to the motive of recovering part of the gains should take an alleged champertor outside the reach of the section. I put this point no higher than indicating that the use of the word" for" in s. 1 leaves open arguments in support of more than one interpretation of the section.

43 Moreover, I am satisfied that the context within which the *Champerty Act* was enacted in 1897 argues strongly in favour of the use of the common law in interpreting the meaning of s. 1 of the *Act*. In 1897, the concepts of champerty and maintenance were well developed and entrenched in the common law. At the time, champerty and maintenance were considered to be both crimes and torts at common law, and by 1897 the courts had for centuries been applying common law principles to the conduct of alleged wrongdoers. Because of the illegality of champertous behaviour, the common law also considered champertous agreements to be unenforceable. Against this background, the Ontario legislature adopted the aged language now found in s. 1 to define who would be considered a champertor. Significantly, that section had been on the statute books in England for hundreds of years and there does not appear to be anything in the jurisprudence that predated the enactment of the *Champerty Act* holding that the section created a different class of champertors than that known at common law.

44 The available record does not disclose why the Ontario legislature enacted the *Champerty Act* in 1897, nor why it chose to adopt what was even at that time aged language to define who would be considered a champertor. However, it seems logical to conclude that the legislature by using existing, longstanding language, rather than carefully crafting a new legislative provision, did not intend to render a fundamental change to the existing concept of champerty.

45 It is a settled principle of statutory interpretation that where the legislature intends to change the common law, it must do so expressly and in clear and unequivocal terms. Fauteaux J. stated the rule in *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 (S.C.C.), at 614, as follows:

> [A] Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed.

Cumming J. (ad hoc) for this court expressed the same rule as follows in *Bayer AG v. Apotex Inc.* (1998), 82 C.P.R. (3d) 526 (Ont. C.A.), at 536:

> It is generally presumed that the legislature does not intend to change existing law or to depart from established principles, policies or practices, unless expressly indicated. In other words, there is a general presumption against the implicit alteration of the law, the converse being that it is presumed the common law will not be displaced unless legislation provides an explicit instruction to that effect; . . . .

46 I am satisfied that the interpretation of s. 1 of the *Champerty Act* calls for the application of the principle that a legislature is presumed not to have intended to change existing law unless otherwise expressly indicated. Because there is no language in the *Champerty Act* that evidences a clear legislative intention to displace what were in 1897 well established and broadly applied principles relating to champerty, I approach the interpretation of s. 1 on the basis that the legislature did not intend to render the fundamental change to the existing law of champerty urged by the Attorney General. In my view, the language of s. 1 and the context in which it was enacted fall well short of establishing such a clear legislative intention. For these reasons, I conclude that s. 1 of the *Champerty Act* should be interpreted as incorporating the common law requirements relating to who should be considered a champertor.

47 Furthermore, I am satisfied that interpreting s. 1 of the *Champerty Act* in this manner is consistent with and promotes the fundamental object of the legislation. The overriding purpose of the common law of champerty has always been to protect the administration of justice from abuse by those who wrongfully maintain litigation. Its origins are rooted in a policy directed to ensuring a fair resolution of disputes and protecting vulnerable litigants from abuse. The protection afforded by the common law is advanced by looking to the propriety of the motives of those who become involved in litigation. By examining motives, one can more readily separate abusive practices from those that are justified or even beneficial to the proper administration of justice. Like the common law, the aim of the *Champerty Act* was no doubt to protect the administration of justice from abuse. It is not apparent from the historical record, nor does the Attorney General now argue, that there were abuses not caught by the common law to which the *Champerty Act* was specifically directed. It seems clear, therefore, that an interpretation of the *Champerty Act* that is consistent with the common law principles relating to champerty would also be harmonious with and promote the aim of the legislation.

(d) Lawyers' contingency fee agreements

48 As an alternative argument, the Attorney General submits that if this court concludes that s. 1 of the *Champerty Act* should be interpreted in a manner consistent with the common law requirements for champerty, then it should apply the case law that holds that lawyers' contingency fee agreements are *per se* champertous and there is, therefore, no need to establish a specific improper motive. The motive can be inferred from the very nature of the agreement itself.

49 There is no question that for many years the courts in Ontario and in England repeatedly held that lawyers' contingency fee agreements were champertous and, as a result, unenforceable. In *Solicitor, Re* (1907), 14 O.L.R. 464 (Ont. Weekly Ct.), at 465, Chancellor Boyd expressed the then commonly held view as follows:

> [T]he confidential relation between lawyer and client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by the tariff and the practice of the Courts. Especially does the law forbid any agreement for the lawyer to share in the proceeds of a litigated claim as compensation for his services. Such a transaction is in contravention of the statute relating to champerty, and it is also a violation of the solemn engagement entered into by the barrister upon his call to the Bar.

50 Similarly, in England Lord Denning described the prohibition on lawyers' contingency fees as follows, in *Wallersteiner v. Moir (No. 2)*, [1975] 1 Q.B. 373 (Eng. C.A.), at 393-94:

> English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee,' that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. . . .
>
> It was suggested to us that the only reason why 'contingency fees' were not allowed in England was because they offended against the criminal law of champerty: and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England.

See also *Trendtex Trading Corp. v. Credit Suisse* (1979), [1980] Q.B. 629 (Eng. C.A.); *Hughes v. Kingston Upon Hull City Council* (1998), [1999] Q.B. 1193 (Eng. Q.B.); *Robinson v. Cooney* (1999), 29 C.P.C. (4th) 72 (Ont. Gen. Div.); and *Awwad v. Geraghty & Co.*, (1999), [2000] 1 All E.R. 608 (Eng. C.A.).

51 A review of the jurisprudence relating to champerty reveals two concerns that fuelled the courts' intolerance for these types of agreements. The first was the apprehension that lawyers, realizing that they would only be paid if an action were successful, would be tempted to resort to a host of unethical practices in order to ensure success and, therefore, payment of their fees. In *Trepca Mines Ltd. (No. 2)*, *supra*, at 219-20, Lord Denning expressed this concern as follows:

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.

52 The second concern prompting courts to fear the use of contingency fee agreements was the perceived need to protect the relationship of trust between lawyer and client. The fear was that if a lawyer's compensation was tied to recovery in the litigation, a lawyer might be tempted to conduct an action to further his or her own best interest rather than that of the client. More indirectly, clients might be concerned that this was in fact the case and question the strength of the lawyer's commitment to the clients' interests. In either event, the concern was that the relationship of trust between lawyer and client would be damaged.

53 There is reason to question whether the contingent nature of a fee agreement, by itself, is the significant threat to professional ethics that was feared at common law. It is interesting to note that while historically these concerns about the potential for abuse by lawyers or damage to the lawyer-client relationship were frequently expressed, there is little, if any, evidence to show that the fears were well-founded. Although the lack of evidence may be attributable to the fact that contingency fee agreements were considered to be illegal and therefore not broadly used, we do know that for years lawyers have acted in what they considered to be meritorious cases for clients of modest means with the realization, if not the express agreement, that they would only be paid in the event of success. See, for example, *Bergel & Edson v. Wolf* (2000), 50 O.R. (3d) 777 (Ont. S.C.J.), at 795; and *Finlayson v. Roberts* (2000), 136 O.A.C. 271 (Ont. C.A.) at para. 24. Lawyers acting in these "informal" arrangements were no doubt subject to some of the same temptations as those who formally agreed to be paid only in the event of a success. However, there is no evidence to indicate that lawyers who have acted in informal arrangements of this nature have performed to a lower ethical standard than those who were paid regardless of outcome.

54 In addition, we have the benefit of the experiences of the many jurisdictions that have enacted legislation permitting regulated contingency fee agreements. This court was not shown any evidence to show that lawyers in these jurisdictions, properly regulated, are more likely to engage in the types of abuse to the administration of justice that were once feared to be the result of contingency fee agreements.

55 There can be no doubt that from a public policy standpoint, the attitude towards permitting the use of contingency fee agreements has undergone enormous change over the last century. The reason for the change in attitude is directly tied to concerns about access to justice. Over time, the costs of litigation have risen significantly and the unfortunate result is that many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation. In this regard, Cory J. made the following comments about the importance of contingency fees to the legal system in *Coronation Insurance Co. v. Florence*, [1994] S.C.J. No. 116 (S.C.C.) at para. 14:

> The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged. . . . Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.

56 Perhaps the most striking evidence of the change in attitude towards the use of contingency fee agreements is found in the fact that every Canadian province and territory other than Ontario has enacted legislation or rules of court to permit and regulate the use of contingency fees. Manitoba, for example, has authorized such fees since 1890, while most of the other provinces have permitted them for at least 25 years. [2]

57 Typically, when legislation has been enacted to permit contingency fee agreements, the legislature also has enacted regulations governing their use. The regulatory schemes vary from jurisdiction to jurisdiction. British Columbia, for example, imposes a ceiling on the percentage of the recovery that a lawyer may receive in certain types of proceedings. Most other jurisdictions impose no such restrictions. All of the provinces require that contingency fee agreements be in writing and many jurisdictions require such agreements to be filed in court. In addition, each Canadian jurisdiction provides a mechanism by which the client may seek a review of the lawyer's fee, similar to the scheme that now exists in Ontario under the *Solicitors Act*, R.S.O. 1990, c. S.15. The applications judge in this case laid out the various regulatory provisions comprehensively in an appendix to her judgment.

58 In the United States, as early as the mid-nineteenth century, the Supreme Court expressly authorized the use of contingency fees. See *Wylie v. Coxe* (1853), 15 How. 415 (U.S.S.C.). Contingency fees in the United States (in both federal and state courts) are now regulated by a combination of professional conduct rules and statutes. Most states base their rules on the American Bar Association's *Model Rules of Professional Conduct*, which impose some limitations on the use of such fee arrangements. The American regulations include required terms for contingency fee agreements and an obligation that fees be reasonable. Some states have placed caps on the percentage of the amount recovered that a lawyer may charge. Some states prohibit or restrict contingency fees in family law and/or criminal matters. See for example, *The Lawyer's Code of Professional Responsibility* (Albany: New York State Bar Association, 2002), DR (Disciplinary Rule) 2-106 — Fee for Legal Services.

59 In England and Wales, the *Courts and Legal Services Act 1990*, 1990, c. 41, s. 58, authorized the use of "conditional fees", under which lawyers may recover their normal fees plus a success "uplift", *i.e.*, an increase in their fees, up to a maximum of 100 percent, based on the chance of winning, except in family law proceedings. The 1990 statute authorized the Lord Chancellor to make Orders specifying the proceedings in which conditional fee agreements lawfully could be made. The first such Order was made in 1995, permitting such fee agreements in personal injury and insolvency proceedings, as well as for cases before the European Commission and the European Court of Human Rights. The availability of conditional fees was expanded to include all civil proceedings in 1998. Moreover, with the passage of the *Access to Justice Act 1999*, 1999, c. 22, courts also may order that a successful litigant recover the success fee and insurance from the losing party. That statute also allows

a party to be funded by a trade union or other prescribed group, and authorizes such a group to recover from the opponent a sum in recognition of that liability.

60 Lawyers in all Australian jurisdictions are permitted to charge clients on a speculative fee basis, *i.e.*, they are paid their normal fees only in the event of success. See *Clyne v. Bar Association of New South Wales* (1960), 104 C.L.R. 186 (Australia H.C.); and *In the Marriage of Sheehan Husband and Sheehan Wife* (1990), 13 Fam. L.R. 736 (Australia Fam. Ct.) at paras. 82, 88, 101. In addition, several Australian states, namely New South Wales, Victoria, South Australia and Queensland, have authorized the use of "uplift" fees (in which the lawyer receives, in addition to his or her usual fee, an agreed flat amount or percentage uplift of the usual fee, if successful) in certain types of cases. See, for example, *Legal Profession Act 1987* (NSW), s. 187(2), (3), (4); *Legal Practice Act 1996* (Vic.), s. 98; *Professional Conduct Rules* (S. Aust.), r. 8.10; and *Barristers' Rules* (Qld.), r. 102A(d). Contingency fee arrangements are, however, prohibited in family and criminal law cases. Tasmania prohibits the charging of uplift fees by barristers: *Rules of Practice 1994* (Tas.), r. 92(1). In the Northern Territory and Western Australia, uplift fee agreements may amount to champerty at common law.

61 While the Ontario legislature has not enacted legislation permitting contingency fee agreements for all civil actions, it has recognized the advantages of these types of agreements for class action proceedings. In 1992, the legislature enacted the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 33(1), which expressly permits and regulates contingency fee agreements for class proceedings. In enacting this legislation, Ontario has recognized the overriding importance of ensuring access to justice for those who have claims arising in the context of a class of injured victims. There is no apparent reason why a policy that favours contingency fee agreements for class actions would not apply equally to litigation brought by individuals.

62 The change in public policy favouring the use of contingency fee agreements to facilitate access to justice is not only found in legislation. In Ontario in recent years, there have been repeated calls for reform to permit and regulate contingency fee agreements. Since 1975, there have been several studies or reviews of the competing policy considerations relating to contingency fee agreements. Overwhelmingly, those studying the issues have recommended that, for reasons of promoting access to justice, contingency fee agreements should be permitted.

63 The Law Society of Upper Canada first formally supported a scheme of regulated contingency fees in 1988 and has reaffirmed that position in 1992 and again in 2000. In 1997, the Ontario Legal Aid Review recommended that the Ontario government introduce legislation that would allow contingent fee arrangements for lawyers in Ontario. The report noted that, over recent years, legal aid certificate coverage had been eliminated for most civil litigation matters and that permitting contingency fee agreements would be an important step in addressing the resulting difficulty. See Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services* (Toronto: Ministry of the Attorney General, 1997) Vol. 1 at 218-25. Most recently, in 2000, the Attorney General's Joint Committee on Contingency Fee, which was comprised of representatives of the Law Society of Upper Canada, the Advocates' Society and the Canadian Bar Association — Ontario, again recommended that, for purposes of increasing the access to justice, Ontario expressly permit contingency fees, *i.e.*, a percentage of the amount recovered in legal proceedings, except in criminal and quasi-criminal cases, and in family law proceedings. The *Joint Committee Report* [unpublished, 2000] stated:

> One way to make justice more accessible is to provide a flexible approach to the payment of legal services by permitting contingency fees. Contingency fees are advantageous for middle class litigants because they shift most of the risk of litigation from a client to a lawyer. Under a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services and are then able to turn to the justice system to seek redress for their injuries. . . .
>
> A variety of controls and safeguards can be imposed to regulate contingency fees to protect consumers, avoid abuse and prevent over-charging by lawyers, including: restrictions on the area of practice to which

contingency fees can be applied, restrictions on clients, regulation of the lawyer's remuneration, review of the contingency fee contract, filing the contract with the court and regulating the form and content of the contract.

64 In recent years, the courts have also begun to recognize the benefits of providing increased access to the courts flowing from the use of contingency fee agreements. Some courts have softened the traditional approach of precluding recovery of fees by lawyers where there has been a contingency fee agreement and have instead focused on the need of an improper motive to render an agreement unenforceable. See *Stribbell v. Bhalla*, *supra*; *Thai Trading*, *supra*; and *Bergel & Edson*, *supra*. These cases are part of the normal process by which the common law adjusts to emerging circumstances and experiences. I recognize, however, that even in recent years not all courts have adopted this approach and some courts have continued to follow the traditional approach of finding that contingency fee agreements are *per se* champertous. See for example, *Robinson v. Cooney*, *supra*; *Hughes v. Kingston*, *supra*; and *Awwad*, *supra*.

65 The important point to be drawn from the recent jurisprudence is that the common law regarding contingency fee agreements has begun to evolve so as to conform to the widely accepted modern public policy norms recognizing the significant advantages in permitting contingency fee agreements in some circumstances. It is not surprising that all courts have not, at a single point in time, accepted the shift in attitude in favour of these types of agreements. The development of the common law most often is an evolutionary and incremental process rather than the result of a single defining judgment.

66 The Attorney General's argument is not that sound public policy does not favour contingency fee agreements for all civil proceedings, nor that contingency fee agreements do not provide significant advantages in promoting access to justice. The Attorney General also does not argue that the types of abuses that underlie the negative views the courts historically took to these types of agreements cannot be managed within the existing regulatory framework. Rather, the Attorney General contends that any change in the law relating to champerty in Ontario must come from the legislature, not the courts.

67 I disagree with this argument. As set out above, I conclude that s. 1 of the *Champerty Act* embodies the common law principles relating to who is a champertor. The development of the common law is, of course, a matter for the courts. While it is clearly open to the legislature of Ontario to reform the law of champerty as it relates to contingency fee agreements, I am satisfied that it is also appropriate for the courts to address this issue as part of their function in developing the common law.

68 There are well-established principles governing judicial reform of the common law. An important reason why courts change the common law from time to time is to ensure that it stays in step with the evolution of society. One of the advantages of the common law is its flexibility — the capacity of the courts to address and accommodate changed needs in societal circumstances. See *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842 (S.C.C.), at 871. I recognize, however, that when considering changes to the common law, courts must exercise caution. Changes must always be weighed against concerns about certainty and fairness. As a result, changes in the common law are generally incremental in nature, often resulting from a need to fill a gap in the law or to address an unfairness from an existing rule.

69 In my view, the current circumstances in the administration of justice in Ontario are such that the courts should take a fresh approach to the application of the common law to contingency fee agreements.

70 I am persuaded that the historic rationale for the absolute prohibition is no longer justified. The common law of champerty was developed to protect the administration of justice from abuse, one aspect of which involved the protection of vulnerable litigants. Within that broad framework, the courts historically held that contingency fee agreements were *per se* champertous. But, as examples from other jurisdictions amply demonstrate, the potential abuses that provided the rationale for the *per se* prohibition of contingency fee agreements can be addressed by an appropriate regulatory scheme governing the conduct of lawyers and the amount of lawyers fees.

71 Currently, in Ontario the *Solicitors Act* provides a comprehensive process for reviewing and assessing the reasonableness of lawyers' accounts. The *Rules of Professional Conduct* contain a complete set of standards for regulating lawyers' ethical behaviour and the complaints and discipline process of the Law Society of Upper Canada provide accessible means by which those standards can be enforced. While many of the jurisdictions that have enacted legislation permitting contingency fee agreements have enacted specific regulations to govern their use, I am satisfied that the basic regulatory framework necessary to address potential abuses in the use of contingency fee agreements is presently in place in Ontario.

72 I am also of the view that the advantages to the administration of justice from permitting properly regulated contingency fee agreements in the form of increased access to justice are compelling. Indeed, there is a strong case to be made that the continuation of a *per se* prohibition against contingency fee agreements actually tends to defeat the fundamental purpose underlying the law of champerty — the protection of the administration of justice and, in particular, the protection of vulnerable litigants. In my view, it is no longer necessary or desirable to deem contingency fee agreements *per se* champertous. Neither the contingent nature of a fee agreement, nor the fact that the lawyer's fees may be paid from the recovery in an action, without more, ought to constitute an improper motive or officious intermeddling for purposes of the law of champerty.

73 I am comfortable that this conclusion is consistent with the reasonable evolution of the common law in this area of the law. Some courts already have reached similar conclusions.

74 Further, the proposed change is not made in a vacuum. The effects of permitting contingency fee agreements have been thoroughly studied in Ontario and the experiences of the many jurisdictions that permit such agreements are well documented. As a result, this court has the benefit of a very broad base of information in assessing the potential advantages or disadvantages in developing the common law along the lines I propose. Moreover, because the issues surrounding contingency fee agreements relate to the administration of justice, a court is in as good a position as anyone to assess the ramifications of an evolution of the law in this area.

75 To be clear, I am not suggesting that contingency fee agreements can never be champertous. Rather, I conclude only that contingency fee agreements should no longer be considered *per se* champertous. The issue of whether a particular agreement is champertous will depend on the application of the common law elements of champerty to the circumstances of each case. A court confronted with an issue of champerty must look at the conduct of the parties involved, together with the propriety of the motive of an alleged champertor in order to determine if the requirements for champerty are present.

76 When considering the propriety of the motive of a lawyer who enters into a contingency fee agreement, a court will be concerned with the nature and the amount of the fees to be paid to the lawyer in the event of success. One of the originating policies in forming the common law of champerty was the protection of vulnerable litigants. A fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose — *i.e.*, taking advantage of the client. See *Thai Trading*, *supra*, at 788, 790. The applications judge in this case dealt with this concern as follows, at 157:

> The suggested compensation may or may not be fair and reasonable, depending upon the outcome of the litigation in light of the difficulty of the case, as well as the time and expenses incurred. Counsel should be well rewarded if the litigation is successful, for assuming the risk and costs of the litigation. The compensation however should not be a windfall resembling a lottery win.

77 I agree with these comments.

(e) Application of the law to this case

78 The applications judge granted a declaration that the proposed fee agreement does not violate the *Champerty Act*. The proposed agreement provides for payment to the respondent's lawyers of a fee in the amount of 30 percent of compensatory damages recovered, 40 percent of punitive damages, costs recovered in the action and any unrecovered disbursements. Depending on the amount recovered in the underlying action, the fees to be paid to the lawyer could be enormous. The lawyers who drafted the agreement provided an example of the potential fees which totalled over $9,000,000. While the amount of the damages on which the example is based may or may not be realistic, the example does make the point that unacceptably large fees could become payable under the agreement.

79 The fee structure in the proposed agreement is related to the amount of money that is recovered on behalf of the respondent. The fee structure has no relationship to the amount of time spent by the lawyers, the quality of the services provided, the level of expertise of the lawyers providing the services, the normal rates charged by the lawyers who provide the services, or the stage of the litigation at which recovery is achieved. Under the terms of this agreement, the respondent would be obliged to pay the lawyers the same amount of fees if the litigation is settled early in the process as she would if the same amount of money was recovered after a lengthy trial and appeal. In addition, the agreement raises the prospect of double recovery for the lawyers — fees from the respondent as well as costs recovered from the defendants in the action. There is no way of telling at this point whether the fees that would be paid to the lawyers under this proposed agreement would be reasonable and fair. When an agreement like this one is structured so that the fees are based on a percentage of the recovery, the determination of whether the fees are reasonable and fair will normally have to await the outcome of the litigation.

80 I have concluded in subsection (d) above that contingency fee agreements do not *per se* contravene the *Champerty Act*. However, in my view, contingency fee agreements that provide for the payment of fees that are unreasonable or unfair are agreements that have an improper motive and come within the prohibition in the *Act*. Because it is premature to address the issue of the reasonableness and fairness of the proposed agreement, it is my respectful view that the applications judge should not have granted the declaration sought by the respondent.

81 I want to address three other matters that were touched on during the arguments of counsel. The first relates to the criteria that should be used in assessing the reasonableness and fairness of fees in a contingency fee agreement. Contingency fee agreements have been expressly permitted by statute in many jurisdictions. Often, the authorizing legislation has also provided for a regulatory regime that addresses the manner in which the propriety of contingency fees may be determined. See for example, the *Class Proceedings Act*, s. 33(1).

82 Ontario, of course, does not have legislation specifically directed at regulating non-class action contingency fee agreements. Until such legislation is passed, the regime in the *Solicitors Act* for assessing lawyers' accounts will apply. When assessing a contingency fee arrangement, the courts should start by looking at the usual factors that are considered in addressing the appropriateness of lawyer-client accounts. See *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344 (Ont. C.A.), at 346.

83 In addition, I see no reason why courts should not also consider compensation to a lawyer for the risk assumed in acting without the guarantee of payment. This is, of course, where the discussion becomes controversial. Some argue that allowing a lawyer to be compensated for the risk assumed increases the concerns about the abuses that historically the law of champerty aimed to prevent. However, I do not think that that needs to be the case. The emphasis here should be on the reasonableness and fairness of the compensation to the lawyer for assuming the risk. Many jurisdictions that have expressly approved contingency fee agreements have set out the criteria for addressing the amount of compensation that will be permitted. Indeed, Ontario has done so in the *Class Proceedings Act*. In these instances, one element giving rise to compensation is often the acceptance of risk and an assessment of the level of risk involved.

84 That said, I want to sound a note of caution about the potential for unreasonably large contingency fees. It is critical that contingency fee agreements be regulated and that the amount of fees be properly controlled. Courts should be concerned that excessive fee arrangements may encourage the types of abuses that historically underlay the common law prohibition against contingency fee agreements and that they can create the unfortunate public perception that litigation is being conducted more for the benefit of lawyers than for their clients. Fairness to clients must always be a paramount consideration.

85 Notwithstanding my conclusion that contingency fee agreements should no longer be absolutely prohibited at common law, I urge the government of Ontario to accept the advise that it has been given for many years to enact legislation permitting and regulating contingency fee agreements in a comprehensive and co-ordinated manner. There are obvious advantages to having a regulatory scheme that is clearly and specifically addressed in a single legislative enactment. There is no reason why Ontario, like all the other jurisdictions in Canada, should not enact such a scheme. Again, I wish to make clear that this comment is not intended to apply to family law matters, where different factors apply.

86 The second matter I wish to briefly address is the effect of the *Solicitors Act* of Ontario on the disposition of this appeal. I start by noting that the underlying application does not raise the question whether the proposed agreement breaches the *Solicitors Act* and, strictly speaking, it is not necessary to comment on the effect of that *Act* on the issues raised in this case. However, for completeness, I think a few comments are warranted.

87 Section 28 of the *Solicitors Act* reads as follows:

> 28. Nothing in sections 16 to 33 gives validity to a purchase by a solicitor of the interest or any part of the interest of his or her client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him or her is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

88 I agree with the applications judge and others who have observed that this section and other similarly worded sections do not prohibit contingency fee agreements. See *Bergel & Edson* at 791-92; and *Thai Trading*, *supra*, at 785. The section says nothing more than contingency fee agreements are not permitted by the *Solicitors Act* if they are not otherwise permitted.

89 Finally, I want to address the *Rules of Professional Conduct* of the Law Society of Upper Canada. Again, the application that underlies this appeal does not call for a determination whether the proposed agreement contravenes these *Rules*. Because this argument was not fully developed on the appeal, I think the issue of the application of those *Rules* is better left for another occasion. That said, the *Rules of Professional Conduct* and the complaints and disciplinary regimes of the Law Society clearly have a role to play in ensuring that lawyers who enter into contingency fee agreements follow the ethical and professional standards set out in the *Rules*, so that the abuses feared in the past do not become a reality in the future.

DISPOSITION

90 For the reasons above, I would allow the appeal and set aside the judgment of the court below. Rather than dismissing the application brought by the respondent, I would stay that application on the basis that it is premature.

91 As to costs, the respondent has achieved substantial success on the central issues raised by the application and on this appeal. The applications judge determined in the exercise of her discretion that, because of the novelty of the issue raised, this was a case in which there should be no order as to costs for the proceeding before her. I would not interfere with that decision.

92 However, I would order that the appellant pay to the respondent 80 percent of the costs of this appeal on a partial indemnity basis. If the parties are unable to agree upon the amount of the costs, the respondent shall deliver a bill of costs, together with any submissions in writing within 30 days of the release of this judgment. The appellant shall have 7 days from the date of receiving such submissions to make written submissions in response.

93 I would make no order with respect to the costs of the interveners.

***Abella J.A.*:**

I agree.

***MacPherson J.A.*:**

I agree.

Appeal allowed; application stayed for being premature.

Footnotes

1 While the text of the *Champerty Act* is not printed in the Revised Statutes of Ontario 1990, the statute, as enacted in 1897, remains in effect. See Schedule C: Table of Unconsolidated and Unrepealed Acts, R.S.O. 1990, vol. 12.

2 Family law cases are generally excluded from such legislation and in the discussion that follows, my comments about the advantages of contingency fee agreements are intended to apply to civil actions other than family law matters.

Original
2005 CarswellOnt 3528
Ontario Court of Appeal

Tri Level Claims Consultants Ltd. v. Koliniotis

2005 CarswellOnt 3528, [2005] O.J. No. 3381, 141 A.C.W.S. (3d) 860, 15 C.P.C. (6th) 241, 201 O.A.C. 282, 257 D.L.R. (4th) 297

NICKI KOLINIOTIS (Appellant / Defendant) and TRI LEVEL CLAIMS CONSULTANTS LTD. (Respondent / Plaintiff)

McMurtry C.J.O., Doherty, LaForme JJ.A.

Heard: May 11, 2005
Judgment: August 12, 2005
Docket: CA C42704

Proceedings: reversing *Tri Level Claims Consultant Ltd. v. Koliniotis* (2004), 8 C.P.C. (6th) 8, 2004 CarswellOnt 5708 (Ont. Div. Ct.); additional reasons to *Tri Level Claims Consultant Ltd. v. Koliniotis* (2004), 2004 CarswellOnt 5709 (Ont. Div. Ct.); affirming *Tri Level Claims Consultant Ltd. v. Koliniotis* (2002), 8 C.P.C. (6th) 1, 2002 CarswellOnt 6004 (Ont. C.J.); varying *Tri Level Claims Consultant Ltd. v. Koliniotis* (2002), 8 C.P.C. (6th) 1, 2002 CarswellOnt 6004 (Ont. C.J.)

Counsel: Glenn Stuart for Appellant
Pina Celli for herself

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.a Agreements for fees
VIII.5.a.iv Contingency fees
VIII.5.a.iv.G Miscellaneous
Professions and occupations
XI Paralegals
XI.1 Organization and regulation of profession
Restitution and unjust enrichment
IV Benefits conferred under ineffective transactions
IV.6 Illegality
Headnote
Barristers and solicitors --- Organization and regulation of profession — Paralegals
Paralegal was retained to represent client in Worker's Compensation claim and proceeded based on client's verbal authorization to act on her behalf — Dispute arose over fees and paralegal brought action against client for payment of account — Trial judge accepted submission that there was verbal agreement to pay paralegal contingency fee of 20 percent of client's award — Client's appeal was dismissed on basis that trial judge did not err in finding contingency fee arrangement was valid and reasonable — In additional reasons, court found no prohibition in law against paralegal, being non-lawyer, to charge contingency fee — Client appealed on basis that contingency fee agreement offended Champerty Act and was void — Appeal allowed — Contingency fee agreement was invalid

as champertous — Determination of whether contingency fee arrangements between paralegals and their clients should be regarded as champertous per se depends on assessment of inherent risks and benefits — Power of Law Society to prosecute paralegals who practice law without licence does not provide any real protection against contingency fee agreements — Contract remedies available to those who enter into contingency fee agreements with paralegals are limited and provide only after-the-fact protection — Court's inherent jurisdiction offers limited means of regulating some contingency fee agreements between paralegals and their clients — Effective regulation of paralegals must be prerequisite to contingency fee arrangements — Unless and until paralegals are brought within regulatory scheme that oversees terms and conditions of contingency fee arrangements, risk/benefit analysis favours maintaining absolute prohibition against such agreements — Paralegal was entitled to some compensation for services provided on quantum meruit basis.

Barristers and solicitors --- Relationship with client — Fees — Agreements for fees — Contingency fees — General

Paralegal was retained to represent client in Worker's Compensation claim and proceeded based on client's verbal authorization to act on her behalf — Dispute arose over fees and paralegal brought action against client for payment of account — Trial judge accepted submission that there was verbal agreement to pay paralegal contingency fee of 20 percent of client's award — Client's appeal was dismissed on basis that trial judge did not err in finding contingency fee arrangement was valid and reasonable — In additional reasons, court found no prohibition in law against paralegal, being non-lawyer, to charge contingency fee — Client appealed on basis that contingency fee agreement offended Champerty Act and was void — Appeal allowed — Contingency fee agreement was invalid as champertous — Determination of whether contingency fee arrangements between paralegals and their clients should be regarded as champertous per se depends on assessment of inherent risks and benefits — Power of Law Society to prosecute paralegals who practice law without licence does not provide any real protection against contingency fee agreements — Contract remedies available to those who enter into contingency fee agreements with paralegals are limited and provide only after-the-fact protection — Court's inherent jurisdiction offers limited means of regulating some contingency fee agreements between paralegals and their clients — Effective regulation of paralegals must be prerequisite to contingency fee arrangements — Unless and until paralegals are brought within regulatory scheme that oversees terms and conditions of contingency fee arrangements, risk/benefit analysis favours maintaining absolute prohibition against such agreements — Paralegal was entitled to some compensation for services provided on quantum meruit basis.

Restitution --- Benefits conferred under ineffective transactions — Illegality

Paralegal was retained to represent client in Worker's Compensation claim and proceeded based on client's verbal authorization to act on her behalf — Dispute arose over fees and paralegal brought action against client for payment of account — Trial judge accepted submission that there was verbal agreement to pay paralegal contingency fee of 20 percent of client's award — Client's appeal was dismissed on basis that trial judge did not err in finding contingency fee arrangement was valid and reasonable — In additional reasons, court found no prohibition in law against paralegal, being non-lawyer, to charge contingency fee — Appeal by client allowed — Contingency fee agreement was invalid as champertous — Paralegal was entitled to some compensation for services provided on quantum meruit basis — At common law, restitutionary relief is unavailable where contract is unenforceable by reason of illegality — Absolute bar against quantum meruit recovery creates unacceptable injustice when considered in light of public policy informing statutory prohibition against champertous agreements — Contingency fee agreement was created in fair circumstances, as both parties were fully aware of what they bargained for — Potentially vulnerable party was given time to consult with others to remedy any imbalance of power — There was no evidence to suggest that paralegal engaged in sharp or dishonest practice in advancing client's claim, that she was in conflict of interest with client, or that she knew contingency fee agreement was illegal — Principle of quantum meruit applied in circumstances — Trial judge's award of $4,800 reduced to $1,300.

Table of Authorities

Cases considered:

Berne Development Ltd. v. Haviland (1983), 40 O.R. (2d) 238, 27 R.P.R. 56, 1983 CarswellOnt 629 (Ont. H.C.) — considered

Giles v. Thompson (1993), [1993] 3 All E.R. 321, [1994] 1 A.C. 142 (Eng. C.A.) — considered
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Robinson v. Cooney (1999), 1999 CarswellOnt 1047, 29 C.P.C. (4th) 72 (Ont. Gen. Div.) — considered
Steinberg v. Cohen (1929), 64 O.L.R. 545, [1930] 2 D.L.R. 916 (Ont. C.A.) — considered
Still v. Minister of National Revenue (1997), 221 N.R. 127, *(*sub nom. *Still v. M.N.R.)* 154 D.L.R. (4th) 229, 98 C.L.L.C. 240-001, [1998] 1 F.C. 549, 1997 CarswellNat 2193, 1997 CarswellNat 2702 (Fed. C.A.) — considered

Statutes considered:

Champerty, Act respecting, R.S.O. 1897, c. 327
Generally — referred to
Solicitors Act, R.S.O. 1990, c. S.15
Generally — referred to

Words and phrases considered

quantum meruit

Quantum meruit is a quasi-contractual remedy. It allows a court to order payment of the reasonable value of services to a service provider when the contract under which the services were provided does not state a price for those services or when that contract cannot be enforced.

***Per curiam*:**

1 This appeal raises the important question whether the law permits paralegals and their clients to enter into contingency fee agreements. It also raises the question whether a paralegal can recover in *quantum meruit* for services provided under a contingency fee agreement that is found to be champertous.

Facts

2 These issues arise in the context of a Workplace Safety and Insurance Board ("WSIB") claim. The appellant, Nicki Koliniotis, had worked at the Toronto General Hospital for twenty years. In August 1999, she began to experience pain in her right wrist, forearm, shoulder and the back of her neck. The pain worsened and Koliniotis was forced to stop working on May 23, 2000. She received short-term disability benefits from her employer until August 2, 2000. When the benefits stopped, she submitted an employee incident report to her employer, which in turn submitted a report to the WSIB.

3 On September 26, 2000, Koliniotis approached Tri Level Claims Consultants Ltd. ("Tri Level"), a paralegal business specializing in WSIB claims, to discuss her legal options. Pina Celli, the principal of the company, initially suggested that Koliniotis ask her union for free assistance with the claim. Koliniotis returned on September 28, 2000, stating that she had decided that she did not want the union to assist her. Celli, who had worked for the WSIB for twenty-six years before becoming a paralegal, agreed to represent Koliniotis. The parties discussed a contingency fee arrangement, but did not sign a retainer at that time.

4 Koliniotis next visited Tri Level on December 15, 2000 with her daughter. Her daughter translated Tri Level's retainer, including a contingency fee arrangement, into Greek for Koliniotis. Koliniotis did not sign the retainer but took it home for her son to see. Although her son advised her that a lawyer would be available for an hourly rate of $165, Koliniotis signed the retainer on December 18, 2000. In it, she agreed to pay Tri Level a $600 retainer

and "a percentage of fees (not to exceed 20%) on any settlement achieved as a result of [Tri Level's] intervention on [Koliniotis's] behalf".

5 After learning from her doctor that third-party representation was not necessary in WSIB procedures, Koliniotis sought to terminate Tri Level's retainer. In a letter to Tri Level dated March 9, 2001, counsel with the Community and Legal Aid Services Programme, a legal clinic associated with Osgoode Hall Law School, stated on behalf of Koliniotis that the retainer was not enforceable. The evidence did not establish whether the appellant attempted to terminate the contingency fee agreement before or after she knew that the WSIB would approve her claim.

6 On March 28, 2001, the WSIB approved Koliniotis's claim. She received $22,176 in income replacement benefits, including $9,966 in retroactive pay. The benefit payments terminated in November of 2001.

7 There was no evidence at trial establishing the actual total time spent by Tri Level on the appellant's file. According to the notes on file of the respondent, Koliniotis visited Tri Level's office approximately six times, once in the presence of a WSIB investigator. Celli's notes indicate that she spoke with Koliniotis and with the WSIB adjudicator a number of times on the telephone.

The Small Claims Court Decision

8 Fisher D.J. found Celli to be a credible witness and he characterized the case as one of "*caveat emptor* to a certain degree". Fisher D.J. concluded that Tri Level performed services for Koliniotis and assisted her in processing the WSIB claim and that the parties had entered into an agreement, which was not "unconscionable".

9 Tri Level was awarded judgment in the Small Claims Court of $4,800.00 plus disbursements. This amount was slightly less than the contingency fee claim of $5,106.60, which was based on the $600 retainer plus 20% of the appellant's recovery.

The Divisional Court Decision

10 Koliniotis's appeal of Fisher D.J.'s judgment to the Divisional Court was heard by Jenkins J., sitting as a single judge. In his reasons dismissing her appeal, Jenkins J. stated, "The reality of all this is that there is no prohibition in law against the paralegalist being a non-lawyer to charge a contingency fee". He also stated, "I cannot find that there was any palpable and overriding error that [Fisher D.J.] made in determining the facts."

11 For the reasons that follow, we find that the Divisional Court erred in law and that the respondent Tri Level's contingency fee agreement was invalid as champertous. However, we also conclude that the respondent is entitled to some compensation for the services provided on a *quantum meruit* basis.

Analysis

***Paralegals, the Champerty Act, and this Court's Decision in* McIntyre Estate**

12 We begin our analysis by acknowledging that there are benefits and risks inherent in contingency fee arrangements for the payment of legal services. Without contingency fees, people without the means of paying for legal services under the more traditional fees for services schemes would go unrepresented. Contingency fees increase access to justice and thereby improve the overall administration of justice. Contingency fees also pose serious risks to the due administration of justice. A lawyer, or a paralegal, with a financial interest in the outcome of a case may be tempted to engage in sharp or even dishonest practice. A contingency fee may also put a lawyer or a paralegal in a conflict of interest position with his or her own client. For example, an offer to settle made early in the proceedings before a lawyer or paralegal has done much work may appear attractive to a lawyer or paralegal who is being paid a percentage of the settlement amount regardless of the work done. That offer may, however, not do justice to the client's claim.

13 The determination of whether contingency fee arrangements between paralegals and their clients should be regarded as *per se* champertous and, therefore, unenforceable depends on how one assesses the benefits and risks inherent when individuals and paralegals enter into contingency fee agreements.

14 If the law prohibits paralegal contingency agreements, the prohibition lies in *An Act Respecting Champerty*, R.S.O. 1897, c. 327 ("*Champerty Act*"). This act has only two sections. The complete text is as follows:

> 1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
>
> 2. All champertous agreements are forbidden, and invalid.

15 The *Champerty Act* is broadly worded. It governs champertous arrangements entered into by lawyers and by anyone else, including paralegals. The appellant argues that the contingency fee arrangement entered into with the respondent offends the *Champerty Act* and is, therefore, void. The respondent contends that while contingency fees may have been viewed as champertous at one time under the common law, the modern realities, particularly access to justice concerns, require that the court accept that contingency fees are not *per se* champertous.

16 The leading authority in Ontario on the validity of contingency fees is the decision of O'Connor A.C.J.O. in *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (Ont. C.A.). This case considered whether lawyers and their clients are prohibited by the law of champerty from entering into contingency fee agreements for civil law suits in Ontario. Although the case at bar involves a paralegal and not a lawyer, *McIntyre* informs the analysis of the application of the law of champerty to contingency fee agreements between paralegals and their clients.

17 In *McIntyre*, at para. 46, O'Connor A.C.J.O. held that champerty as described in the *Champerty Act*, should be equated with champerty at common law. The common law definition of champerty required that an individual become involved in the litigation of another person for an improper motive and that the individual share in the profits of the litigation. O'Connor A.C.J.O. observed that the fundamental aim of the law of champerty has always been to protect the administration of justice from abuse (at paras. 26-32).

18 O'Connor A.C.J.O. recognized that the common law had evolved over time so that the prohibition against champerty would continue to catch only conduct that interfered with the proper administration of justice (at para. 32). He quoted with approval Lord Mustill in *Giles v. Thompson*, [1993] 3 All E.R. 321 (Eng. C.A.) at 360:

> As Steyn LJ has demonstrated, the law of maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose.... I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and *the interests of vulnerable litigants*
>
> [emphasis added].

19 O'Connor A.C.J.O. went on to acknowledge that the common law had traditionally regarded contingency fee arrangements between lawyers and clients as champertous *per se* (at para. 49). This *per se* rule reflected the view that the linking of a lawyer's compensation to the result of litigation was sufficiently deleterious to the proper administration of justice so as to constitute irrefutable proof of the improper motive required to establish champerty (at paras. 51-2).

20 O'Connor A.C.J.O. then turned to whether contingency fee arrangements between lawyers and clients should continue to be *per se* champertous. He questioned the assumptions underlying the common law position

that such arrangements were automatically deleterious to the due administration of justice (at para. 53). He went on to demonstrate that those assumptions were no longer valid in Ontario. He said at paras. 70-1:

> *I am persuaded that the historic rationale for the absolute prohibition is no longer justified.* The common law of champerty was developed to protect the administration of justice from abuse, one aspect of which involved the protection of litigants. Within that broad framework, the courts historically held that contingency fee arrangements were *per se* champertous. *But, as examples from other jurisdictions amply demonstrate, the potential abuses that provided the rationale for the per se prohibition of contingency fee arrangements can be addressed by an appropriate regulatory scheme governing the conduct of lawyers and the amount of lawyers' fees.*
>
> Currently, in Ontario, the *Solicitors Act* provides a comprehensive process for reviewing and assessing the reasonableness of lawyers' accounts. The Rules of Professional Conduct contain a complete set of standards for regulating lawyers' ethical behaviour and the complaints and discipline process of the Law Society of Upper Canada provides accessible means by which those standards can be enforced. *While many of the jurisdictions that have enacted legislation permitting contingency fee agreements have enacted specific regulations to govern their use, I am satisfied that the basic regulatory framework necessary to address potential abuses in the use of contingency fee agreements is presently in place in Ontario* [emphasis added].

21 Having determined that the *per se* rule went beyond the purpose justifying the prohibition against champerty, O'Connor A.C.J.O. further held that some contingency fee arrangements will be champertous. That determination can only be made on a case-by-case basis and often only after the services covered by the contingency fee agreement have been provided. The reasonableness of the lawyer's fee is a factor for the court to consider in assessing whether a contingency fee arrangement is champertous. As O'Connor A.C.J.O. stated (at para. 76):

> When considering the propriety of the motive of a lawyer who enters into a contingency fee agreement, a court will be concerned with the nature and the amount of the fees to be paid to the lawyer in the event of success. One of the originating policies in forming the common law of champerty was the protection of vulnerable litigants. A fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose — i.e., taking advantage of the client.

22 The decision in *McIntyre* made it possible for lawyers in Ontario to enter into reasonable contingency fee agreements with their clients. After *McIntyre*, the Legislature amended the *Solicitors Act*, R.S.O. 1990, c. S.15 to permit lawyers to charge contingency fees in particular areas. It also created regulations governing the formation of contingency fee arrangements. This legislation brought Ontario into line with the other provinces of Canada, which had permitted regulated contingency fee arrangements, in some provinces for as long as twenty-five years.

23 The regulatory network applicable to lawyers, including the Rules of Professional Conduct and the detailed statutory provisions for the review of legal fees found in the *Solicitors Act*, played a central role in the holding in *McIntyre* that contingency fee arrangements between lawyers and clients should no longer be subject to an absolute prohibition. O'Connor A.C.J.O. was satisfied that this regulatory framework sufficiently addressed the potential abuses associated with contingency fee arrangements to reduce the risk to the administration of justice inherent in such arrangements to a level where those risks could be satisfactorily addressed with something less than an absolute prohibition against contingency fees. At the same time, the added access to justice flowing from contingency fee arrangements provided a real benefit to the administration of justice. In short, O'Connor A.C.J.O. held that the conduct of lawyers was sufficiently regulated to tip the benefit/risk analysis away from the absolute prohibition against contingency fees to a case-by-case determination of the lawfulness of contingency fee arrangements.

24 Paralegals have an important role to play in increasing access to justice. The role of paralegals in increasing access to justice has been recognized in several reports on paralegal activity in Ontario: see *A Framework for*

Regulating Paralegal Practice in Ontario (Toronto: Ontario Ministry of the Attorney General, 2000) ("*Cory Report*") and *Report of the Task Force on Paralegals* (Toronto: Ontario Ministry of the Attorney General, 1990) ("*Ianni Report*"). Both the *Cory Report* and the *Ianni Report* comment that the majority of paralegals operate in an ethical, dedicated and professional manner. The Law Society has proposed that: "When lawyers are finally permitted to enter into contingent fee agreements and to incorporate a practice, licensed paralegals should then be permitted to do so as well, subject to all restrictions on doing so that will apply to lawyers": *An Analysis of A Framework for Regulating Paralegal Practice in Ontario* (Toronto: Law Society of Upper Canada, 2000) at 12.

25 The Government of Ontario has acknowledged the potential value of paralegals to the due administration of justice. It has also stated that paralegals should be regulated and has asked the Law Society of Upper Canada to accept the responsibility for that regulation. The Law Society agreed to take on this task and has forwarded draft regulations to the Ontario government. However, no such regulations have been put in place as of yet.

26 Four factors may be suggested as providing some control over contingency fees charged by paralegals. They are:

- the Law Society's ability to prosecute paralegals who engage in activities beyond those in which they are allowed to represent individuals;
- contract remedies such as a plea of unconscionability;
- the inherent power of the courts to control their own process; and
- the law of champerty.

27 However, the Law Society's power to prosecute paralegals who practice law without a licence does not provide any real protection against contingency fee arrangements. If the activity is one in which paralegals are allowed to provide legal representation, the Law Society has no power to challenge the propriety of any fee arrangement between the client and the paralegal. The Law Society can prosecute paralegals who practice law without a licence, but it cannot prosecute paralegals who enter into contingency fee agreements for payment of services that they are entitled to provide to clients.

28 Contract remedies are available to an individual who has entered into a contingency fee agreement with a paralegal. But these remedies are limited and provide only after-the-fact protection. That protection also comes at the expense of further litigation, an expense that many who resort to contingency fee arrangements with paralegals cannot afford.

29 The court's inherent jurisdiction to control its own process may, and we stress may, give a court some power over a contingency fee agreement made in respect of proceedings before that court. That inherent jurisdiction cannot reach cases like this one where the individual retains a paralegal in relation to proceedings before an administrative body. At the very best, the inherent jurisdiction of the court offers a limited means of regulating some contingency fee agreements between paralegals and their clients.

30 The fourth possible control, the law of champerty, suffers from the same shortcomings as the contractual remedies potentially available to the individual client. That client must go to court and litigate in order to obtain any relief.

31 Evidently, these four factors do not come close to the kind of regulation described in *McIntyre* at para. 71 for controlling the conduct of lawyers. Significantly, the professional and ethical limitations imposed on lawyers provide prophylactic protection against unfair contingency fee arrangements, as does the power of the Law Society to regulate the kinds of fees that can be charged and the circumstances in which contingency fees can be charged. Paralegals are presently not subject to any before-the-fact regulation.

32 Not only is there no regulation of paralegals equivalent to that applicable to lawyers, we think the need for regulation to avoid the abuses inherent in contingency fees may be more pressing in the case of paralegals. This is so not because paralegals are inherently less trustworthy than lawyers, but because many, if not most, individuals who retain paralegals are particularly vulnerable because of their social and/or economic circumstances. For example, paralegals figure prominently in the representation of immigrants and injured workers before various specialized tribunals. Unlike some of the paralegals who provide these services, the individuals who need the services may have little or no idea of the work involved in bringing a particular matter to resolution. Individuals retaining paralegals will often have no concept of the fair market value of the work provided by paralegals. Most of these individuals will also be in no position to assess the fairness of a proposed contingency fee arrangement. Contingency fee arrangements between paralegals and their clients will seldom reflect a bargain made by an informed consumer. Effective regulation of paralegals must be a prerequisite to contingency fee arrangements.

33 Unless and until paralegals are brought within a regulatory scheme that permits oversight of the terms and conditions of contingency fee arrangements, the benefit/risk analysis favours maintaining the absolute prohibition against contingency fee agreements. We acknowledge that this conclusion must have some negative effect on the ability of individuals to gain access to justice. Absent contingency fees, some individuals who may have been represented by paralegals under a contingency fee agreement will be unrepresented. The net loss to public access to justice is inevitable, although the extent of that loss cannot be measured. We are convinced, however, that the appropriate response to this problem lies not in opening the door to unregulated contingency fee arrangements between paralegals and their clients, but in the enactment of long called for and anticipated legislation recognizing the valuable role of paralegals in the justice system and regulating that role.

Quantum Meruit and Illegal Contracts

34 We now consider whether the respondent may recover on a *quantum meruit* basis for services provided under the contingency fee agreement that we have found unlawful. *Quantum meruit* is a quasi-contractual remedy. It allows a court to order payment of the reasonable value of services to a service provider when the contract under which the services were provided does not state a price for those services or when that contract cannot be enforced. Courts have traditionally refused to grant *quantum meruit* in cases in which the contract was illegal, rather than merely unenforceable.

35 The principle barring relief for benefits conferred in performance of an illegal contract was first stated in *Holman v. Johnson* (1775), 98 E.R. 1120 (Eng. K.B.), where Lord Mansfield stated at 1121:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. *The principle of public policy is this...No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act*
>
> [emphasis added].

On the facts in *Holman v. Johnson*, Lord Mansfield concluded that the plaintiff had not committed a crime and was entitled to recovery.

36 This principle was intended as a flexible principle, as Robertson J. commented in *Still v. Minister of National Revenue* (1997), 154 D.L.R. (4th) 229 (Fed. C.A.) at para. 15. However, in the more than two centuries since *Holman v. Johnson* was decided, the principle appears to have been applied in a rigid, categorical fashion. This absolute application has often been criticized because the refusal of the courts to permit restitutionary relief in a situation governed by an illegal contract may result in a *prima facie* injustice: see, for example, Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, looseleaf (Aurora: Canada Law Book Inc., 2004) at

15:100, 15:700. The result has been that a person who performed a service, unaware that the contract governing that service was illegal, would not be compensated for services provided in good faith.

37 The trial court judge in *McIntyre Estate v. Ontario (Attorney General)* (2001), 53 O.R. (3d) 137 (Ont. S.C.J.) reviewed the traditional position at common law that restitutionary relief is not available where a contract is found unenforceable by reason of illegality. Wilson J. observed that a finding that a contingency fee agreement is champertous could result in a windfall to the recipient of the contingency fee services. Cullity J. made a similar observation in *Robinson v. Cooney*, [1999] O.J. No. 1341 (Ont. Gen. Div.). He cited the traditional law that champertous agreements are sufficiently illegal "as to preclude recovery on the basis of a *quantum meruit* for the value of services rendered" (at para. 22). He also recognized that the courts should examine the traditional bar against *quantum meruit* in terms of the policy justifying it to see if *quantum meruit* recovery made more sense in the modern context than a bar against it (at para. 23). Cullity J. declined to engage in such an examination because the policy considerations had not been fully argued before him.

38 Other judicial decisions have engaged in such an examination and have suggested that an absolute bar against *quantum meruit* recovery where an agreement is found to be illegal lacks coherence and is no longer justified in principle. For example, in *Still*, *supra*, Robertson J. stated at para. 46:

> Professor Waddams suggests that where a statute prohibits the formation of a contract the courts should be free to decide the consequences (at 372) [S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Carswell, 1993)]. I agree. If legislatures do not wish to spell out in detail the contractual consequences flowing from a breach of a statutory prohibition, and are content to impose only a penalty or administrative sanction, then it is entirely within a court's jurisdiction to determine, in effect, whether other sanctions should be imposed. As the doctrine of illegality is not a creature of statute, but of judicial creation, it is incumbent on the present judiciary to ensure that its premises accord with contemporary values.

39 In *Berne Development Ltd. v. Haviland* (1983), 40 O.R. (2d) 238 (Ont. H.C.), Saunders J. criticized the absolute bar. In that case, the parties structured an agreement specifically to mislead a third party. Saunders J. stated that the need to preserve public policy by not enforcing illegal agreements must be balanced with the need to prevent unjust enrichment. He commented that the illegal action in the case did not demonstrate "moral turpitude of such a magnitude as to call for the severe consequence of depriving the vendor of the balance of the purchase price to the benefit of the purchaser" (at para. 43). In that case, the illegal conduct did not preclude the plaintiff from obtaining some relief. In coming to this conclusion, Saunders J. referred to *Steinberg v. Cohen* (1929), [1930] 2 D.L.R. 916 (Ont. C.A.) at 928, where Masten J.A. stated rather presciently, "It is possible that each case should depend upon its own facts, and upon balancing by the Court of the public interest on the one hand and of the private injustice on the other".

40 In this appeal, several factors demonstrate that an absolute bar on *quantum meruit* recovery creates an injustice that is unacceptable when considered in light of the public policy informing the statutory prohibition against champertous agreements. As noted, that policy is to protect the administration of justice from abuse. In the case before us, the contingency fee agreement was created in fair circumstances, as both parties were fully aware of what they bargained for. Any imbalance of power was remedied by giving the potentially vulnerable party time to consult with others. There is no evidence to suggest that the respondent engaged in sharp or dishonest practice in advancing the appellant's claim, nor that the respondent was in a conflict of interest with the appellant. To employ Saunders J.'s phrase in *Berne Development*, *supra*, there is not sufficient "moral turpitude" to justify denying the respondent any payment whatsoever for the work that was performed. In this regard, it is significant that it is not suggested that the respondent knew that a paralegal contingency fee agreement was illegal. To the contrary, it seems that contingency fee agreements were an accepted practice. We therefore conclude that the principle of *quantum meruit* can be applied in the circumstances.

What is a reasonable fee for the services Tri Level performed?

41 The appellant argued that Tri Level expended, at most, thirteen hours of work on the matter, which was not disputed by the respondent. This court is not in a position to express an opinion as to an appropriate hourly fee for a paralegal. However, we are prepared to apply a generous view of the value of the assistance provided to the appellant and conclude that the sum of $1,300 would be reasonable compensation on a *quantum meruit* basis.

Conclusion

42 The decision of the Divisional Court is set aside and the amount awarded in the judgment of Fisher D.J. is reduced to the sum of $1,300.

Costs

43 As success has been divided between the parties and as the appeal raised an important and novel issue of law, there will be no order of costs.

Appeal allowed.

Original
2006 CarswellOnt 3518
Ontario Superior Court of Justice

Williams (Litigation Guardian of) v. Bowler

2006 CarswellOnt 3518, [2006] O.J. No. 2347, 81 O.R. (3d) 209

Vicki Williams, by her Litigation Guardian, Charmaine Thynne, Charmaine Rose Thynne, Bettylou Ann Williams, Cathy Enman, Danny Williams, Shane Williams, Wade Williams, Tanya Kerns, Francine Beckwith, Roy Williams, Connie Williams and Armando Meleiro (Plaintiffs) and Adrian P. Bowler, The Belleville General Hospital and The Trenton Memorial Hospital (Defendants)

Roccamo J.

Heard: March 7,29, 2006
Judgment: May 16, 2006
Docket: 2268/94

Counsel: Gary R. Will, Paul J. Cahill, Christopher Clifford for Plaintiffs
Darryl A. Cruz, Carole G. Jenkins, Debra Lovinsky for Defendant, Adrian Bowler

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.a Agreements for fees
VIII.5.a.iv Contingency fees
VIII.5.a.iv.C Fair and reasonable requirement

Headnote
Professions and occupations --- Barristers and solicitors — Fees — Agreements for fees — Contingency fees — Fair and reasonable requirement
Client by her guardian brought action for damages for catastrophic injuries — Initial retainer provided for fees of 33.3 per cent of overall recovery after trial — After trial commenced, solicitor agreed to 28 per cent of $3.98 million settlement plus payment over of costs assessed against defendant — Client succeeded on liability at trial and was awarded total of $4.7 million including partial indemnity costs of $720,000 — Actual fees were $1.83 million which included premium of $703,459 or 63 per cent — Client and solicitor brought motion for approval of fees — Motion granted — Court approval of payment to solicitor of costs in addition to fee payable under agreement was mandatory pursuant s. 28.1(8) of Solicitors Act — Circumstances were exceptional because of very significant and unusual risk assumed by solicitor in guaranteeing structured settlement and in dealing with feuding guardians — Solicitor was entitled in any event to premium based on risk of non-payment, complexity of litigation, responsibility assumed, amount in issue, importance to clients, and excellent result — Contingency fee agreement by itself was insufficient to promote access to justice — Client's future care needs were not compromised by approval of fees.

Table of Authorities
Cases considered by *Roccamo J.*:
Chong (Guardian ad litem of) v. Royal Columbian Hospital (1997), 31 B.C.L.R. (3d) 303, 1997 CarswellBC 75 (B.C. S.C.) — considered

Christian Brothers of Ireland in Canada, Re (2003), 2003 CarswellOnt 4447, 232 D.L.R. (4th) 450, 178 O.A.C. 355, 43 C.P.C. (5th) 203, 46 C.B.R. (4th) 241, 68 O.R. (3d) 1 (Ont. C.A.) — referred to

Cohen v. Kealey & Blaney (1985), 10 O.A.C. 344, 26 C.P.C. (2d) 211, 1985 CarswellOnt 376 (Ont. C.A.) — referred to

Desmoulin v. Blair (1994), *(*sub nom. *Desmoulin (Committee of) v. Blair)* 21 O.R. (3d) 217, 76 O.A.C. 1, *(*sub nom. *Desmoulin (Committee of) v. Blair)* 120 D.L.R. (4th) 700, 1994 CarswellOnt 1208 (Ont. C.A.) — referred to

Harrington (Guardian ad litem of) v. Royal Inland Hospital (1994), 22 C.P.C. (3d) 113, 89 B.C.L.R. (2d) 165, 1994 CarswellBC 141 (B.C. S.C. [In Chambers]) — considered

Raphael Partners v. Lam (2002), 2002 CarswellOnt 3077, 24 C.P.C. (5th) 33, 164 O.A.C. 129, 61 O.R. (3d) 417, 218 D.L.R. (4th) 701 (Ont. C.A.) — considered

656203 Ontario Inc. v. Soloway, Wright (1999), 90 O.T.C. 43, 1999 CarswellOnt 495 (Ont. Gen. Div.) — considered

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Justice Statute Law Amendment Act, 2002, S.O. 2002, c. 24

Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

s. 28.1 [en. 2002, c. 24, Sched. A, s. 4] — referred to

s. 28.1(8) [en. 2002, c. 24, Sched. A, s. 4] — considered

s. 28.1(8)(a) [en. 2002, c. 24, Sched. A, s. 4] — considered

s. 28.1(8)(b) [en. 2002, c. 24, Sched. A, s. 4] — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 7 — referred to

***Roccamo J.*:**

Background

1 This is a motion under Rule 7 of the *Rules of Civil Procedure* for the approval of fees for services rendered to the main plaintiff, Vicki Williams, a 51-year-old woman who suffered catastrophic injuries on April 19, 1993 due to a ruptured aneurysm. These injuries have left her totally disabled, both physically and mentally.

2 Ms. Williams, by her litigation guardian, brought an action in medical negligence against the defendant, Dr. Adrian Bowler for having failed to consider a leaking aneurysm among the possible explanations for her complaints, in time to avert the subsequent rupture.

3 This motion is the last chapter in the litigation begun in 1994 involving the care provided to Vicki Williams in 1993 by the defendant.

4 The trial commenced on January 3, 2005 and lasted 22 days, ending on May 11, 2005. Nine expert witnesses were called to give testimony. During the course of trial, the parties settled the issue of damages (the details of which were not disclosed to me until this motion) and the trial proceeded on liability alone. Judgment was rendered on August 4, 2005 in favour of the plaintiffs. The defendant appealed the decision on September 2, 2005 but abandoned the appeal on December 10, 2005.

5 The amount payable by the defendant pursuant to the settlement of damages is $4,894,319.95, comprised of $3,980,069.95 in damages for Ms. Williams' claims, plus $194,250.00 for the *Family Law Act* claims. In addition, counsel negotiated $720,000.00 in partial indemnity costs. The total amount allocated to Vicki Williams is $4,700.069.95.

6 Counsel's actual docketed time plus disbursements and GST up to March 24, 2006 is $1,124,458.70. Adding the fees for the *Family Law Act* claims of $65,955.00 including GST, the total amount sought by counsel is $1,827,917.77. This constitutes a premium of 63% or $703,459.00. Approval of counsel's solicitor-client account per the actual fees incurred as of March 24, 2006, plus GST and disbursements was granted by interim order on March 29, 2006.

7 Counsel proposes a fee to be charged to Ms. Williams, calculated in the following way:

Fees	$1,500,000.00
GST	$105,000.00
Disbursements	$156,962.77
Total	**$1,761,962.77**

8 Counsel proposes that Ms. Williams' award be disbursed in the following manner, with the net sum to be paid into a trust account to be used for Vicki's benefit:

Total settlement allocated for Vicki	$4,700,069.95
Minus fees to Will Barristers	-$1,761,962.77
Minus cost of structured settlement	-$2,516,928.45
Amounts to Frank and Erma Williams	-$200,000.00
Net sum for Vicki	**$221,178.73**

9 The initial retainer agreement between the plaintiffs and counsel provided that the fees payable in the event of a successful settlement or judgment would be in the range of 25% to 33.3% of the overall recovery, plus GST and disbursements. It was agreed that the lower end of the range would apply if the case settled prior to trial and the higher end would apply if the matter settled after the commencement of trial or upon judgment of the court. There were to be no fees or disbursements payable if the case was unsuccessful. No monetary retainer was required. The fees payable to counsel under this contingency fee arrangement, based on the amount recovered for Vicki Williams' claims excluding partial indemnity costs, would be the following:

33.3% of 3,980,069.95	$1,325,363.29
GST	$92,775.43
Disbursements	$156,962.77
Total	**$1,575,101.49**

10 Prior to trial counsel were authorized by Frank and Erma Williams, on behalf of Ms. Williams to attempt to settle the claim for $4,200,000.00, a figure at the top end of the range proposed by counsel. It was agreed that 33% of this amount would be paid towards legal costs and that disbursements would also be deducted from the settlement funds. Counsel also received authorization from the family members with respect to settling the *Family Law Act* claims.

11 By mid-January 2005, after the commencement of trial, the defendant made an offer to settle Vicki Williams' claims for $3,900,000.00 on top of an amount previously agreed to for *Family Law Act* claims. Frank

and Erma Williams signed an Authorization and Direction January 16, 2005, which amended the original Retainer Agreement, to provide for a reduced percentage of the recovery payable to counsel for fees plus payment over of the award of costs agreed between the parties or assessed against the defendant. The amount payable to counsel under this agreement would be the following:

28% of $3,980,069.95	$1,114,419.59
GST	$78,009.37
Non-assessable disbursements	$31,000.00
Partial Indemnity Costs	$720,000.00
Total	**$1,943,428.96**

12 The settlement was complicated by a battle among the *Family Law Act* claimants over custody of Ms. Williams, which ended in 2002 with an award of custody to Frank and Erma Williams. Unfortunately, the end of the litigation among family members failed to reconcile their differences so that their testimony at trial threatened the overall presentation of the case, and potential outcome. This made dealings with the plaintiffs difficult, settlement discussions over damages protracted and further complicated the need to ensure allocation of an amount to Vicki Williams adequate to provide for her future care.

13 On October 1, 2004, amendments to the *Solicitors Act* came into force, to regulate contingency fees. The amendments prohibit payment over to counsel of the award of costs payable by defendants, unless the Court approves such payment.

14 This motion raises for the first time the application of the *Solicitors Act* amendments in the context of a request for a premium over and above fees payable under the contingency agreement. Further, the matter brings into focus the need to balance counsel's claim for adequate compensation to ensure access to justice in these cases, as against the future needs of the party under a disability.

Issues

15 The issues to be determined on this motion are as follows:

a. Does subsection 28.1(8) of the *Solicitors Act*, as amended, which in the absence of court approval precludes counsel's fee to include payment of an award of costs obtained in settlement or ultimate disposition of a matter, apply in this case?

b. If the *Solicitors Act* amendment applies, would the circumstances in this case be characterized as "exceptional" such as to warrant a departure from subsection 28.1(8)?

c. If there are no exceptional circumstances, should counsel be awarded a premium in any case?

d. How much weight should be given to the potential that Ms. Williams' future care needs may be compromised?

History of Proceedings

16 This action was commenced by Tavel & Flanigan on March 9, 1994. In or around 1997, Tavel & Flanigan requested payment of a monetary retainer of $5,000.00. Shortly thereafter, they sought to be removed from the record. On or about August 28, 1998, the law firm of MacMillan Rooke Boeckle, the predecessor firm to current counsel, assumed carriage of the file.

17 Vicki Williams was a resident in long-term care facilities from the time she suffered the ruptured aneurysm to November 10, 1995, at which time her mother Connie and sister Charmaine began to care for her. They cared

for her until April 15, 1997. On July 30, 1997, Vicki's father Frank and step-mother Erma brought Vicki home to live with them. In March 2002, after a bitter custody dispute among members of Vicki's family, Frank Williams was ordered to be the permanent guardian of Vicki's person and property, with access given to Connie Williams.

18 The opinion obtained from a rehabilitation expert retained on behalf of Ms. Williams projected her future care costs at over $185,000.00 per year. The defendant's expert estimated that the costs would range from $106,000.00 to $126,000.00 per year. The parties were able to come to a compromise and agreed that the future care costs would be funded by way of a structured settlement guaranteeing payment of $150,000.00 per year ($12,500.00 per month), indexed to 2%. The sum of $12,500.00 per month will ensure that Vicki Williams will have institutional care 24 hours a day, if her family is no longer capable and willing to provide care for her at home.

19 After the commencement of trial, the defendant made an offer to settle the damages of Vicki Williams for $3,900,000.00 in addition to the *Family Law Act* claims. In order to facilitate settlement, and in recognition of the fact that counsel assumed the risk of an adverse change in the cost of the structure purchased then in order to guarantee a monthly payment of $12,500.00 for future care costs, counsel agreed to charge the plaintiffs a lower percentage for fees (28%), and to receive as part of the contingency agreement any costs award paid by the defendant.

20 The parties settled the issue of damages and the trial proceeded through to its conclusion with judgment rendered on August 4, 2005.

Solicitors Act Amendments

21 Subsection 28.1(8) of the *Solicitors Act*, R.S.O. 1990, c. S.15 ("*Act*") reads as follows:

> (8) A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless,
>
> > (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
> >
> > (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them [emphasis added].

Issue #1: Does the Solicitors Act amendment of 2004 apply in this case?

22 While counsel concedes that the *Solicitors Act* amendment applies to the Authorization and Direction signed January 15, 2005, counsel submits that the above provisions are not mandatory based upon the permissive language of subsection 28.1(1) of the *Act*, which reads as follows:

> (1) A solicitor *may* enter into a contingency fee agreement with a client in accordance with this section [emphasis added].

23 An interpretation more in keeping with the legislative intent underlying the *Solicitors Act* is that the section allows counsel to enter into a contingency fee agreement if they so choose, but also provides that when that is done, the agreement shall be in accordance with section 28.1. It is the "entering into" of the agreement that is optional, not the provisions of section 28.1 once an agreement is in place. This reasoning is in keeping with the short statement provided by Attorney General Mr. Michael Bryant at the first reading of Bill 25, An Act to amend the Solicitors Act to permit and to regulate contingency fee agreements: "Contingency fee arrangements shall not permit the solicitor to recover costs as well as a proportion of the amount recovered unless approved by the court." (Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, L005 (16 May 2002). The intention of the legislation

is further gleaned from the summary of the *Act* on the website of the Attorney General ("Contingency Fees — March 2004", online: Ministry of the Attorney General <http://www.attorney general.jus.gov.on.ca/english/about/contingency/default. asp>):

24 On December 9, 2002, Bill 213, the *Justice Statute Law Amendment Act, 2002*, received Royal Assent. Schedule A of this legislation amends the Solicitors Act to regulate contingency fee agreements. It contains broad regulation-making power relating to contingency fees, and includes the following regulatory controls:

> • Requires all contingency fee agreements to be made in writing;
>
> • Prohibits contingency fees in criminal, quasi-criminal and family law matters;
>
> • Precludes lawyers from collecting both the pre-determined contingency fee and legal costs, unless approved by a judge; [emphasis added]

. . . . .

25 The commentary under Subrule 2.08(3) of the *Rules of Professional Conduct* also reflects the intention that court approval of such an agreement is mandatory. It reads as follows:

> In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. **The lawyer and client may agree that in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which agreement under the Solicitors Act must receive judicial approval**. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable. [emphasis added]

26 I find that the amendments apply and make section 28.1 mandatory, such that counsel must therefore show that exceptional circumstances apply.

Issue #2: Would the circumstances in this case be characterized as "exceptional" such as to warrant a departure from subsection 28.1(8)?

27 Counsel submits that while there appear to be no reported decisions interpreting "exceptional circumstances", the threshold should not be so high as to discourage counsel from accepting retainers in cases of merit, particularly difficult matters such as this one, which usually require significant investment of time and disbursements through to and including trial and often appeal.

28 Counsel further cited instances in which a client may be unjustly enriched if permitted in every case to keep the costs award where counsel has invested significant time and expenditure funding the overall carriage of the litigation.

29 In this case, counsel pointed to the added challenge posed by representation of warring factions of plaintiffs whose presence at trial might well have jeopardized the outcome.

30 Counsel also submits that a significant amount of time was spent securing the costs award and negotiating with the defendant after judgment was rendered. These particular actions likely do not constitute exceptional circumstances, as these are steps that most counsel would engage in the ordinary course of litigation.

31 It is clear in this case that counsel assumed a very significant and unusual risk in guaranteeing a structure that would pay out $12,500.00 per month. The risk related to fluctuating interest rates and changes in the risk rating by the insurance companies providing the structure. Mr. John P. Rousseau of McKellar Structured Settlements Inc. opined on the risk taken by Will Barristers by letter of March 27, 2006. He stated: "In my opinion, [the guarantee] represents a very substantial assumption of risk on your part." Mr. Rousseau concluded by stating, "I can also say that we have rarely, if ever, seen counsel undertake this type of risk for their clients." Although in the end, the risk which actually materialized resulted in a further investment by counsel of only $16,928.45 due to declining rates, this risk coupled with the added complication of dealing with the feuding plaintiffs, persuades me that it is appropriate to approve payment over to counsel of the award of costs paid by the defendant.

Issue #3: Should counsel be awarded a premium in any case?

32 A number of the circumstances described in this litigation as "exceptional" are the very kind which justify the award of a premium. The overriding policy reason for awarding reasonable premiums is to promote access to justice: *Christian Brothers of Ireland in Canada, Re*, [2003] O.J. No. 4249 (Ont. C.A.) at para. 21 [*Christian Brothers of Ireland in Canada*]. The risk pertaining to the structured settlement, along with the risk of representing all plaintiffs, over and above the usual risks in this kind of litigation, amount to the very type of exceptional circumstances contemplated by subsection 28.1 of the *Solicitors Act*. The degree of risk assumed in this case exceeded the usual risk of non-payment in the promotion of access to justice.

33 The factors considered in assessing a premium have been found to be those which help establish a fair and reasonable fee. See *656203 Ontario Inc. v. Soloway, Wright*, [1999] O.J. No. 429 (Ont. Gen. Div.) [*Soloway, Wright*], where Chadwick J. found that a premium was appropriate in the absence of a written agreement and that it was within the court's jurisdiction to assess a premium. The factors considered by Chadwick J. at paragraph 49 of his decision were among the criteria referred to by Robins J.A. in *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344 (Ont. C.A.), at 346, for establishing a fair and reasonable fee by reference to Commentary 1 of Rule 9 of the Rules of Professional Conduct (now Rule 2.08(2)). The commentary under subrule 2.08(2) currently reads as follows:

> What is a fair and reasonable fee will depend upon such factors as
>
> (a) the time and effort required and spent,
>
> (b) the difficulty and importance of the matter,
>
> (c) whether special skill or service has been required and provided,
>
> (d) the amount involved or the value of the subject-matter,
>
> (e) the results obtained,
>
> (f) fees authorized by statute or regulation,
>
> (g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency.

34 The solicitor's risk of non-payment is also a relevant factor to consider: *Desmoulin v. Blair* (1994), 21 O.R. (3d) 217 (Ont. C.A.). Counsel submits this is often the most important factor, and was in this case.

35 Counsel submits that the premium is justified based on the complexity of the case, the responsibility assumed by counsel, the amount in issue, the importance of the case to the clients, the skill shown by counsel, the results achieved, the client's inability to pay and the solicitor's corresponding financial risk: *Christian Brothers of Ireland in Canada* , *supra* at para. 17.

36 There is no question that this was a difficult, complicated and certainly contentious piece of litigation. Even though damages were eventually settled after the commencement of trial, recovery remained uncertain to the plaintiffs until judgment was rendered. Nine medical experts gave evidence of competing theories on the standard of care and causation in this matter. Counsel assumed a great responsibility and took on a very significant financial risk, in entering into a contingency agreement and especially in guaranteeing the structure. As this was a catastrophic brain injury, the amount in issue was substantial. This case was extremely important to the clients. Because of the positive result of this case, Vicki Williams will be in a position to receive proper care and to live at an increased standard of care, receiving a guaranteed monthly income for the rest of her life. Her caregivers will not be burdened with the financial responsibility associated with round-the-clock care. Counsel showed great skill in presenting this case in the face of competing theories presented by the experts and the difficult custody dispute. Consequently, the results achieved were excellent.

37 It might be said that a contingency fee arrangement to some extent already factors in these considerations. However, the inescapable conclusion is that a contingency fee arrangement in and of itself will not in a case of this kind address the level of risk assumed such as to promote access to justice. With access to justice being the overriding factor, if the premiums awarded by the courts are not high enough, counsel will not be able to afford to take on the risk associated with bringing these actions. Counsel could craft contingency agreements to reflect the degree of risk that might be involved, however clients would never agree to assume the magnitude of risk that can perhaps be better addressed by a premium awarded by the court.

38 Counsel referred to a number of cases where premiums were awarded where there was no contingency fee arrangement in place. Other cases considered the reasonableness of the fees charged under a contingency fee arrangement rather than whether a premium was warranted: *Raphael Partners v. Lam*, [2002] O.J. No. 3605 (Ont. C.A.) [*Raphael Partners*]; *Chong (Guardian ad litem of) v. Royal Columbian Hospital*, [1997] B.C.J. No. 250 (B.C. S.C.); *Harrington (Guardian ad litem of) v. Royal Inland Hospital*, [1994] B.C.J. No. 128 (B.C. S.C. [In Chambers]) [*Harrington*]. Finally, other cases referred to by counsel considered the appropriateness of awarding premiums as against the defendant. This case law is summarized in two charts attached hereto as Appendices A and B.

39 The cases in which the court considered the reasonableness of existing contingency agreements are worthy of note. In *Harrington*, *supra* at para. 27, the Court found that it had inherent jurisdiction to review the reasonableness of any contingency fee agreement. In conducting such a review, it considered all the circumstances leading up to the conclusion of the retainer. These circumstances are similar to the factors that may be considered in assessing reasonable fees and whether a premium is justified. See *Raphael Partners* , *supra* at para. 50. In essence, even in the face of a contingency agreement, in most cases the fees sought by counsel will represent a premium on the actual time invested. In *Harrington*, the contingency agreement in place allowed counsel to collect 33 1/3 % of the settlement. The claim settled for $1,525,000.00. Pursuant to the agreement, counsel would have been entitled to $500,000.00. However, the Court found $175,000.00 to be a reasonable fee. If a court is entitled to review the reasonableness of contingency agreements and may conclude that the amount provided for is too high, then the corollary is true and a court has jurisdiction to conclude that a contingency agreement provides for a fee that is too low, based on the factors listed in *Soloway, Wright* , *supra*.

40 In short, the circumstances of this case would justify a premium in excess of the fee determined by the contingency agreement at 28% of the recovery. The extraordinary risks assumed by counsel justify payment over of the partial indemnity award received from the defendant.

Issue #4: How much weight should be given to the potential that Ms. Williams' future care needs may be compromised?

41 In a case involving a party under a disability, Rule 7 provides another layer of protection to the disabled party by requiring court approval of a settlement and legal fees payable by the party under a disability. In this case, I have considered the potential for a shortfall in the sums allocated to the structured settlement of future care costs, given the fact that the $12,500.00 per month was a compromise between costs projected by the plaintiffs and by the defence.

42 The Ontario Court of Appeal considered this issue in *Christian Brothers of Ireland in Canada* , *supra*. At paragraph 22, Laskin J.A., writing for the Court, commented as follows:

> Undoubtedly, any premium paid to the law firm will diminish the funds available to satisfy the claims of the victims. The motions judge correctly took into account the interests of these men who as boys "suffered unspeakable acts of sexual, physical and emotional abuse" at the hands of the Christian Brothers. But as important as their interests are, they must be balanced against the risk that the law firm undertook and the result it achieved for its client and, therefore, for the victims. The reality is that but for WeirFoulds having assumed this risk, the estate would have had no money at all to compensate the victims.

43 The reality is that a plaintiff will never recover 100% of an award or settlement because there will always be fees to be paid. The settlement allows for a reasonable measure of support for Vicki Williams. The structure will ensure 24 hour per day institutional care if Ms. Williams' family is no longer capable and willing to care for her as Frank and Erma presently do at no cost to her. In any event, there is a fund in addition to the structured settlement that Frank and Erma can draw upon for Ms. Williams' needs.

44 Access to justice is paramount. If premiums were not awarded in cases such as this one, counsel could not justify taking them on and plaintiffs would not be compensated for their losses.

45 Balancing the interest of Ms. Williams, and her future care, against the risk taken by her counsel, I am satisfied that the amount sought to be approved by counsel is reasonable and fair in all the circumstances.

Conclusion

46 Approval of counsel's actual fees incurred as of March 24, 2006, plus GST and disbursements was granted by interim order on March 29, 2006. Counsel is entitled to the balance of the fees sought in the amount of $637,504.07, bringing the total amount approved to $1,761,962.77.

Motion granted.

 Original
2007 CarswellOnt 6193
Ontario Superior Court of Justice

Andrew Feldstein & Associates Professional Corp. v. Keramidopulos

2007 CarswellOnt 6193, [2007] O.J. No. 3683, 160 A.C.W.S. (3d) 724

ANDREW FELDSTEIN & ASSOCIATES PROFESSIONAL CORPORATION(Solicitors) v. GEORGE KERAMIDOPULOS (Client)

Murray J.

Heard: August 21, 2007
Judgment: September 11, 2007
Docket: CV-07-0166-00

Counsel: Ms Sanja Curic for Solicitors
Mr. Peter M. Callahan for Client

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.d Accounting and refunding by lawyer
VIII.5.d.iii Application for assessment, review, or taxation of account
VIII.5.d.iii.A Entitlement to assessment or review
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.d Accounting and refunding by lawyer
VIII.5.d.v Miscellaneous

Headnote
Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Application for assessment, review, or taxation of account — Entitlement to assessment or review
Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Miscellaneous

Table of Authorities
Cases considered by *Murray J.*:
Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson (1998), 157 D.L.R. (4th) 322, 38 O.R. (3d) 257, *(*sub nom. *Shapiro, Cohen, Andrews, Finlayson v. Enterprise Rent-A-Car Co.)* 107 O.A.C. 209, 1998 CarswellOnt 707, 18 C.P.C. (4th) 20, 80 C.P.R. (3d) 214 (Ont. C.A.) — considered
Fellowes, McNeil v. Kansa Canadian Management Services Inc. (1997), 34 O.R. (3d) 301, 1997 CarswellOnt 2606, *(*sub nom. *Kansa Canadian Management Services Inc. v. Fellowes, McNeil)* 101 O.A.C. 238 (Ont. C.A.) — referred to
Javornich v. McCarthy (2007), 2007 CarswellOnt 4107, 2007 ONCA 484, 225 O.A.C. 201 (Ont. C.A.) — considered
Ladner Downs v. Crowley (1987), 14 B.C.L.R. (2d) 357, 1987 CarswellBC 169, [1987] 5 W.W.R. 322, 25 C.P.C. (2d) 189, 41 D.L.R. (4th) 403 (B.C. S.C.) — considered

Lang, Michener, Cranson, Farquharson & Wright v. Newell (January 11, 1985), Craig J. (Ont. H.C.) — referred to

Lang, Michener, Cranson, Farquharson & Wright v. Newell (January 27, 1986), Grange J.A., Howland C.J.O., Zuber J.A. (Ont. C.A.) — referred to

Potash v. Royal Trust Co. (1986), 1986 CarswellMan 353, 1986 CarswellMan 404, [1986] 2 S.C.R. 351, 31 D.L.R. (4th) 321, 69 N.R. 286, [1986] 6 W.W.R. 550, 44 Man. R. (2d) 30, 34 B.L.R. 167, 41 R.P.R. 197, [1986] R.D.I. 725 (S.C.C.) — referred to

Price v. Sonsini (2002), 2002 CarswellOnt 2255, 162 O.A.C. 85, 22 C.P.C. (5th) 1, 60 O.R. (3d) 257, 215 D.L.R. (4th) 376 (Ont. C.A.) — considered

Statutes considered:

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

s. 3 — referred to

s. 3(b) — considered

s. 4 — referred to

s. 11 — referred to

***Murray J.*:**

This Motion

1 Section 3(b) of the *Solicitors Act*, R.S.O. 1990, c. S.15 provides that where a lawyer's retainer is not disputed and there are no special circumstances, an order for assessment of the lawyer's bill may be obtained from the Registrar on requisition by the client within one month of the delivery of the bill.

2 This is a motion by Andrew Feldstein and Associates Professional Corporation (hereinafter referred to as "AF") for an order setting aside the order for assessment of AF's accounts made by the Registrar, dated January 18, 2007, on the basis that its former client, George Keramidopulos, (hereinafter referred to as "G.K.") did not comply with the 30-day time limit for the requisition of an order for assessment of costs as set out in s. 3(b). AF asserts that the Registrar had no jurisdiction to make such an order and seeks to have it quashed on that basis.

Facts

3 On or about April 26, 2006, AF was retained by G. K. to represent him in a family law dispute with his common-law spouse.

4 At the request of AF, on April 26th, 2006, G.K. entered into a Retainer Agreement and, at the same time, signed and thereby acknowledged receipt of a Memorandum accompanying the Retainer Agreement.

5 Both documents were prepared by AF. G.K. picked up the documents at AF's offices and was told to review them, to sign them and to return them to AF. No member of AF reviewed the documents with G.K. prior to his signing. The client was not given the opportunity to negotiate any of the terms of these documents. There is no evidence that the lawyers of AF knew their client (i.e., his level of sophistication) at the time they asked him to enter into the Retainer Agreement and sign the Memorandum. Prior to G.K.'s signing the Retainer Agreement, independent legal advice for G.K. was neither arranged by — nor required by — AF.

6 The Retainer Agreement, reviewed in more detail below, provides for billing on a monthly basis and describes all accounts, including interim accounts, as final.

7 During the course of the retainer, AF sent to G.K. accounts each month beginning in May, 2006 through to and including December, 2006. The accounts were all styled "final invoice" and were dated May 5, 2006, June 7, 2006, July 12, 2006, August 11, 2006, September 7, 2006, October 6, 2006, November 6, 2006, and December 6, 2006. The accounts add up to approximately $50,000.

8 The affidavit of Marina Faye Iannicca, a law clerk employed by AF, stipulates that: "A review of the file indicates that since being retained the firm actively represented the client in his matrimonial matter, addressing day to day issues along with drafting pleadings and attending at two case conferences in an attempt to settle his matrimonial matter." Although the value of the legal services rendered by AF to G.K. are not an issue in this motion, one cannot help but question the reasonableness of accounts that aggregate to $50,000 where the extent of the services performed are described as issuing pleadings, attending at two case conferences and attending to day to day issues. The fees may be entirely justified but they do exceed what one might normally expect with respect to the professional services performed.

9 On December 6, 2006, AF was advised in writing by a new lawyer, Mr. Peter Callahan, that he had been retained by G.K. to represent him in his family law matter. Mr. Callahan served AF with a Notice of Change in Representation.

10 On December 8, 2006, AF wrote to Mr. Callahan indicating that the file was ready to be picked up and further stating that Mr. Keramidopulos "will receive our final statement of account in this regard shortly". A final account dated January 12, 2007 was sent by AF to G.K. From oral submissions made by counsel on the motion before me, I understand that the January account from AF for services rendered to G.K. was for approximately $1,500.

11 The order for assessment was obtained from the Registrar by G. K. on January 18, 2007. An appointment for assessment was taken out returnable on March 21, 2007. The accounts to be assessed included the eight accounts of AF for services rendered between the date of retainer in April of 2006 and December 6, 2006. The accounts have not yet been assessed.

12 When monthly accounts were rendered to G.K. by AF, monies that had been deposited with A.F. by G.K., and held in trust, were applied to pay down the accounts issued. The trust funds were replenished on a monthly basis by G.K. in accordance with the Retainer Agreement between him and AF. All AF's accounts have been paid in full.

The Position of AF

13 AF takes the position that the 8 accounts rendered by AF from May 5, 2006 up to and including the December 6, 2006 account are "final" accounts and that G.K.'s requisition for an order for assessment made on January 18, 2007 was out of time with respect to all of them. AF therefore disputes the jurisdiction of the Registrar to order an assessment of all the accounts rendered except for the January 12, 2007 account.

14 AF further asserts that there are no special circumstances which require an order for the assessment of its accounts.

The Position of G.K.

15 G.K. wants to have AF's accounts related to his family law matter, dated May 5, 2006, June 7, 2006, July 12, 2006, August 11, 2006, September 7, 2006, October 6, 2006, November 6, 2006, and December 6, 2006 and January 12, 2007, assessed. G.K. takes the position that all of the accounts, except the January 2007 account, are interim accounts and therefore can be assessed pursuant to the order of the Registrar.

16 In the alternative, G.K. asserts that there are special circumstances which permit the Court to order an assessment of AF's accounts.

The Issues

17 Did the Registrar have jurisdiction to order an assessment of the 8 accounts rendered by AF to G.K. between May and December, 2006?

18 Secondly, if the Registrar had no jurisdiction to order an assessment of AF's accounts, are there special circumstances that justify this Court ordering an assessment of the accounts?

The Retainer Agreement and the Memorandum

19 G.K. retained AF on April 26, 2006 to represent him in a family law dispute. Two documents, a "Retainer Agreement" and a "Memorandum" were signed by G.K. at the request of AF on April 26th, 2006. The first document is a contract. The second document, the "Memorandum", was provided to G.K. at the same time as he was given the Retainer Agreement and was signed by G.K. to acknowledge that he received it.

20 In paragraph 4 of the Retainer Agreement, the client acknowledges that AF will render accounts which are "final accounts for the period set out in the said accounts". The client agrees to pay the accounts on receipt "subject to my right of assessment" and further acknowledges that AF will "withdraw services subject to court approval if required if I do not pay your account when rendered." I note that the Retainer Agreement does not specifically say that the client must exercise his right to assessment within 30 days from receipt of such account. It simply says that his accounts are "subject to my right of assessment."

21 The Memorandum is not a contract. It is described as being given to the client so that he will know and have a record of the firm's policy on matters such as the payment of fees. The Memorandum states that all accounts rendered are intended to be and are, in fact, final accounts for the period to which they refer and that any referral for assessment on any account must occur "within one month of the date of the said account in accordance with the *Solicitors Act*."

22 Attached to and forming part of the Retainer Agreement is a schedule setting out the hourly rates of lawyers at AF. Paragraph 6 of the Retainer Agreement provides that others (i.e. other lawyers) may be used at rates AF deems appropriate and further stipulates that the rates for AF lawyers shown on the schedule may be varied without notice to G.K.

23 In paragraph 7 of the Retainer Agreement, G.K. agrees to deposit money in trust beginning with a $10,000 deposit. These funds are to be applied to any disbursements and "interim accounts" for fees. G.K. agrees that he will make further deposits on request if the trust funds being held in trust are depleted and further that: "if I am unable to replenish the monetary retainer when requested to do so, I understand the solicitor-client relationship will automatically terminate."

24 In paragraph 8 of the Retainer Agreement, it is stipulated that "Court proceedings are expensive and uncertain" and the client acknowledges that AF "has not given me any estimate of total fees or disbursements that will be charged."

25 The Retainer Agreement in paragraph 9 provides that unpaid legal costs shall be a first charge against equalization payments owing to the client and/or the proceeds of the sale of the matrimonial home.

26 In the Retainer Agreement, G.K. waives independent legal advice "notwithstanding the advice of AF to the contrary." There is no evidence that Andrew Feldstein and Associates ever gave him any advice to the contrary before he signed the contract.

27 In paragraph 10, G.K. agrees to pay all "interim and final accounts" rendered by AF and agrees that if he is unable to pay when requested, the solicitor-client relationship automatically terminates.

28 Paragraph 12 permits AF to apply trust funds to fees and disbursements.

29 In paragraph 13, G.K. agrees that AF "in your discretion... may withdraw from acting on my behalf upon receipt of actual notice or written notice" and G.K. acknowledges that he understands that "I will be asked to execute a consent to this effect if an application to the court is required." In other words, the client is required to agree that AF can stop acting for him at any time for any reason. In my view, this arrangement is inconsistent with Rule 2.09 of the *Rules of Professional Conduct* which provides as follows:

> **2.09 (1)** A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

30 In paragraph 16 of the Retainer Agreement, it is stipulated that if — for any reason — an account remains unpaid with no arrangements made for payment of the account in full, then G.K. agrees that AF "will contact the credit bureau and advise the credit bureau of the outstanding account." Rule 2.09 (8) of the *Rules of Professional Conduct* provides as follows:

> **2.09 (8)** When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

I do not see how reporting a client to a credit bureau with potential adverse consequences to the client's credit rating is consistent with the lawyer's duty to avoid prejudice to the client.

31 The Memorandum sets out AF's policy on office procedure and payment of fees. In that Memorandum, the client is advised by AF that: "we submit interim accounts from time to time to keep matters current." Under the heading "Retainer", AF advises the client how the retainer works in the following terms:

> Like most lawyers, we require a retainer. The money goes into our trust account. Then we take funds out for immediate payment of disbursements made on your behalf. When we submit *interim accounts* to you, we pay these immediately from the retainer and expect you to send us a cheque for the full amount of the account so that any remaining balance is satisfied and the retainer is restored to its original amount.
>
> Naturally, if the retainer exceeds our fees and disbursements, then the balance will be returned to you on the *final billing*. (emphasis added)

32 AF submits that it sends "final invoices" on a periodic basis. To AF, there is nothing inconsistent with the notion of interim bills that are final. As was explained in the law clerk's supporting affidavit:

> ... reference to the word "interim" in the said retainer means regular accounts, that is, accounts sent from time to time. It is made clear in the retainer that each account is a final account.

According to AF, all interim accounts are all final accounts.

Analysis

The Applicable Legal Principles

33 Section 3 (b) of the *Solicitors Act* states as follows:

> Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,
>
> (b) by the client, for the assessment of a bill already delivered, within one month from its delivery.

34 In the case of *Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson* (1998), 38 O.R. (3d) 257 (Ont. C.A.), Mr. Justice Labrosse held that the distinction between interim and final bills is well entrenched in our law and should be retained. The Court of Appeal in *Enterprise Rent-A-Car Co.* affirmed the principle that where interim accounts are rendered in connection with the same matter, the limitation period for assessment under the *Solicitors Act* begins to run from the date of the final account, even if some of the interim accounts have been paid: see also *Lang, Michener, Cranson, Farquharson & Wright v. Newell*, [1985] O.J. No. 272 (Ont. H.C.) and [1986] O.J. No. 2459 (Ont. C.A.).

35 Whether an account is to be treated as a final account or as an interim account for purposes of the limitation period for seeking an assessment is a question of fact: see *Fellowes, McNeil v. Kansa Canadian Management Services Inc.* (1997), 34 O.R. (3d) 301 (Ont. C.A.).

36 The payment of a bill does not constitute an implied acceptance of its reasonableness particularly when accounts are rendered on a regular basis and paid over the course of time. In *Enterprise Rent-A-Car Co.*, our Court Of Appeal approved the following statement by Mr. Justice McDonald of the B.C. Supreme Court in *Ladner Downs v. Crowley* (1987), 41 D.L.R. (4th) 403 (B.C. S.C.) at p. 428:

> The solicitors intended that unless the client took steps to tax during the retainer, she should have no such right. They insisted on payment of their accounts although they had only partially performed their entire contract and now raise payment as a defence to taxation. They cannot in good conscience do so.

37 In *Price v. Sonsini*, [2002] O.J. No. 2607 (Ont. C.A.), Sharpe J.A. stated, at paragraph 16:

> Interim accounts are necessary as a matter of commercial reality, even though it may be difficult to assess the value of legal services before the solicitors work is completed. A rule that required clients to move for immediate assessment of interim accounts would force clients into the invidious position of straining, if not rupturing, the solicitor-client relationship before the retainer has ended. Clients should not be forced to choose between harming the solicitor-client relationship and forgoing the right to have an interim account assessed. Rather, under s. 3, clients should be entitled to move for an assessment of an interim account within one month of delivery of the final account.

Justice Sharpe further stated at paragraph 19 :

> Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of solicitor's bill. As a general matter, if a client objects to a solicitor's account, the solicitors should facilitate the assessment process, rather than frustrating the process. ... As Orkin argues, "If the courts permit lawyers to avoid the scrutiny of their accounts for fairness and reasonableness, the administration of justice will be brought into disrepute". The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities.

38 As the Court of Appeal stated in the *Enterprise Rent-A-Car Co.*, pursuant to the provisions of the *Solicitors Act*, in particular sections 3, 4 and 11, a client may apply for the assessment of delivered accounts in the following circumstances:

> a) Upon requisition from the registrar, within 30 days of delivery of the final account provided that there are no special circumstances and that the retainer is not disputed. There is no distinction between paid and unpaid accounts.
>
> b) After 12 months of delivery, if special circumstances are shown.

c) Within 12 months after payment on showing special circumstances.

The Court has also relied on its inherent jurisdiction to order assessments: see *Enterprise Rent-A-Car Co.* (*supra*) at paragraph 16.

The Application of the Appropriate Legal Principles to the Facts in This Case

39 In support of its motion to quash the Registrar's order for assessment, AF filed the affidavit of Marina Faye Iannicca, a law clerk employed by AF. The affidavit is based on her review of the file. Her affidavit does not set out either when the account of December 6, 2006 was delivered by AF to G.K. or when any other account was delivered by AF to G.K.

40 There was some discussion and argument about the meaning of the word "deliver" because of the requirement of s. 3(b) of the *Solicitors Act* which requires the client to obtain an order for assessment from the Registrar within one month from the delivery of the solicitor's account.

41 The Shorter Oxford English dictionary defines "delivery" as: "The action of handing over something to another; esp. a (scheduled) performance of the action of delivering letters, goods etc. *Law* A formal handing over or transfer, esp. of a deed to the grantee or third-party". I am of the view that the word "delivery" in this section of the *Solicitors Act* should be given its normal meaning. I hold that the one month period is triggered by the presentation of the account to the client by the solicitor.

42 Debbie James (a law clerk in Mr. Callahan's office) swore an affidavit that was filed on behalf of G.K. In her affidavit, based on information from G.K., she deposes to her belief that the account dated December 6, 2006 was not received by G.K. until after December 20, 2006.

43 There is no evidence from any representative of AF that the December 6, 2006 account was ever presented to or handed over to G.K. — or indeed that it was ever sent to him by regular post or by registered post. In short, there is no evidence from or on behalf of AF or its representatives that establishes when the December 6, 2006 account was delivered to G.K. In the absence of any contradictory evidence from AF, I accept the evidence filed on behalf of G.K. that this account was not received by him until after December 20, 2006. I therefore conclude, as a matter of fact, that the December 6, 2006 account was not delivered by AF to G.K. until after December 20, 2006.

44 The result of this finding of fact is that on January 18, 2007, when the Registrar's order was obtained, G.K. was not outside the one month period during which he could requisition an order assessing AF's account dated December 6, 2006 regardless of whether it is characterized as an "interim" or "final" account. It was not delivered by AF to G.K. until December 20th or thereafter and, therefore, the assessment order was requisitioned within the one month limitation period which began to run on the date of delivery of the account.

45 However, even if I am incorrect with respect to when the December 6, 2006 account was delivered to G.K., for reasons set out below, it is subject to assessment as are the other interim accounts.

46 G.K. wants to tax the accounts rendered prior to December 6, 2006 as well as the account of that date. The other accounts are dated May 5, 2006, June 7, 2006, July 12, 2006, August 11, 2006, September 7, 2006, October 6, 2006 and November 6, 2006. Based on the arguments made on the return of the motion, there appears to be no dispute by G.K. that all accounts rendered by AF between May 2006 and November 2006 were delivered to him more than 30 days before January 18, 2007, the date of the Registrar's order.

47 In my view, the Retainer Agreement, which attempts to limit the client's rights under the *Solicitors Act*, does not extinguish the rights of the client that are protected by that *Act*. There are a number of reasons why I come to this conclusion.

48 As was said by Justice Labrosse of the Court of Appeal in *Enterprise Rent-A-Car:*

> The statute (the Solicitors Act) does not distinguish between final and interim bills. In *Fellowes*, this Court stated (p. 303):
>
> > It is a question of fact as to whether the prior accounts are, in the circumstances, to be treated as final for the purposes of the limitation period for seeking assessment...
>
> The court relied on *Romer v. Haslam*, [1893] 2 Q.B. 286, an old case which stands for the proposition that a solicitor has no right to render a final bill until the transaction is completed, as "the client gets nothing by the action until that time" (at p.294). Bowen LJ noted that a solicitor may demand payment of a bill at a "natural break" in the proceedings or where there was a "clear understanding between the parties that the ultimate bill sent in should be a bill of costs."

In the case at bar, there was no natural break in the proceedings which might justify the rendering of an account which is subject to taxation and secondly, based on the language of the Retainer Agreement, there is no clear understanding between the parties that the interim bill delivered should be a bill of costs. In the absence of a clear understanding, AF has no right to render a final bill until there is a natural break in the proceeding or when transaction is completed.

49 To be sure, the documentation provided to the client by AF endeavours to make interim accounts final accounts. For example, in the Memorandum under the heading "Unpaid Accounts" the client is advised that "all accounts that are rendered by our firm are intended to be and are in fact final accounts for the period to which they refer." This language mimics the language of the Retainer Agreement. The client is also advised in the Memorandum that "any referral for assessment on any of our accounts must occur within one month of the date of the said account in accordance with the *Solicitors Act*." I have two observations to make. Firstly, the *Solicitors Act* does not require a requisition to the Registrar for an order for assessment to be made within 30 days from the rendering of an interim account. Secondly, as noted above, while the Retainer Agreement stipulates that interim accounts are subject to assessment, it does not provide that any assessment of accounts must occur within one month of the date of delivery of the account. Therefore, the contract between the client and AF does not require interim accounts to be assessed within 30 days of the date on which the interim account is delivered. Certainly, in the absence of clear contractual language which indicates both parties understood that interim accounts had to be referred for assessment within one month of delivery, I am not prepared to interpret the Retainer Agreement to require this outcome.

50 There is a further reason why I conclude that there is no clear agreement between the client and AF that an interim bill will be treated as a final bill. AF, in both the Retainer Agreement and the Memorandum, uses the words "final" account and "interim" account to describe the same account. The inconsistent use of language in the documents creates ambiguity. This ambiguity must be resolved in favour of the client.

51 An interim account is a temporary or provisional account or an account done after an interval and before the final account. The Retainer Agreement stipulates as much. Although the client is required in paragraph 4 to acknowledge that all accounts are final accounts, in paragraph 7, the client agrees to deposit $10,000 in trust and acknowledges that the funds will be held in a non-interest-bearing account and he authorizes and directs the law firm to use such funds to pay for any disbursements incurred on behalf of the client and "*any interim accounts for fees*". The Retainer Agreement therefore, by its terms, recognizes that interim accounts are rendered from time to time and by necessary implication these accounts will be rendered prior to the final account being submitted.

52 The Memorandum, which was given to the client at the same time as he was asked to sign the Retainer Agreement, purports to explain AF's policy on payment of fees. The Memorandum stipulates that "interim accounts" are paid out of the trust fund as they are rendered from time to time. When "interim accounts" are

submitted, money is taken from the trust account to satisfy such interim accounts. The Memorandum also provides that AF expects the client to send a cheque for the full amount of the account so that the retainer is restored to its original amount. In this case, G.K. kept the trust fund topped up at $10,000 and, on a monthly basis, AF applied the trust funds to pay interim accounts for fees and disbursements.

53 The Memorandum further provides that "if the retainer exceeds our fees and disbursements, then the balance will be returned to you on the *final billing*." This is a clear written acknowledgment by AF that there will be a final billing and that this "final" billing is different from other previous billings because the final billing will result in a return of the balance of the trust funds if they have not already been used up by the law firm. As previously noted, interim billings require the amount in the trust account to be topped up by the client to the amount of the original retainer.

54 Based on the language of the Retainer Agreement and the Memorandum both of which sometimes — but not all the time — use the words "interim" and "final" interchangeably, the client would have reason to believe that all accounts rendered before the final account are interim accounts. Therefore, based on the ambiguity of the language of the Retainer Agreement and the Memorandum, AF's motion must fail. With such ambiguity, there is no clear understanding between the client and the law firm that an interim bill is a final bill for purposes of assessment.

55 Quite apart from an interpretation of the contract, the fact that AF refers to "interim" accounts as "final" accounts in the same document is not sufficient to make what is, in fact, an interim account a final account. As stated in *Fellowes, McNeil v. Kansa Canadian Management Services Inc.* (*supra*), whether an account is to be treated as a final account or as an interim account for purposes of the limitation period for seeking an assessment is a question of fact.

56 Notwithstanding the semantic gymnastics of AF, it is clear that, as a matter of fact, the bills in dispute are interim bills and not final bills. AF cannot change the character of an interim account simply by changing its name. In this case, all accounts prior to the January 12, 2007 were rendered with respect to the same matter. The law firm did not complete the work it was retained to do on behalf of the client. There was no natural break in the proceedings which might, in some circumstances, enable a law firm to send a final account for work done to date. This was a very short retainer beginning in late April of 2006 and ending in December of 2006. There was no final resolution of the matter. The client moved quickly to assess accounts after receiving what the law firm described as its final account in January 2007. Prior to January 12, 2007 no final account had been sent which would trigger the return to G.K. of any unused trust funds. Therefore, quite apart from the language of the Retainer Agreement and the Memorandum, I find as a fact that all accounts rendered to G.K. by AF before the final account (the January 12, 2007 account) are interim accounts.

57 There are also strong policy reasons why law firms should not be encouraged to treat interim accounts as final accounts. It would be most unfair to clients to allow what in reality is an interim bill to be treated as a final bill for purposes of assessment.

58 In most cases, during the course of the retainer, it is very difficult, if not impossible, for a client to formulate an accurate idea of whether a solicitor's account is reasonable based only on the receipt of an interim account. It is also unreasonable for the law firm to require a client to form a rational opinion about whether he/she has been overcharged or whether he has received value for services before a final account is rendered. Quite simply, as a practical matter, a client is not in a position to make an informed decision whether to exercise his/her rights to have interim accounts assessed. Justice Labrosse, in *Enterprise Rent-A-Car*, put it this way: "Moreover, the bill should not be viewed as final because of the very nature of the litigation. It would not have been possible to really assess the value of the service until it was completed..."

59 In addition, clients should not be forced to choose between harming the solicitor-client relationship and forgoing the right to have an interim account assessed. As was said by Sharpe J.A. in *Price v. Sonsini (supra)*, an

arrangement such as this forces the client into the invidious position of straining, if not rupturing, the solicitor-client relationship before the retainer has ended.

60 Finally, I conclude that the Retainer Agreement is inconsistent with the client's rights under the *Solicitors Act*. The *Solicitors Act* is designed to give some protection to clients against unreasonable accounts rendered by their solicitors. The provisions of the *Solicitors Act* that allow a client to assess the accounts of his law firm are, in essence, consumer protection provisions designed for the protection of the public. To permit contracting out of the provisions of the *Solicitors Act* would defeat the whole purpose of those legislative provisions enacted in the public interest and designed to allow a client protection against unwarranted or unreasonable legal fees. See the judgment of Wilson J. in *Potash v. Royal Trust Co.* (1986), 31 D.L.R. (4th) 321 (S.C.C.). I conclude that a law firm cannot, as a condition of being retained, require a client to contract out of the *Solicitors Act* and thereby give up his/her rights to have accounts assessed. Such an agreement is unenforceable. I am bolstered in this conclusion by the decision of Rouleau J.A. in *Javornich v. McCarthy* [2007 CarswellOnt 4107 (Ont. C.A.)], a decision dated June 28, 2007 in which the OCA dealt with a retainer agreement that reduced to 15 days the time period within which a client could seek an assessment. Mr. Justice Rouleau stated in paras 22-24:

> [22] ...there are public policy considerations that mete in favour of restricting the parties' ability to contract out of the rights and obligations created by the *Solicitors Act*. This court in *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 at para. 14 (C.A.), adopted the comments made by Adams J. in *Borden & Elliott v. Barclays Bank of Canada* (1993), 15 O.R. (3d) 352 at 357-58 (Gen. Div.) where he said:
>
> > The *Solicitors Act* begins with s. 1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness: see s. 18 of the *Solicitors Act*.
>
> [23] Later in *Plazavest*, this court, while recognizing that the terms of a contract between a solicitor and client are of some significance, rejected "the contention that an agreement between a client and a lawyer may preclude the client from resorting to the Act or the inherent power of the court to seek an assessment of the lawyer's fees".
>
> [24] As set out in *Price v. Sonsini* (2002), 60 O.R. (3d) 257 at para.19 (C.A.):
>
> > Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill. As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the process.
>
> It would, in my view, be contrary to the public interest to allow solicitors and clients to contract out of the statutory rights granted to clients to have their accounts assessed within the statutory time frame.

61 A consideration of the arrangements which AF imposed on its client in this case underscores the harshness that would result if artificial labels could sustain the sheltering of AF's accounts from neutral third party scrutiny and adjudication. The Retainer Agreement attempts to impose on G.K. a rule that requires him to move for immediate assessment of interim accounts, a difficult if not impossible thing to do without his being concerned about the termination of or the profound impairment of the solicitor-client relationship. The Retainer Agreement provides that rates can be varied without notice. It provides that failure by the client to top-up the trust account results in automatic termination of the solicitor client-relationship (this appears to apply whether or not any monies are owed by the client to AF). The client is required to agree that "at the firm's discretion the firm could withdraw from acting on his behalf" upon the receipt of notice from the firm and that he will be asked to consent to such

withdrawal of services, regardless of the adverse impact caused by such withdrawal. As if that is not enough, if for any reason the client's account remains unpaid with no arrangements made for the payment to AF in full, then he "will be reported to the credit bureau" and the credit bureau will be advised of the outstanding account. In other words, if any account remains outstanding, then no matter how unreasonable the account or no matter how small the amount, any failure to pay the account will result in his legal representatives (who are obligated to represent him and his interests) acting to injure his credit rating.

62 If the contract were to be given the meaning suggested by AF, then, as a practical matter, the Retainer Agreement would have the effect of extinguishing the right of the client to assessment of AF's accounts. The provisions of the Retainer Agreement threaten the client with abandonment by the firm for any reason ("at the firm's discretion"). The Retainer Agreement is designed to put the client in a difficult — if not impossible — position if, during the course of the retainer, the client questions the lawyers' interim fees. How can the client question interim fees when the act of questioning could lead to abandonment by the law firm? The Retainer Agreement threatens abandonment of the client by AF at a time when the client may be vulnerable legally and emotionally and when abandonment could be punitive in that it would necessitate significant duplication of legal fees, significant delay in achieving a result and/or could put at risk the client's interests at trial — particularly if the client is forced to proceed as a self-represented litigant. In short, the Retainer Agreement is designed to frighten the client with dire consequences should there be any dispute with the firm. The Retainer Agreement is harsh and unfair and aspects of it are unprofessional.

63 At a time when access to justice is such an important issue, and when lawyers' fees are getting so far out of reach for many ordinary people, it is crucial that an individual's right to a fair procedure for assessment of lawyers' fees exists. As Justice Sharpe said in *Price v. Sonsini*, public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for assessment of a solicitor's bill. His admonition that solicitors should facilitate the assessment process when a client objects to a solicitor's account rather than frustrating the process is more than just a guideline for law firms. It is essential. Clients must be able to assess their lawyers' accounts or they will be or will perceive themselves to be powerless in the face of unfair billing practices. There can be little doubt that if the courts permit lawyers to avoid scrutiny of accounts in appropriate cases, the administration of justice will be brought into disrepute.

Conclusion

64 I conclude that the Retainer Agreement did not express a clear understanding between the law firm and the client that interim accounts were final accounts for purposes of assessment. In the absence of a clear understanding, I am not prepared to interpret the Retainer Agreement so as to frustrate the client's rights to assessment pursuant to the provisions of the Solicitors Act. Therefore, I am of the opinion that the Registrar did have jurisdiction to order the assessment of the final account, dated January 12, 2007, and of all previous interim accounts.

65 I find that all accounts rendered prior to the January 12, 2007 were as a matter of fact interim accounts and on this basis I also conclude that the Registrar did have jurisdiction to order an assessment of all accounts rendered by AF to G.K.

66 I conclude that the Retainer Agreement between AF and G.K. is unenforceable insofar as it attempts to frustrate the assessment of AF's accounts by treating interim accounts as final accounts. AF could not contract out of the provisions of the *Solicitors Act*.

67 In the alternative, where special circumstances exist, the Court has jurisdiction to order an assessment of all AF's accounts pursuant to s. 11 of the *Solicitors Act*. Section 11 provides that the payment of a bill does not preclude the Court from referring it for assessment if the special circumstances of the case, in the opinion of the Court, appear to require it. The special circumstances in this case are as follows:

• The lack of clear agreement that interim accounts were to be treated as final accounts for purposes of assessment;

• The provisions of the Retainer Agreement made it practically impossible for G.K. to refer an interim account for assessment even if there was a clear understanding that interim accounts were final accounts for purposes of the Solicitors Act — for example, the provision of the Retainer Agreement permitting the law firm to terminate the solicitor-client relationship at its discretion.

• The fact that the Retainer Agreement was executed by G.K. without independent legal advice;

• The amount of the account which may be excessive for services rendered;

• The short duration of the retainer;

• The fact that the retainer related to one discrete matter which was not completed by AF;

• The fact that the client sought to assess AF's accounts expeditiously after receiving their final account dated January 12, 2007;

• the difficulty that the client would have assessing the value and/or fairness of interim accounts.

I conclude that the special circumstances in this case require AF's accounts to be referred for assessment.

68 AF's motion is therefore dismissed.

69 I order that all accounts rendered by AF to G.K. are to be assessed. I expect that the parties can agree on a date for the assessment to take place. If a date for an assessment is not agreed within two weeks of the date of this order, then, if the parties agree, the Registrar shall fix a date or the matter shall be brought back before me and I will fix a date.

Costs

70 The client is entitled to his costs of this motion. The solicitors for the client should file brief written submissions with respect to costs within two weeks of the date of this order. AF shall file in its brief written response within two weeks from the date of receipt of the client's submissions. Cost submissions should be sent to me at my chambers in Milton Ontario.

 Original
2021 ONSC 3529
Ontario Superior Court of Justice

Rooz Law Professional v. Hallett

2021 CarswellOnt 7103, 2021 ONSC 3529, 335 A.C.W.S. (3d) 206

ROOZ LAW PROFESSIONAL CORPORATION (Plaintiff) and BRYAN HALLETT (Defendant)

Diamond J.

Heard: May 12, 2021
Judgment: May 17, 2021
Docket: CV-18-00601544-0000

Counsel: Alon Rooz, for Plaintiff
Aryan Kamyab, for Defendant

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.8 Lawyer's or solicitor's lien
VIII.8.b Statutory charging order
VIII.8.b.i Entitlement

Headnote
Professions and occupations --- Lawyers — Lawyer's or solicitor's lien — Statutory charging order — Entitlement
Client retained solicitor under three contingency fee retainers to represent him in actions for damages sustained in motor vehicle accidents — Parties' relationship broke down so solicitor rendered final account based on retainer agreement, which allowed for hourly rate in event of early termination — Client responded to account by accusing solicitor of misconduct and threatening complaint — Solicitor's ex parte motion for charging order for fees and disbursements incurred by client was granted — Client was given 90 days to challenge order but did not do so until over one year later, then adjourned motion, and then hearing was delayed due to COVID-19 pandemic — Client brought motion to set aside charging order and for leave to proceed to assessment of invoices — Motion granted in part — Solicitor did not fail to make full and frank disclosure in support of ex parte motion but failed to wait statutorily prescribed 30-day period set out in s. 2(1) of Solicitor's Act — There was no urgency to warrant waiving mandatory waiting period at that time so court lacked jurisdiction to grant charging order — Given client's delay in bringing this motion, equitable result was to suspend enforcement of charging order for 60 days to permit solicitor to regularize this technical nullity of possible Solicitors Act, R.S.O. 1990, c. S.15, s 2(1).

Table of Authorities

Cases considered by *Diamond J.*:

Cheadles LLP v. Zanewycz (2016), 2016 ONSC 7909, 2016 CarswellOnt 20466 (Ont. Div. Ct.) — considered

M. (A.) v. M. (J.) (2016), 2016 ONCA 644, 2016 CarswellOnt 14353, 352 O.A.C. 324 (Ont. C.A.) — considered

Statutes considered:

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A

Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

s. 2(1) — referred to

***Diamond J.*:**

Overview

1 On August 18, 2018, Justice Koehnen granted an *ex parte* motion brought by the plaintiff seeking, *inter alia*, a charging order in the amount of $26,944.87 for fees and disbursements incurred by the plaintiff in its legal representation of the defendant.

2 Justice Koehnen granted the charging order ("the Koehnen order") on specific terms, and allowed the defendant 90 days after being served with the order to challenge it.

3 Despite being served in early September 2018, the defendant did not move to challenge the Koehnen order until approximately late 2019. The defendant then adjourned his motion once, and the motion was not able to be fully argued for some time due to, *inter alia*, the suspension of regular court operations caused by the COVID-19 pandemic.

4 The defendant's motion seeking to set aside the Koehnen order (together with leave to proceed with an assessment of the plaintiff's invoices) ultimately proceeded before me on May 12, 2021. At the conclusion of argument, I took my decision under reserve.

Summary of Relevant Facts

5 On or about February 5, 2016, the defendant was involved in a motor vehicle accident. He signed a retainer agreement with the plaintiff law firm with respect to both his accident benefits and tort claims arising from the accident.

6 The defendant was then involved in two subsequent motor vehicle accidents in June and August 2016. He signed two additional retainer agreements with the plaintiff to act on his behalf with respect to his additional accident benefits and tort claims arising from both subsequent accidents.

7 All of the retainer agreements contained a contingency fee arrangement, but in the event of an early termination of the retainer agreement(s), the plaintiff's fees were to be calculated at prescribed hourly rates or a percentage of the highest settlement amount offered to the date of the termination of the retainer agreement(s).

8 In or around early July 2018, the solicitor/client relationship between the parties deteriorated and essentially broke down. On July 3, 2018, the defendant sent two separate emails to the plaintiff with the subject line "URGENT!" stating that he believed the plaintiff was trying to "take advantage of the circumstances with respect to the contingency agreement". The defendant stated (mistakenly) that in his view, the plaintiff should only be paid if the plaintiff "settled the defendant's case in full". As such, the defendant gave instructions to only make an offer to settle for the full amount of his claims. The defendant then ended one of those emails with the cryptic words "I'm well aware of the term double-dipping."

9 On July 6, 2018, the defendant sent another email to the plaintiff. In that email, the defendant stated as follows:

> "At the end of the day, we both know, I am the client, which your firm is retained to work for me and you are responsible to protect me people from trying to abuse me and take advantage of me in my medical conditions.
>
> . . . . . .

> If having me as your client such a problem, you have the option to quit and walk away from both cases you are handling?
>
> . . . .
>
> I have no problem to find another law firm to take over my cases. You are well aware of my knowledge of my rights within a client & lawyer relationship and I have proven that on many occasions in the past.
>
> If you decide to continue representing me, you and your lawyers may advise me on what my best "options" are from here on in. But at the end of the day it is my instructions that count and I expect your lawyers to fallow (*sic*) them as to the Laws which governs.
>
> . . . . . .
>
> The choice is up to you and the ball is in your court?"

10 The defendant gave evidence on this motion that his first July 6, 2018 email was returned back to him as "undeliverable", and this forced him to forward the contents of his email back to the defendant from a different email address. In the plaintiff's responding materials, it appears that the plaintiff in fact received both July 6, 2018 emails delivered by the defendant from both email addresses. It is unclear how or why the defendant's original July 6, 2018 email was returned as "undeliverable" as there had never been any technical problems with electronic communications between the parties up to that point.

11 In any event, on July 11, 2018 the defendant forwarded the "undeliverable" response back to the plaintiff and stated as follows:

> "I guess, I should assume, taken with your quick attempt to block my emails from getting through to you, your lack of response within the 72 hour window and your lack of seriousness within these matters you have quit representing me as to the the (*sic*) LSUC ACT & Consumer Protection Act.
>
> So I would appreciate if you may have my files delivered to my home as soon as possible, so that I may begin either by representing myself or looking for another lawyer.
>
> I thank you for your time and consideration. If you have any further questions or concerns, you may direct them to this email and/or the alternative email if you have still block (*sic*) my main email address."

12 Later that afternoon, the plaintiff responded to the defendant by return email and advised that at no time did the plaintiff block any of the defendant's emails, but the plaintiff did receive the second July 6, 2018 email delivered from the defendant's alternative email address. In that reply, the plaintiff advised the defendant as follows:

> "I understand that your instructions are to prepare a copy of your file. I will have your file prepared and advise you of the costs to providing same to you (i.e. $0.25 per page plus any shipping fees). Alternatively, if you do find another lawyer, your lawyer may write to us and with the appropriateness I am taking we may prepare the file to be sent directly to them"

13 On July 9, 2018, the plaintiff had received an offer to settle the defendant's accident benefits claims. According to the retainer agreements, the plaintiff was entitled to charge legal fees on the basis of the prescribed hourly rates or 30% of the highest amount offered to the client to date. As the solicitor/client relationship had broken down, a final account was rendered on July 13, 2018.

14 On July 16, 2018, the defendant sent another email accusing the plaintiff of various forms of misconduct and threatening a complaint to the Law Society of Ontario.

15 On August 10, 2018, the plaintiff attended before Justice Koehnen and proceeded to argue the *ex parte* motion for a charging order. The Koehnen order directed that several identified parties (including certain insurance companies and law firms) hold in trust or pay into court the sum of $26,944.97 until further direction of the Court or agreement between the parties.

16 The Koehnen order further directed the plaintiff to serve the order, the notice of action and the statement of claim on the defendant by September 10, 2018, and permitted the defendant 90 days from the date of being served with those materials to bring a motion to challenge the terms of the Koehnen order.

17 The plaintiff arranged for personal service of the Koehnen order, the notice of action and the statement of claim upon the defendant, which service was effected on September 4, 2018. The defendant did not move within the 90 day period prescribed by Justice Koehnen to challenge, vary or set aside the Koehnen order.

18 The impetus for the defendant bringing the within motion is the ultimate settlement of his claims, and the fact that the $26,944.97 has been paid in accordance with the Koehnen order.

Issue #1: Did the plaintiff breach its obligation to make full and frank disclosure?

19 The defendant argues that the plaintiff was under a duty to make full and frank disclosure of all known material facts when it proceeded on an *ex parte* basis before Justice Koehnen. I agree with this submission. As held by the Court of Appeal for Ontario in *A.M. v. J.M.*, 2016 ONCA 644 (CanLII):

> "An *ex parte* order is intended to be used only in exigent situations where the delay required to serve the motion would probably have serious consequences, or where the giving of notice by the service itself would probably have serious consequences. A judge hearing an *ex parte* motion who is not satisfied of the probability of those consequences will decide that the motion cannot proceed *ex parte* and order that notice be given.
>
> Where a motion is brought without notice, the person bringing the motion must make full and fair disclosure of all material facts (rule 39(6) of *the Rules of Civil Procedure*), including facts that may not be helpful to that party's position. An *ex parte* order that is obtained without full and fair disclosure, even if the lack of full disclosure was unintended, is subject to being set aside. See for example, *Rinaldi v. Rinaldi*, 2013 ONSC 7368.
>
> Notice and the opportunity to be heard are basic tenets of our justice system. *Ex parte* orders are therefore made only in very limited circumstances. The requirement for full and frank disclosure is essential to allow a court to fairly make a temporary order that will affect the rights of another person in an emergency situation where the court has not heard both sides of the story."

20 I cannot agree that the plaintiff failed to discharge its duty to make full and frank disclosure. As I understand the defendant's argument, the plaintiff allegedly breached its duty of full and fair disclosure by not alerting Justice Koehnen to the fact that the defendant's emails were returned as undeliverable; the defendant argues that the returned emails were true reason for the breakdown of the solicitor/client relationship.

21 The defendant argues that the plaintiff did not include the complete email thread between the parties which included his July 6, 2018 email that set out "multiple failed delivery notices". The defendant argues that the plaintiff presented a picture before Justice Koehnen that only the July 11, 2018 email was received by the plaintiff, i.e. the email asking for the delivery of the defendant's file. By not mentioning the fact that the defendant was under the impression that the plaintiff had "blocked his emails", the plaintiff allegedly misled Justice Koehnen from assessing all the material facts and circumstances prior to making his decision. In other words, the plaintiff did not advise Justice Koehnen that it was the defendant's belief that the plaintiff withdrew from providing legal services and representation to the defendant.

22 I do not agree. As stated above, the defendant's emails were never "blocked" and there is no expert evidence in the record before me to come to any contrary conclusion (even though the defendant's motion was adjourned previously to allow him the opportunity to tender such expert evidence). The record in fact discloses that the plaintiff did receive the defendant's July 6, 2018 email, and even though the plaintiff did not include that email in the motion material before Justice Koehnen, it effectively made no difference as the solicitor/client relationship had already broken down.

23 The plaintiff did not know that the defendant's emails were returned as "undeliverable", and even when the plaintiff advised the defendant on July 11, 2018 that it had never blocked his emails, the defendant carried on with the same course of action and reiterated his request to have his file delivered so that he could retain new counsel.

24 I do not find the presence of a failure to make full and frank disclosure of material facts before Justice Koehnen. As such, the answer to Issue #1 is "No".

Issue #2: Did the plaintiff withdraw from providing legal services thereby precluding its right to a charging order?

25 This argument fails as it is premised upon a finding that the plaintiff blocked email correspondence from the defendant. I have not made any such finding on the record before the Court.

26 While the defendant may have been under a mistaken belief that the plaintiff somehow "targeted" him by blocking his emails, this was not in fact the case.

27 As such, the answer to Issue #2 is "No".

Issue #3: Should the charging order be set aside due to its timing?

28 The defendant submits that the plaintiff moved before Justice Koehnen on August 10, 2018, which was less than the 30 day period prescribed by section 2(1) of the Solicitors Act, R.S.O. 1990 c. S15. Section 2(1) provides as follows:

> "No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof, subscribed with the proper hand of the solicitor, his or her executor, administrator or assignee or, in the case of a partnership, by one of the partners, either with his or her own name, or with the name of the partnership, has been delivered to the person to be charged therewith, or sent by post to, or left for the person at the person's office or place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill."

29 The defendant argues that as the plaintiff did not wait the mandatory 30 day period before commencing this proceeding this proceeding (and thus the Koehnen order) are in contravention of the *Solicitors Act* and therefore a nullity.

30 Normally, section 2(1) is raised as a defence to a claim brought under the *Solicitors Act*. In *Cheadles v. Zanewycz*, 2016 ONSC 7909 (CanLII), Justice Horkins dismissed an appeal of a decision made on a motion described as follows:

> "The motion judge excluded the respondent's claim for the account dated April 8, 2010, in the amount of $13,243.91. In respect of this account only, the motion judge found that the respondent's Affidavit of Claim under the *Creditors' Relief Act* was contrary to s.2(1) of the *Solicitors Act* that states as follows:

> 2. (1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof, . . . has been delivered to the person to be charged therewith.
>
> The motion judge found that the respondent was barred from seeking relief for the April 8, 2010 account of $13,243.91, because the Affidavit of Claim was issued less than 30 days following delivery of the account to the appellant. As a result, the respondent's claim was reduced to $49,715."

31 The plaintiff argues that it was "under the gun" to seek the charging order as a potential settlement was "imminent" given the offers to settle obtained from the defendant's insurer in early July 2018. I do not agree with the plaintiff. There was no urgency at that time, and the defendant's claims did not ultimately settle until later on, and for a far greater amount.

32 As such, this proceeding is a technical nullity given that it was commenced before the mandatory 30 day period set out in section 2(1) of the Solicitors Act. Notwithstanding the terms of Justice Koehnen's order, it appears that this Court lacked jurisdiction to entertain the charging order at a time when the mandatory 30 day period had yet to expire.

33 Accordingly, I find the answer to Issue #3 is "Yes". However, given the fact that the defendant did not move to challenge Justice Koehnen's order for some time, in my view an equitable result is to suspend enforcement of my decision setting aside the Koehnen order for 60 days to allow the plaintiff the opportunity to regularize this technical nullity if legally possible.

34 In other words, the plaintiff shall have up to 60 days to either (a) bring whatever motion (*on notice*) it deems fit in this proceeding, or (b) commence a new legal proceeding and presumably seek a new charging order (again, *on notice*) to try and correct the technical nullity described above. If the plaintiff does not take any such steps, or if any motion proves unsuccessful, then the charging order is set aside.

35 Finally, for completeness of the exercise, I do not find the presence of any "special circumstances" that would the invoking of this Court's discretion to grant the defendant leave to proceed with an assessment of the plaintiff's account at this late stage. The Koehnen order already extended the time by which the plaintiff could have moved for such leave and he chose to wait over one year to bring his motion.

Costs

36 If the parties are unable to resolve the cost of this motion, they may serve and file written costs submissions (totaling no more than five pages including a Costs Outline) in accordance with the following schedule:

> a) the defendant may serve and file his written costs submissions within 10 business days of the release of this Endorsement; and
>
> b) the plaintiff may serve and file its written responding costs submissions within 10 business days of the receipt of the defendant's written costs submissions.

Motion granted in part.

Original
1993 CarswellOnt 1071
Ontario General Division

Borden & Elliot v. Barclays Bank of Canada

1993 CarswellOnt 1071, [1993] O.J. No. 1946, 106 D.L.R. (4th) 478, 15 O.R. (3d) 352, 42 A.C.W.S. (3d) 399, 4 W.D.C.P. (2d) 476

Borden & Elliot, Solicitors of the Ontario Court of Justice (General Division) v. Barclays Bank of Canada, Respondent (Client); Lorenzetti Development Corporation, Applicant (Third Party)

Adams J.

Oral reasons: August 16, 1993
Docket: Doc. 2339/93

Counsel: *John Montogomery*, for Borden & Elliot and the Respondent (Client) Barclays Bank of Canada.
Stephen Thom, for the Applicant (Third Party).

Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.14 Taxation or assessment of costs
XXIV.14.a Right to
XXIV.14.a.ii Miscellaneous
Headnote
Practice --- Costs — Taxation or assessment of costs — Right to
Solicitors Act, R.S.O. 1990, c. S.15, s. 9(1).
Applicant arranged financing for one of its construction projects through respondent bank. Under the arrangement, applicant was contractually obligated to pay all reasonable legal costs incurred by respondent. In fact, respondent was to deduct the fees from the moneys it loaned applicant. When respondent's solicitors submitted their bill, applicant questioned the amount. When respondent did not provide the requested breakdown of the figures, applicant applied to have the bill assessed. Respondent contended that only it was entitled to do so or, if applicant was so entitled, it was only in special circumstances that this was so. Held, the application was allowed. Under s. 9(1) of the Act, applicant, even though not chargeable as principle party, could have the bill assessed. Moreover, the arrangement between applicant and respondent regarding payment of the bill constituted special circumstances. Furthermore, the reference to reasonable legal fees in the contract indicated that reasonableness was the premise underlying the deduction of the fees from the loan money and respondent had not taken adequate steps to reassure applicant that the deduction was reasonable.

Adams J. **(Orally):**

1 This is an application for an order that a bill of legal fees, charges and disbursements be referred to an Assessment Officer pursuant to the *Solicitors Act*, R.S.O. 1990, c.S.15.

2 The facts are not in dispute. Lorenzetti Development Corporation ("LDC"), a land developer entered into a partnership agreement with the City of Toronto Economic Development Corporation ("TEDCO") and the Parking Authority of Toronto ("PAT") pursuant to which LDC agreed to develop a site owned by the City of Toronto at 323

Richmond Street East, Toronto (the "Project"). The Project consisted of two phases of which the first involved the construction of an underground parking garage and the second involved a commercial office and retail building to be constructed directly above the parking garage. The development of the Project proceeded during 1991 and 1992 and construction of the underground parking was substantially completed in or about January of 1993. The development of the commercial building has not yet been proceeded with. Construction financing for the Project was obtained by LDC from Barclays Bank of Canada ("Barclays") in the amount of approximately $7.5 million. The loan was secured by various agreements between Barclays, LDC, PAT and TEDCO.

3 Paragraph 6.6 of the Loan Agreement dated December 24, 1991 between Barclays and LDC obligated LDC to pay all reasonable legal fees and disbursements incurred by Barclays and provided:

> The Borrower will pay all reasonable legal fees and disbursements incurred by the Lender in connection with the preparation and review of the Loan Documents, the Security Documents and the other documents required hereunder and in connection with consummation of the transactions contemplated by this Agreement including without limitation each Advance. Such fees and disbursements (or if the exact amount thereof is undetermined at the time, a reasonable estimate thereof) may, without further direction of the Borrower be paid to such counsel by the Lender out of any Advance. Such payment shall form part of the Advance for all purposes hereof. Failure to deduct actual or estimated fees in whole or in part and disbursements as aforesaid shall not reduce the Borrower's liability therefor. The Borrower will, upon request, promptly reimburse the Lender for all reasonable amounts expended, advanced or incurred by the Lender to enforce the rights of the Lender under this Agreement or the Security Documents (if the Lender is successful in whole or in part) which amounts will include all court costs, lawyers' fees, fees of auditors and accountants, and investigation expenses reasonably incurred by the Lender in connection with any such matters, together with interest thereon at the same rate as is then applicable to Cost of Funds Loans.

4 Barclays commenced negotiations with LDC in April of 1991 and the law firm of Borden, Elliot was retained as counsel to Barclays at that time. This work included advising Barclays respecting the legal structure of the transaction, preparing, reviewing and amending draft documentation, negotiating the structure and documentation with the solicitors for LDC and other parties, conducting searches and preparing documentation relating to security and providing opinions and advice generally to Barclays.

5 The commitment letter is dated June 3, 1991 and it provided "all costs incurred by the Bank including legal fees in completing or attempting to complete this transaction plus any costs of subsequent discharges are for the borrower's account." By account dated February 5, 1992, Borden & Elliot delivered to Barclays an account for services rendered in connection with the transaction for the period between April 1991 and February 1992. This account was in the usual form required by Barclays and was addressed to and payable by Barclays. The amount was for $68,000 for fees plus GST and disbursements resulting in a final bill in the total amount of $74,457.96.

6 The first loan advance made by Barclays to LDC pursuant to the loan agreement took place on February 17, 1992. As paragraph 6.6 indicates, the Loan Agreement provides that Barclays' legal expenses may be deducted by Barclays from any advance made under the Loan Agreement without further direction from LDC. LDC advised Barclays of its objections to the amount of the account on receipt. On February 28, 1992 Barclays wrote to LDC requesting that the account be paid by March 31, 1992. By letter dated March 5, 1992, LDC requested of Barclays and Borden & Elliot:

> (a) the details of the calculation (i.e. on time or lump sum);
>
> (b) a breakdown of the time spent by individuals identifying the work done and the respective fees; and
>
> (c) documentation of the disbursements listed on the statement.

7 Barclays by letter of March 9, 1992 advised that the fee was calculated on a "time spent" basis. However, it took the position that the requested breakdown of time spent and copies of invoices and receipts would involve considerable effort and was not required as part of the statement of account. Barclays therefore insisted settlement of the account by March 31, 1992 or it would pay the fee out of the third draw pursuant to the Loan Agreement. TEDCO's Board of Directors was apparently required to approve the payment of the legal bill. It refused to do so "until further information was received on the breakdown of the statement". It also concurred in LDC's recommendation "to proceed with taxation" should the requested information not be forthcoming. In the result, LDC advised Barclays it would proceed to tax the bill by letter dated April 3, 1992. Payment of the legal account was made by way of deductions from the third construction mortgage financing advanced by Barclays on or about April 2, 1993 requiring LDC to make an additional equity contribution to the Project to compensate for the reduction from the mortgage funds advanced.

8 LDC made the decision that it would not refer the legal account of Barclays for assessment, at that time, because of its apprehension that, if it did so, construction financing would be delayed or withheld thereby imperiling the completion of the project. This application was then made February 4, 1993 and, after a series of adjournments, has come on for hearing now.

9 Barclays and Borden & Elliot take the position that LDC is liable to pay the Bank's legal expenses and this liability arises from a separate contract between Barclays and LDC. Accordingly, they submit that only the Bank, not its customer, is the client liable for the cost and only the Bank is entitled to have the account assessed. It relies on the decision of *Conrad v. Quinel International Ltd.* (1989), 69 O.R. (2d) 223 a decision of Rosenberg J. sitting in appeal in the Divisional Court pursuant to the *Courts of Justice Act*, s.19(1)(c) and s.21(2)(a). Alternatively, it submitted the applicant must make out special circumstances as required by s.11 of the *Solicitors Act* and, where the special circumstances alleged relate to overcharging, a court will not refer the account to taxation unless the charges are so gross as to amount to fraud. In this respect, my attention is directed to *Re: Shibley Righton and McCutcheon and Remtec Inc.*, (1991), unreported, Ontario Court of Justice (Gen. Div.) decision of Potts J. and *Re: Randell and Robins & Robins*, (1979) 22 O.R. (2d) 642.

10 The principal submission of the respondent is, however, that the applicant's entitlement to pay only "reasonable fees" is a matter of contract between it and Barclays and is enforceable only by commencing an action for breach of contract against Barclays. The respondent stresses that an assessment officer would have no jurisdiction to require Barclays to take back a portion of the fees Barclays wishes to pay to Borden & Elliot or to require Barclays to reimburse LDC pursuant to their contract. Counsel also cautions that if the matter is proceeded with on a reference, the assessment officer will potentially be confronted with resolving contested allegations that the counsel to LDC and TEDCO caused Borden & Elliot to extend many of the efforts that they did. It is submitted that this is an unlikely responsibility for an assessment officer.

11 In support of the application, the applicant submits that the *Solicitors Act* expressly applies, having regard to the wording in s.9(1) of that Act. The applicant further submits that s.11 of the Act, with the requirement of special circumstances, has no application. Section 11 requires special circumstances where a bill has been paid provided the application has been brought within twelve months of the payment. The applicant submits this provision is not applicable where the payment in question was not made voluntarily by LDC, but rather was unilaterally deducted by Barclays in the face of an LDC protest. In this respect, the applicant relies on *Re: Randell and Robins & Robins, supra*. Thus, the applicant submits the requested reference is a matter of right pursuant to ss.4(1) and (9)(1) of the *Solicitors Act*. Alternatively, the applicant submits special circumstances exist having regard to its strenuous and timely objections to the bill and to the fact that payment was made unilaterally by Barclays and not voluntarily by it.

12 With respect to the *Conrad* case, the applicant submits that Rosenberg J., in a very brief endorsement, made no reference to s.9(1) of the *Solicitors Act*; that there were grounds in that case, in addition to the existence of a separate agreement, for refusing the application; and that there is authority in this court endorsing a reference in

these circumstances as in *Tory, Tory, Deslauriers & Binnington v. Concert Productions International Inc.* (1985), 7 C.P.C. (2d) 54.

13 This application is granted. The *Solicitors Act* begins with s.1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness. See s.18 of the *Solicitors Act*.

14 Section 9(1) makes clear, reading selectively, that where a person, not being chargeable as the principal party, is liable to pay or has paid a bill to the principal party entitled thereto, the person so liable to pay or paying may apply to the court for an order referring the bill to assessment as the party chargeable therewith might have done. LDC falls clearly within this provision. Moreover, whether or not special circumstances are required in the circumstances before me, the applicant is entitled to the reference. While I appreciate the purposive position on involuntary payment taken by Eberle J. in *Randell and Robins & Robins, supra*, I would prefer, in the circumstances of this case, to hold that s.11 applies, but that the nature of LDC's payment to Barclays and Barclays' payment, in turn, to Borden & Elliot pursuant to a contract between LDC and Barclays, constitute special circumstances within the meaning of s.11. The payment was not made directly by the party seeking the reference but the applicant was required to permit the payment pursuant to a contract providing for the unilateral deduction of the legal fees by Barclays from the construction financing it controlled. While this contractual provision was voluntarily entered into by LDC, it contains the reference to "reasonable legal fees". In other words, "reasonableness" is the premise underlying any such deduction and neither Barclays nor Borden & Elliot took adequate steps to assure the applicant that the account was reasonable. A breakdown was said to involve too much effort, notwithstanding LDC's agreement to pay only reasonable fees and charges.

15 The *Solicitors Act* reflects a clear bias against ordinary civil actions as the mechanism to protest the appropriateness of legal fees, even where the only difference might be between the client and another person wishing to assess a bill. See s.9(4) of the Act. Moreover a third party such as LDC cannot be bound by an executory or executed agreement between a client and solicitor that the client pay a specific amount or at a greater rate than the solicitor would otherwise be entitled to unless the third party has also agreed. See s.20(1) of the Act. Indeed, it seems clear that the *Solicitors Act* contemplates that parties, who are not clients, will be obligated to pay the legal fees of clients and provides for the opportunity of assessment, having regard to the profession's monopoly status. This seems a reasonable approach given that a client may lose interest in its right to assessment where that client is party to an indemnifying agreement with another.

16 I am further of the view that the provision (paragraph 6.6) to pay "reasonable legal fees" is not sufficiently express to permit me to conclude LDC compromised or forfeited its entitlement to bring this application. While the wording of the contract does not explicitly mention the assessment process under the *Solicitors Act* as the means to determine reasonableness, and it may be that reasonableness is not the sole criterion on a reference, the language employed fits comfortably within the policy of the Act and is best applied in that setting. The officer's attention will no doubt be directed to the Loan Agreement's wording and the officer may wish to take that wording into account having regard to all of the circumstances. Whether or not the assessment officer has contractual powers to direct Barclays in any manner, the officer clearly has the power to direct Borden & Elliot to return any overpayment to LDC. See s.6(2) of the Act.

17 The *Conrad* case I believe was animated by quite different facts. Unfortunately, the brief endorsement prevents a full appreciation of all that went into Rosenberg J.'s decision and no mention is made of the express language of s.9 of the Act. Clearly, Steele J. in *Tory, Tory, supra*, saw nothing wrong in principle with an application such as the instant matter. However, in the circumstances there, the applicant could not establish the required special circumstances.

18 The application is, therefore, granted. It is directed that the bill of fees, charges and disbursements of Borden & Elliot, paid by the applicant, be referred to the assessment officer at 145 Queen Street West, Toronto. Having regard to the state of the case law and the general importance of the issue, there will be no order as to costs.

 Original
2019 ONCA 762
Ontario Court of Appeal

Temedio v. Niagara North Condominium Corporation No. 6

2019 CarswellOnt 15264, 2019 ONCA 762, 148 O.R. (3d) 171, 310 A.C.W.S. (3d) 642, 440 D.L.R. (4th) 154

Jean Temedio (Applicant / Appellant in Appeal, Respondent in Cross Appeal) and Niagara North Condominium Corporation No. 6 and Simpson Wigle Law LLP (Respondents / Respondents in Appeal, Appellants in Cross Appeal)

David M. Paciocco, Harvison Young, B. Zarnett JJ.A.

Heard: August 16, 2019
Judgment: September 30, 2019
Docket: CA C66339

Proceedings: reversing *Temedio v. Niagara North Condominium Corporation No.6* (2018), 2018 CarswellOnt 20499, 2018 ONSC 7214, Heather McArthur J. (Ont. S.C.J.)

Counsel: Benjamin J. Rutherford, for appellant in appeal and respondent in cross-appeal
Erik Savas, for Respondents in appeal and appellants in cross-appeal

Headnote
Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Application for assessment, review, or taxation of account — Entitlement to assessment or review
Applicant (JT) purchased residential unit for her grandson and his mother W — Disputes arose between W and tenant of another unit in building and respondent corp. retained lawyers giving rise to one set of legal bills (pre-litigation bills) — Corp. commenced proceedings against JT and W seeking order that W and her son permanently vacate unit or that she comply with rules of condominium and refrain from causing undue noise (compliance proceeding), giving rise to second set of legal bills from lawyers to corp. (compliance proceeding bills) — Judge refused to order eviction of W from unit instead ordering that W comply with rules of condominium and that JT take reasonable steps to ensure that occurred — Judge also dismissed JT's request to remove lien corp. had registered against her unit on secure pre-litigation bills of $1,714.20 — JT sought to appeal but did so beyond applicable time limit — JT's motion to extend time to appeal was opposed by corp., and this generated third set of legal bills from lawyers (appeal bills) — JT applied for assessment of legal bills rendered by lawyers to corp. on basis that she was liable to pay proper amount of those legal bills and sought injunction restraining corp. from enforcing lien it had registered against her condominium unit to secure payment of those legal bills until any assessment was concluded — Application judge referred appeal bills to assessment in St. Catharines, but otherwise denied relief JT sought because she had not established special circumstances with respect to pre-litigation bills or compliance proceeding bills — JT appealed seeking balance of relief, including that any assessment be in Toronto; lawyers and corp. cross-appealed arguing that no assessment at all should have been ordered — Appeal allowed; cross-appeal dismissed — Even if application judge was right to require JT to show special circumstances, she erred in failing to find that special circumstances were present — More generous approach should be taken when

person applying for assessment is person liable to pay bill but is not client; JT was on receiving end of corp.'s heavy-handed approach, criticized by application judge, and was being asked to pay for that approach — Extent to which fees charged may include amounts for pursuing failed eviction strategy and heavy-handed approach raised questions about amount of legal bills — Corporation's costs were limited to $2,500 for compliance proceeding which also raised questions about $52,000 charged — There were enough special circumstances to warrant review of compliance proceeding bills — Pre-litigation bills should be included in assessment given relationship between pre-litigation steps and compliance proceedings — There was no error in application judge's determination that appeal bills proceed to assessment — Since all bills were proceeding to assessment, dismissal of request for injunction was set aside — Corporation was enjoined from enforcing its lien until assessment was complete.

Table of Authorities

Cases considered by *B. Zarnett J.A.*:

Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP (2010), 2010 ONCA 709, 2010 CarswellOnt 8065, 92 C.P.C. (6th) 1, 325 D.L.R. (4th) 518, 269 O.A.C. 382, 104 O.R. (3d) 93 (Ont. C.A.) — referred to

Niagara North Condominium Corp. No. 6 v. Temedio (2017), 2017 ONSC 897, 2017 CarswellOnt 1363 (Ont. S.C.J.) — considered

Plazavest Financial Corp. v. National Bank of Canada (2000), 2000 CarswellOnt 1081, 47 O.R. (3d) 641, 185 D.L.R. (4th) 78, 44 C.P.C. (4th) 288, 133 O.A.C. 100 (Ont. C.A.) — referred to

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19

s. 85(1) — considered

s. 85(2) — considered

s. 85(5) — considered

s. 134(1) — considered

s. 134(5) — considered

Solicitors Act, R.S.O. 1990, c. S.15

s. 4 — considered

s. 4(1) — considered

s. 9 — considered

s. 9(1) — considered

s. 9(2) — considered

s. 11 — considered

***B. Zarnett J.A.*:**

INTRODUCTION

1 The appellant, Jean Temedio, asked the application judge to order the assessment of legal bills rendered by the respondent lawyers, Simpson Wigle LLP (the "lawyers"), to the respondent, Niagara North Condominium Corporation No. 6 (the "Corporation"), on the basis that she was liable to pay the proper amount of those legal bills. She also sought an injunction restraining the Corporation from enforcing the lien it had registered against her condominium unit to secure payment of those legal bills, until after any assessment was concluded.

2 The application judge referred one set of legal bills to assessment in St. Catharines, but otherwise denied the relief Ms. Temedio had sought. Ms. Temedio appeals seeking the balance of the relief she sought, including that any assessment be in Toronto. The lawyers and the Corporation cross appeal, arguing that no assessment at all should have been ordered.

3 For the reasons which follow I would allow the appeal, direct all of the lawyers' bills to assessment in St. Catharines, and direct that the Corporation not enforce the lien against Ms. Temedio's unit until 30 days after the assessment has been completed if at that time there are amounts owed to the Corporation which have not been paid by Ms. Temedio. I would dismiss the cross appeal.

THE FACTS

4 Ms. Temedio owns a residential unit in Niagara North Condominium No. 6, a condominium building located on Scott Street in St. Catharines. She purchased the unit so that her grandson, Robert James, who is 29 years old, has autism, and is unable to live independently, would have a place to live with his mother, Kimberley Watson, his sole caregiver.

5 Disputes arose between Ms. Watson and the tenant of another unit in the building, involving complaints of noise and profanity. The Corporation retained the lawyers, who generated various correspondence. That gave rise to one set of legal bills (the "pre-litigation bills").

6 Subsequently, proceedings were brought by the Corporation against Ms. Temedio and Ms. Watson seeking an order that Ms. Watson and her son permanently vacate the unit, or that she comply with the rules of the Condominium and refrain from causing undue noise (the "compliance proceeding"). That gave rise to a second set of legal bills from the lawyers to the Corporation (the "compliance proceeding bills").

7 Taylor J. heard the compliance proceeding. In a decision dated February 7, 2017, he refused to order the eviction of Ms. Watson from the unit, terming such relief "draconian" and "not an appropriate remedy": *Niagara North Condominium Corp. No. 6 v. Temedio*, 2017 ONSC 897 (Ont. S.C.J.), at para. 25. He instead ordered that Ms. Watson comply with the rules of the Condominium and that Ms. Temedio take reasonable steps to ensure that occurred: at para. 26.

8 Taylor J. also dismissed Ms. Temedio's request to remove the lien the Corporation had registered against her unit on January 20, 2015 to secure the pre-litigation bills of $1,714.20: at para. 31.

9 On the question of costs of the compliance proceeding, Taylor J. was critical of the approach the Corporation had taken. He said, at paras. 32-33 of his decision:

> However, I do not approve of the action of the Condominium in continuing to seek the extreme remedy of eviction of Kimberly Watson and Robert James as tenants of unit 511. A less heavy-handed approach might very well have avoided an application to the court. It was also open to the Condominium to apply to the court for an order requiring Jean Temedio and Kimberly Watson to comply with the rules.
>
> Therefore, although the Condominium was successful in obtaining an order in this proceeding, I have a discretion with respect costs. In fixing costs, I take into consideration the amount of the lien which has already been registered against unit 511. I therefore fix the costs of this application payable to the Condominium by Jean Temedio and the Kimberly Watson, jointly and severally, in the amount of $2,500 inclusive of disbursements and HST. This amount shall be charged to the common element expenses of unit 511.

10 Following the decision of Taylor J., on March 13, 2017, the Corporation advised Ms. Temedio that she was responsible for the Corporation's actual costs in pursing the compliance proceeding, that those actual costs were

$52,000, and that amount would be added to the amounts secured by the lien against her unit. The Corporation relied on s. 134(5) of the *Condominium Act, 1998*, S.O. 1998, c. 19.

11 Ms. Temedio sought to appeal the decision of Taylor J. to this court but did so beyond the applicable time limit. Her motion to extend the time to appeal was opposed by the Corporation, and this generated a third set of legal bills from the lawyers (the "appeal bills"). Ms. Temedio's request for an extension of time was dismissed by Nordheimer J.A. on December 19, 2017, and the Corporation was awarded costs of $5,000.

12 On February 1, 2018, Ms. Temedio was notified that the Corporation's actual costs of the appeal related proceedings were $29,588.46, that the Corporation claimed the appeal bills from her pursuant to s. 134(5) of the *Condominium Act*, and that this amount would also be added to the costs secured by the lien.

13 On January 18, 2018, Ms. Temedio commenced the application which resulted in the orders which are the subject of this appeal and cross appeal. Ms. Temedio sought an order for the assessment of all of the legal bills which the Corporation was claiming Ms. Temedio was responsible to pay and were secured by the lien. After the Corporation issued a notice of sale on April 25, 2018, claiming $85,290.17 as payable under the lien and giving notice of intention to sell her unit to realize that amount, Ms. Temedio amended her notice of application to also claim an injunction restraining the enforcement of the lien until after any assessment had taken place.

14 Ms. Temedio paid the $2,500 costs award of Taylor J., and the $5,000 costs award of Nordheimer J.A. The balance of the amounts claimed by the corporation arising from the pre-litigation bills, the compliance proceeding bills, and the appeal bills remain unpaid.

THE DECISION OF THE APPLICATION JUDGE

15 The application judge held that since s. 134(5) of the *Condominium Act* made Ms. Temedio liable to pay the legal bills incurred by the Corporation, Ms. Temedio was entitled to apply for an assessment of the lawyers' bills in the same way as the Corporation might have, under s. 9(1) of the *Solicitors Act*, R.S.O. 1990 c. S.15. She further held that Ms. Temedio was required to establish special circumstances to obtain an assessment, as the Corporation would have had to if it were applying to assess the accounts, due to the fact that some of the accounts were rendered more than 12 months before Ms. Temedio's application was commenced, and all had been paid: *Solicitors Act*, ss. 4 and 11; at paras. 8-15.

16 The application judge held that Ms. Temedio had not established special circumstances with respect to the pre-litigation bills, because she had not taken steps to have the accounts assessed earlier but had unsuccessfully sought, before Taylor J. to obtain a ruling that the Corporation was not entitled to a lien for these costs: at paras. 16-19.

17 The application judge also held that Ms. Temedio had not established special circumstances with respect to the compliance proceeding bills of $52,000, because the only ground of special circumstances she advanced was that the fees were excessive. She held that the fees did not appear excessive for a two day application given the number of pages of material filed. She also observed that Ms. Temedio was an active party to the compliance proceeding whose counsel anticipated that the Corporation would claim fees in approximately that amount; therefore Ms. Temedio's own legal fees must have been the equivalent: at paras. 20-23.

18 The application judge found that special circumstances existed for the appeal bills ($29,588.48). The special circumstances arose from a comparison of the appeal bills with the compliance proceeding bills, given the less extensive work required for the appeal related proceedings. Accordingly, the application judge referred the appeal bills to assessment: at paras. 24-31.

19 Applying the test for an interlocutory injunction, the application judge refused to enjoin the Corporation from enforcing its lien: at paras. 34 and 37. She held that there was an absence of "real details or expert information about

her grandson's condition" so no irreparable harm was shown: at para. 35. The balance of convenience favoured the Corporation because even though some bills were to be assessed, Ms. Temedio would still be responsible for significant costs, and the Corporation's ability to function was negatively impacted by the failure of Ms. Temedio to pay the legal bills: at para. 36.

STATUTORY PROVISIONS

20 Section 4(1) of the *Solicitors Act* provides that a lawyer's bill shall not be ordered assessed more than twelve months after the date the bill was delivered unless special circumstances are shown. Section 11 of the *Solicitors Act* provides that payment of a bill does not preclude the ordering of an assessment, if special circumstances are shown.

21 Section 9 of the *Solicitors Act* permits a person other than the client to obtain an order referring a bill for assessment if that person is liable to pay the bill, and expands the range of circumstances that justify ordering the assessment. Sections 9(1) and (2) of the *Solicitors Act* provide as follows:

> **9(1)** Where a person, not being chargeable as the principal party, is liable to pay or has paid a bill either to the solicitor, his or her assignee, or personal representative, or to the principal party entitled thereto, the person so liable to pay or paying, the person's assignee or personal representative, may apply to the court for an order referring to assessment as the party chargeable therewith might have done, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable.
>
> (2) If such application is made where, under the provisions hereinbefore contained, a reference is not authorized to be made except under special circumstances, the court may take into consideration any additional special circumstances applicable to the person making it, although such circumstances might not be applicable to the party chargeable with the bill if he, she or it was the party making the application.

22 Subsections 134(1) and (5) of the *Condominium Act* provide that a condominium corporation may apply to the court to enforce its by-laws or rules against a unit owner and may add any costs awarded together with "additional actual costs" incurred in obtaining the order to the common expenses of the unit.

23 Subsections 85(1), (2) and (5) of the *Condominium Act* permit a condominium corporation to register a lien for amounts owing by an owner for common expenses, and to enforce the lien in the same manner as a mortgage.

ANALYSIS

24 Ms. Temedio argues that the application judge erred in finding that special circumstances were required to be shown. She argues that the application judge erroneously approached the matter as though the date of the delivery of the bills by the lawyers to the Corporation was what mattered, when Ms. Temedio's assessment application was commenced within twelve months of *her receipt* of the compliance proceeding bills. She also argues that because the lien may be enforced in the same way as a mortgage, she should be treated in a manner analogous to a mortgager. Alternatively, she argues that the application judge erred in not finding special circumstances for both the pre-litigation and compliance proceeding bills.

25 I do not find it necessary to decide whether Ms. Temedio is right that no special circumstances needed to be shown. In my view even if the application judge was right in requiring Ms. Temedio to show special circumstances, she erred in failing to find that special circumstances were present, sufficient to warrant assessment of all of the bills.

26 A judge's finding about the existence of special circumstances warranting the referral of a bill for assessment may be interfered with on appeal if the judge made an error in principle or arrived at a clearly unreasonable result: *Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP*, 2010 ONCA 709, 104 O.R. (3d) 93 (Ont. C.A.), at para 29.

27 In my view, the application judge made an error in principle.

28 When a person other than the client is liable to pay a lawyer's bill, not all of the same incentives that may exist between the lawyer and the client to ensure the bill is reasonable may be present. Thus, in considering whether special circumstances have been shown, a more generous approach is to be taken when the person applying for the assessment is a person liable to pay the bill but is not the client. Section 9(2) of the *Solicitors Act* allows the court to consider extra circumstances applicable to such a person which would not pertain to the client itself. Although being a third party liable to pay the bill is not in and of itself a sufficient special circumstance, this court has endorsed the concept that a third party should be given more favorable consideration than the client who received and paid the account: *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 (Ont. C.A.), at p. 651. The application judge failed to advert to and apply this principle.

29 Viewing the matter through the lens of the favourable consideration to be given to Ms. Temedio's request, the dates when the bills were delivered to the Corporation, and the payment of them by the Corporation have less significance than they would if the Corporation were seeking the assessment. The circumstances that justify an assessment of the bills do not need to overcome the inference of propriety and reasonableness of the bills that arises from delay in seeking assessment, or payment, by the client.

30 Similarly, a consideration of the length of time spent arguing the application, the number of pages of materials filed, or whether Ms. Temedio's counsel correctly predicted how large the Corporation's claim for legal fees would be, are not determinative of whether special circumstances exist for Ms. Temedio to assess the bills. This is especially so given that Taylor J. made a finding about why the Corporation's legal bills may have risen to what they were, which raise questions about the fees charged. The application judge failed to take this into account.

31 Taylor J. voiced his disapproval of the conduct of the Corporation in seeking the extreme remedy of eviction (which the Corporation did not obtain) and observed that a less heavy-handed approach on its part might have avoided litigation altogether. Ms. Temedio was on the receiving end of that unsuccessful strategy and approach, yet to the extent the legal bills to the Corporation included time spent on it, Ms. Temedio is being asked to pay for it. The extent to which the fees charged may include amounts for pursuing the failed eviction strategy and the heavy-handed approach raise questions about the amount of the legal bills. So too does the fact that Taylor J. limited the Corporation to an award of $2,500 in costs for the compliance proceeding; this also raises a question about the total fees of $52,000 charged for that proceeding.

32 Taken together and viewed in light of the correct principle, there were sufficient special circumstances to warrant a review of the compliance proceeding bills at an assessment at the request of a third party like Ms. Temedio given that her request is entitled in law to favorable consideration.

33 Given the relationship between the pre-litigation steps and the compliance proceeding itself, I would also include the pre-litigation bills in the assessment. I do not view Taylor J.'s ruling about the ability of the Corporation to register a lien for those bills to be a ruling on their quantum or to preclude assessment to determine their appropriate amount.

34 It follows from my conclusions that the cross appeal of the Corporation must fail. I see no error in the application judge's determination that the appeal bills proceed to assessment; indeed, that conclusion is fortified by a determination that the pre-litigation and compliance proceeding bills should proceed to assessment.

35 I would not interfere with the order of the application judge as to the place of assessment. She did not err in exercising her discretion to order that the assessment take place in St. Catharines.

36 Given that all of the bills will now proceed to assessment, I would set aside the dismissal of the request for an injunction and substitute an order enjoining the Corporation from enforcing its lien until the assessment

has been completed. In my view, the application judge erred in finding that there was no irreparable harm due to an absence of evidence about Ms. Temedio's grandson's condition. There was uncontradicted evidence in the affidavit of Ms. Temedio that her grandson "has autism and is unable to live independently", that the unit was purchased so that he would have a place to live with his sole caregiver, and that requiring that the unit be sold would result in dislocation of her grandson "from the home he has grown accustomed to living in [which] would likely lead to severe emotional and mental complications, the extent of which [Ms. Temedio has] not, at this juncture, been able to fully ascertain". As well, the application judge's finding that the balance of convenience favoured the Corporation was premised on the limited assessment she ordered. Since all of the bills are to be assessed, and since according to the Corporation's counsel an assessment in St. Catharines will not involve significant delay, the balance of convenience favours the granting of an injunction.

CONCLUSION

37 I would allow the appeal and vary the judgment of the application judge to refer all the legal bills to assessment in St. Catharines, and to direct that the Corporation not enforce its lien until 30 days after the completion of the assessment and then only for such amounts found due on the assessment to the extent that such amounts remain unpaid. I would dismiss the cross appeal.

38 The parties may make written submissions on costs, not exceeding two pages. Those of Ms. Temedio should be delivered within 10 days of this date. Those of the respondents should be delivered 5 days thereafter.

***David M. Paciocco J.A.*:**

I agree.

***Harvison Young J.A.*:**

I agree.

Appeal allowed; cross-appeal dismissed.

Original
2019 ONCA 455
Ontario Court of Appeal

Newell v. Sax

2019 CarswellOnt 8678, 2019 ONCA 455, 306 A.C.W.S. (3d) 182, 43 C.P.C. (8th) 217

Eileen P. Newell (Applicant / Respondent) and Lawrence Sax and Sax Lawyers (Respondents / Appellants)

K. Feldman, L.B. Roberts, Fairburn JJ.A.

Heard: March 5, 2019
Judgment: May 31, 2019
Docket: CA C65765

Proceedings: reversing *Newell v. Sax* (2018), 2018 CarswellOnt 12061, 2018 ONSC 4517, E.M. Morgan J. (Ont. S.C.J.)

Counsel: J. David Sloan, for Appellants
Robert G. Tanner, for Respondent

Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.d Accounting and refunding by lawyer
VIII.5.d.iii Application for assessment, review, or taxation of account
VIII.5.d.iii.C Powers and duties of assessment officer

Headnote
Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Application for assessment, review, or taxation of account — Powers and duties of assessment officer
Client was elderly woman who retained solicitor in relation to sale of investment property — Transaction was not overly complicated, but solicitor encountered number of problems that made transaction "hectic" — Solicitor charged total fees of $165,000, and matter proceeded to assessment — Solicitor had no time dockets but estimated his time at just under 75 hours, resulting in hourly rate of $2,220 — Assessment officer noted "Solicitor determined what his fees should be based on criteria that could not be demonstrated or explained to the Court" but still upheld account as fully payable and made costs order against client — Officer's reasons exhibited inexplicable animus toward client, being highly critical of client's lack of attendance even though her counsel was always present — Client's motion to oppose confirmation of report and certificate of assessment officer was granted; report and certificate set aside — Solicitor's account was assessed at total of $26,375, officer's costs order was quashed, and client was awarded $35,096.04 for costs of assessment and $13,439.25 for costs of motion on partial indemnity basis — Trial judge found officer's approach misapprehended overall structure and content of assessment process, and indeed of legal process at large — Trial judge found there was no obligation on client to testify or even attend at assessment, and there was no reason for officer to have drawn adverse inference or to have felt compelled to accept solicitor's poor evidence at face value — Trial judge found officer had also inappropriately limited cross-examination conducted by client's counsel, and her approach to assessment amounted to denial of natural justice for client — Solicitor appealed — Appeal allowed, order set aside, assessment of $100,000 substituted — Trial

judge erred in finding that assessment officer showed reasonable apprehension of bias — Assessment Officer erred by making ruling curtailing cross-examination but this did not indicate bias or animus, deny fair hearing or taint entire evidentiary record — Findings of assessment officer were owed considerable deference and should not have been rejected by trial judge — Appellate intervention was nevertheless warranted as erroneous analysis by assessment officer took overly mechanical approach to account — Applying percentage deduction was improper — Purpose of quantum meruit assessment is to assess reasonable value of solicitor's account, and it was error in principle for assessment to focus principally on mechanical application of hourly rate to given number of hours rather than meaningfully address all relevant factors to determine value of solicitor's account.

Table of Authorities

Cases considered by *L.B. Roberts J.A.*:

Bales Beall LLP v. Fingrut (2012), 2012 ONSC 4991, 2012 CarswellOnt 12787, 356 D.L.R. (4th) 103 (Ont. S.C.J.) — referred to

Bales Beall LLP v. Fingrut (2013), 2013 ONCA 266, 2013 CarswellOnt 5025 (Ont. C.A.) — considered

Cohen v. Kealey & Blaney (1985), 10 O.A.C. 344, 26 C.P.C. (2d) 211, 1985 CarswellOnt 1906 (Ont. C.A.) — followed

Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital & Health Center (2013), 2013 SCC 30, 2013 CarswellBC 1400, 2013 CarswellBC 1401, 357 D.L.R. (4th) 585, 51 Admin. L.R. (5th) 1, [2013] 7 W.W.R. 211, 44 B.C.L.R. (5th) 1, *(*sub nom. *Cojocaru v. British Columbia Women's Hospital and Health Centre)* 445 N.R. 138, *(*sub nom. *Cojocaru v. British Columbia Women's Hospital and Health Center)* 336 B.C.A.C. 1, *(*sub nom. *Cojocaru v. British Columbia Women's Hospital and Health Center)* 574 W.A.C. 1, *(*sub nom. *Cojocaru v. British Columbia Women's Hospital and Health Centre)* [2013] 2 S.C.R. 357, 1 C.C.L.T. (4th) 1 (S.C.C.) — referred to

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.) — referred to

Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc. (2011), 2011 ONCA 418, 2011 CarswellOnt 4081, 1 C.L.R. (4th) 194, 334 D.L.R. (4th) 445, 278 O.A.C. 216 (Ont. C.A.) — referred to

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Hooper v. Sheehan (2012), 2012 ONSC 4315, 2012 CarswellOnt 9154 (Ont. S.C.J.) — considered

Kruger v. Giverty (1981), 23 C.P.C. 3, 1981 CarswellOnt 384 (Ont. H.C.) — followed

Lynch-Staunton v. Somerville (1918), 44 O.L.R. 575, 13 O.W.N. 303, 46 D.L.R. 748, 1918 CarswellOnt 125 (Ont. C.A.) — referred to

McAllister v. Cleary (1999), 1999 CarswellNB 208, 213 N.B.R. (2d) 156, 545 A.P.R. 156, 33 C.P.C. (4th) 328 (N.B. C.A.) — referred to

R. v. Villota (2002), 2002 CarswellOnt 854, 163 C.C.C. (3d) 507, 3 C.R. (6th) 342 (Ont. S.C.J.) — considered

RZCD Law Firm LLP v. Williams (2016), 2016 ONSC 2122, 2016 CarswellOnt 4989, 87 C.P.C. (7th) 167, 348 O.A.C. 89 (Ont. Div. Ct.) — referred to

Roberts v. R. (2003), 2003 SCC 45, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 231 D.L.R. (4th) 1, 19 B.C.L.R. (4th) 195, *(*sub nom. *Wewayakum Indian Band v. Canada)* 309 N.R. 201, [2004] 2 W.W.R. 1, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2004] 1 C.N.L.R. 342, *(*sub nom. *Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259 (S.C.C.) — referred to

Rouben v. Toth (2000), 2000 CarswellOnt 2254 (Ont. S.C.J.) — referred to

Rouben v. Toth (May 29, 2002), John Hamilton Brockenshire J. (Ont. Div. Ct.) — referred to

Solicitors, Re (1945), [1946] O.W.N. 135, [1946] 2 D.L.R. 382, 1945 CarswellOnt 390 (Ont. H.C.) — referred to

Tri Level Claims Consultants Ltd. v. Koliniotis (2005), 2005 CarswellOnt 3528, *(*sub nom. *Koliniotis v. Tri Level Claims Consultants Ltd.)* 201 O.A.C. 282, 15 C.P.C. (6th) 241, 257 D.L.R. (4th) 297 (Ont. C.A.) — referred to

8867799 Canada Inc. v. Paul A. MacLeod Barrister Solicitor (May 24, 2016), (Ont. S.C.J.) — referred to

Statutes considered:

Solicitors Act, R.S.O. 1990, c. S.15
s. 3 — considered

s. 5 — considered

s. 6(9) — considered

***L.B. Roberts J.A.*:**

A. OVERVIEW

1 This appeal deals with the proper approach to be taken on a *quantum meruit* assessment of a solicitor's account.

2 The appellants appeal from the order setting aside the Report and Certificate of Assessment Officer A. Palmer dated October 6, 2017, reducing the appellants' assessed $149,635.52 account to $26,375.00.

3 For the reasons that follow, I would allow the appeal, set aside the order of the application judge, and substitute an assessment of the appellants' impugned account in the amount of $100,000, inclusive of all amounts.

B. FACTUAL BACKGROUND

4 The respondent is 93 years old and a longstanding client of the appellant, Lawrence Sax, an 87-year-old real estate lawyer. Over the course of about seventeen years, Mr. Sax had acted on several matters for the respondent.

5 The focus of the December 31, 2014 account was on the services performed by Mr. Sax in relation to the $14 million sale of the respondent's three-storey eleven-unit commercial building at 102-104 Yorkville Avenue ("the property") in Toronto. Mr. Sax's account before assessment was in the amount of $187,044.40 for all fees, disbursements and taxes. Without issuing an account or seeking the respondent's authorization, Mr. Sax paid the amount of the account in full from the respondent's trust account held by Mr. Sax. He later provided the respondent with his account that he reconstructed from memory since he had no written retainer agreement with the respondent and kept no time dockets.

(a) Assessment Officer's Report and Certificate

6 The respondent sought an assessment of Mr. Sax's account of fees, charges, and disbursements pursuant to the *Solicitors Act*, R.S.O. 1990, c. S.15, s. 3. The matter was heard over the course of three days in April of 2017.

7 The respondent did not personally appear at the hearing, although she was represented by counsel. In her reasons, under a heading titled, "Failure of the Client to Appear for Hearing", the Assessment Officer noted that the respondent was absent from the hearing without having provided a doctor's note.

8 The Assessment Officer confirmed with the respondent's counsel that he and the respondent understood that his client's absence constituted a waiver of her right to testify to the reasonableness of any evidence submitted. She referenced s. 5 of the *Solicitors Act* that permitted her to proceed with the assessment without further notice to the respondent who did not attend the assessment. She concluded:

> Accordingly, the Court will weigh any evidence submitted by the Client's solicitor [Mr. Sax] based on its face value, as the Client failed to appear for hearing, and therefore, was unable to testify to the Court as to the reasonableness of the arguments made or evidence presented. The Client's counsel had no personal knowledge of the facts in this case.

9 Mr. Sax was the only witness at the hearing. The Assessment Officer made a ruling that curtailed the respondent's cross-examination of Mr. Sax. The Assessment Officer's ruling arose in relation to an objection by Mr. Sax's counsel, Mr. Sloan, to a suggestion from the respondent's counsel, Mr. Tanner, that he was told to create

some time records by the Assessment Officer at the preliminary hearing. The exchange and the ruling occurred as follows:

> Mr. Tanner: ...do you recall at the preliminary hearing, it was suggested to you that you ought to create some time records by the assessment officer?
>
> Mr. Sloan: Don't answer the question. I object.
>
> Mr. Tanner: Do you...
>
> The Court: Counsel, I believe this is cross-examination, correct?
>
> Mr. Tanner: Yes.
>
> The Court: Okay, so we're limited to the scope of the direct that was done, right, until you can present your case in-chief, you can do what you need at that time. But you're limited to the scope of what was brought up in examination. I don't think we talked [about] the preliminary conference in the direct examination.
>
> Mr. Tanner: I would have thought that in cross-examination on an account where the records are insufficient, I can cross-examine the witness on why, and by what means we come to have such...
>
> The Court: Oh, absolutely, and that's what you've been doing until you asked about the preliminary conference...
>
> Mr. Tanner: Yes.
>
> The Court: ...was certainly not a topic in direct examination. So why don't we just move on, thank you. [Emphasis added.]

10 The Assessment Officer accepted Mr. Sax's evidence that he had taken on significant responsibility for and spent considerable time and effort dealing with the various complex issues that arose to ensure that the $14 million sale transaction successfully closed. However, she found the following deficiencies, at para. 72:

> I find that there was a deficiency in the Solicitor's degree of responsibility in his duty owed to the Client with respect to keeping a record of the actual time being accrued and ultimately billed in rendering services to the Client; as well as, in his action of transferring fees from the proceeds of the sale being held in the Client's trust account without first issuing a bill or getting authorization from the Client.

11 The Assessment Officer stated that she would assess Mr. Sax's account on a *quantum meruit* basis. She accepted the amount billed was fair and reasonable in the circumstances of this case, but reduced it by 20% because of the deficiencies earlier noted.

(b) Application Judge's Order

12 The respondent moved to oppose confirmation of the Report and Certificate of the Assessment Officer, pursuant to s. 6(9) of the *Solicitors Act*.

13 The application judge agreed with the respondent that the Assessment Officer had shown "inexplicable animus" towards her. The application judge found that because the respondent did not attend the assessment hearing, the Assessment Officer made unwarranted adverse inferences against her, and felt compelled to accept Mr. Sax's evidence without question.

14 The application judge criticized the Assessment Officer's actions that he characterized as the admonishment of an elderly party for not testifying, the taking of the appellant's evidence at face value because the respondent

did not testify and the denial of full cross-examination. He concluded that these actions resulted in the "spectre of pre-judgment and a reasonable apprehension of bias": citing from *R. v. Villota*, [2002] O.J. No. 1027 (Ont. S.C.J.), at para. 108.

15 The application judge reasoned that the Assessment Officer's animus and bias against the respondent caused her to uphold the account as "fully payable", notwithstanding the shortcomings of the solicitor's account and of his evidence in support of it.

16 As a result, the application judge concluded that the Assessment Officer denied the respondent natural justice and "undermined due process of law" and that "it cannot be left to stand".

17 In consequence, the application judge gave no deference to the Assessment Officer's findings and undertook afresh the assessment. He reduced the account to $26,375.00.

C. ANALYSIS

(1) Reasonable apprehension of bias

18 I agree with the appellants that the application judge erred in finding that the Assessment Officer showed a reasonable apprehension of bias.

19 There is a very stringent standard for finding a reasonable apprehension of bias. The test asks whether "an informed person, viewing the matter realistically and practically — and having thought the matter through" would conclude, whether consciously or unconsciously, that the matter was not decided fairly: *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at p. 394. The grounds for this apprehension must be substantial: *Committee for Justice and Liberty*, at p. 395.

20 Apposite is this court's observation in *Bales Beall LLP v. Fingrut*, 2013 ONCA 266 (Ont. C.A.), at para. 20, in relation to a similar allegation of bias against a motion judge reviewing an assessment officer's report and certificate:

> The suggestion of judicial bias - actual or perceived - is a serious allegation. It is tantamount to the assertion that a miscarriage of justice occurred. As a result, it should not be advanced lightly and without evidentiary support.

21 In my view, it is clear that the test for bias is not met in this case.

22 It is important to recall that the issue of the respondent's absence was not raised by the Assessment Officer, but by counsel for the appellants. It arose at the outset of the hearing when counsel for the appellants expressed concern over the respondent's absence and implied that they had been deceived as to the respondent's intentions to appear. Counsel for the respondent rejected the allegation of any deceptive behaviour and noted that his client was not required to attend the assessment hearing.

23 The Assessment Officer then asked the respondent's counsel a series of questions, in which it was confirmed that the respondent was alive, capable of giving instructions, and able to appear. The Assessment Officer asked the respondent's counsel to confirm that the respondent was waiving her right to put forward evidence, including her personal knowledge of the circumstances of the solicitor-client relationship, if she failed to appear at the hearing. The respondent's counsel indicated that would be the case.

24 The five short paragraphs in the Assessment Officer's reasons and the brief exchange with counsel on the transcript concerning the respondent's absence from the assessment hearing do not meet the very high threshold required to displace the strong presumption of impartiality of judicial officers: *Cojocaru (Guardian ad litem of)*

v. British Columbia Women's Hospital & Health Center, 2013 SCC 30, [2013] 2 S.C.R. 357 (S.C.C.), at para. 20; *Roberts v. R.*, 2003 SCC 45, [2003] 2 S.C.R. 259 (S.C.C.), at para. 59.

25 I see no evidentiary basis for the application judge's finding of animus or bias by the Assessment Officer against the respondent. The Assessment Officer drew no adverse inferences against the respondent because of her absence. Rather, as earlier noted, the Assessment Officer fairly set out in her reasons the inevitable evidentiary consequences flowing from the respondent's absence, namely, that there would be no testimonial evidence from the respondent to challenge the appellants' version of events.

26 The Assessment Officer's reasons clearly demonstrate that she did not feel "compelled" to accept without question Mr. Sax's evidence. Rather, the Assessment Officer wrote that she would "*weigh* any evidence submitted by the Client's solicitor [Mr. Sax] based on its face value, as the Client [the respondent] failed to appear for hearing, and therefore, was unable to testify to the Court as to the reasonableness of the arguments made or evidence presented" (emphasis added). In other words, while Mr. Sax's evidence was unchallenged by any testimonial evidence from the respondent, the Assessment Officer acknowledged that she still had to assess or "weigh" Mr. Sax's evidence. To that end, the Assessment Officer detailed the deficiencies in Mr. Sax's evidence and her recognition of its frailties led her to reduce his account by 20%.

27 The respondent submits that the Assessment Officer's erroneous curtailment of the cross-examination of Mr. Sax demonstrated bias, violated her right to be heard, and more generally, amounted to a denial of natural justice and denied her a fair hearing, thus justifying appellate intervention by the application judge.

28 I disagree. While it is common ground that the Assessment Officer erred by making her ruling curtailing cross-examination, in my view, it did not indicate bias or animus on her part, nor did it deny the respondent a fair hearing. Moreover, the erroneous ruling did not taint the entire evidentiary record and the Assessment Officer's findings such that no deference was owed to them. In my opinion, the effect on the respondent's fair hearing rights and the evidentiary record was limited to the narrow issue of the accuracy of Mr. Sax's time records.

29 For these reasons, I am of the view that the application judge misapplied the test for bias. This skewed his analysis of the Assessment Officer's decision and erroneously caused him to reject her findings.

(2) Did the application judge err in his assessment of the solicitor's account?

(i) Failure to give deference to the Assessment Officer's findings

30 The appellants submit that the application judge erred by failing to give appropriate deference to the findings of the Assessment Officer and by retrying the assessment, rather than assessing the account based on her findings or sending the assessment back for a hearing before another assessment officer.

31 I agree that the application judge erred in rejecting the Assessment Officer's findings on matters not affected by her curtailment error. The Assessment Officer made numerous findings about Mr. Sax's efforts that were subject to full cross-examination and not affected by her curtailment error concerning his time records.

32 Importantly, the Assessment Officer accepted Mr. Sax's evidence regarding the exigencies and complications of the transaction. She found that the transaction was complicated because of its size but also due to other complex issues that arose and threatened the closing of the transaction. These included the respondent's documentation and accounting issues with the property that created other problems, as well as potential tax exposure for the respondent, and estoppel certificates required by the purchaser from each tenant of the property. In addition to creating a lot of work, these issues made the handling of the transaction more complicated, including a renegotiation of the purchase price as well as a delay in the preparation of the taxes, maintenance and insurance statements that were required for the sale.

33 As the Assessment Officer concluded, Mr. Sax's interventions were instrumental in closing the $14 million transaction that was of undisputed importance to the respondent. It is clear from the cross-examination that did take place that the respondent was able to mount a vigorous challenge to the nature, extent and level of skill of the work carried out by Mr. Sax to complete the $14 million transaction.

34 These findings were open to the Assessment Officer and free of any error. As a result, they are owed considerable deference on appeal and should not have been rejected by the application judge: *RZCD Law Firm LLP v. Williams*, 2016 ONSC 2122 (Ont. Div. Ct.), at paras. 46-48.

(ii) Flawed approach to the assessment

35 However, appellate intervention was and is nevertheless warranted because of the erroneous analysis undertaken by the Assessment Officer and repeated by the application judge in assessing the solicitor's account. Specifically, they erred by taking an overly mechanical approach to the assessment of the solicitor's account.

36 Notwithstanding the many deficiencies that the Assessment Officer found in the calculation of the solicitor's account, she accepted its amount as "fair and reasonable" and merely applied a percentage deduction. As the application judge noted in the following passage:

> At para. 67 of her reasons for decision, the Assessment Officer states candidly that, "the Solicitor determined what his fees should be based on criteria that could not be demonstrated or explained to the Court." In fact, in his testimony the respondent admitted that in calculating his fees he included "a significant amount of time" spent prior to the dates shown on the account — going back up to 10 years — on work that pre-dated and was entirely unrelated to the present transaction. None of that previous work was described or itemized in the bill. Given the magnitude of the account and its disproportion to the transaction to which it purportedly pertained and the amount of time ostensibly devoted to this file, the Assessment Officer's comment about the inexplicability of the account appears to be an understatement.

37 The Assessment Officer erred in adopting a mathematical rather than the nuanced, contextual approach required in *quantum meruit* analysis. This error was exacerbated in the light of the Assessment Officer's findings of the account's deficiencies that significantly undermined its numerical validity.

38 While correctly highlighting the Assessment Officer's error, the application judge nevertheless failed to undertake a proper *quantum meruit* approach. Like the Assessment Officer, he effectively carried out a mathematical analysis of the account: he calculated the number of hours that he found appropriate to allot to the appellants' work, multiplied them by an hourly rate that he found was reasonable, and thus arrived at a total assessed amount.

(iii) Correct quantum meruit approach to a solicitor's assessment

39 A *quantum meruit* assessment is not a bookkeeping exercise or a mechanical calculation. Rather, a *quantum meruit* assessment is concerned with the reasonable value of services rendered and requires an assessment officer to undertake a nuanced, contextual approach having regard to all the relevant circumstances: *Tri Level Claims Consultants Ltd. v. Koliniotis* (2005), 257 D.L.R. (4th) 297 (Ont. C.A.), at para. 34; *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2011 ONCA 418, 334 D.L.R. (4th) 445 (Ont. C.A.), at paras. 46-50.

40 In solicitors' assessments, the relevant circumstances are usually examined in reference to the well-established criteria articulated by this court in *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344 (Ont. C.A.), at p. 346. These criteria involve factors beyond a mathematical calculation of a solicitor's time records and turn on the evidence underlying them:

1. The time expended by the solicitor;

2. The legal complexity of the matter dealt with;

3. The degree of responsibility assumed by the solicitor;

4. The monetary value of the matters in issue;

5. The importance of the matter to the client;

6. The degree of skill and competence demonstrated by the solicitor;

7. The results achieved;

8. The ability of the client to pay; and

9. The reasonable expectation of the client as to the amount of fees.

41 Since the purpose of a *quantum meruit* assessment is clearly to assess the reasonable value of a solicitor's account, it is an error in principle for an assessment to focus principally, as was the case here, on the mechanical application of an hourly rate to a given number of hours rather than meaningfully address all relevant factors to determine the value of a solicitor's account. To the point is Anderson J.'s oft-cited maxim from *Kruger v. Giverty* (1981), 23 C.P.C. 3 (Ont. H.C.), at p. 5 that "a taxation of costs is not a matter of precision in which one arrives at a conclusion simply on the basis of a mathematical formula."

42 For example, in *Greenglass, Re* (1988), 32 C.P.C. (2d) 55 (Ont. H.C.), at pp. 59-60, where the assessment officer also listed the nine *Cohen* factors but "strictly applied" the solicitor's hourly rate to the time expended, the court observed that the mechanical application of an hourly rate can lead to error. Similarly, in *Hooper v. Sheehan*, 2012 ONSC 4315 (Ont. S.C.J.), at paras. 20-21, where the assessment officer listed the nine *Cohen* factors but spent little time addressing these factors, except for the "time" set out in the solicitor's dockets, the court found this approach to be an error in principle and set aside the certificate.

43 The quantity of time spent does not solely determine the fairness or reasonableness of the account: *Solicitors, Re* (1945), [1946] 2 D.L.R. 382 (Ont. H.C.), at p. 385, citing to *Lynch-Staunton v. Somerville* (1918), 44 O.L.R. 575 (Ont. C.A.). Since time is only one factor to consider in determining the reasonableness of the bill, a fee, although reduced, may nevertheless be allowed even if not all time is docketed, provided there is other evidence available, as there was here, to support the fairness and reasonableness of the bill. That said, the failure of a solicitor to keep proper time dockets may justify a significant reduction in the assessed account. See, for example: *8867799 Canada Inc. v. Paul A. MacLeod Barrister Solicitor*, [2016] O.J. No. 4398 (Ont. S.C.J.); *McAllister v. Cleary* (1999), 213 N.B.R. (2d) 156 (N.B. C.A.); *Rouben v. Toth*, [2000] O.J. No. 2514 (Ont. S.C.J.), aff'd, [2002] O.J. No. 2523 (Ont. Div. Ct.).

(iv) Principles applied

44 Returning to the present case, the Assessment Officer considered the *Cohen* factors and made detailed credibility and factual findings based on Mr. Sax's evidence of his responsibility for bringing the $14 million transaction to fruition, the complications that arose, and the time and effort that he expended that went beyond his time records.

45 However, the Assessment Officer nevertheless fell into error because she failed to analyze and apply her findings to arrive at a fair and reasonable assessment. Instead, she appears to have taken the numerical value of Mr. Sax's account at face value, notwithstanding its many deficiencies, and simply mechanically reduced the total amount of Mr. Sax's account by 20%. This erroneous approach led her to make an unreasonably high assessment in the circumstances of this case based on her own findings.

46 Similarly, while listing the *Cohen* factors, the application judge failed to engage meaningfully with them, especially the degree of the appellants' responsibility, skill and competence, and the importance to the respondent of the significant result attained in the completion of a $14 million transaction that had run into complicated difficulties.

47 The application judge did not address these issues or analyze the evidence relevant to them in any significant way. He failed to recognize that this was not the kind of case that could be disposed of principally by a calculation of hours and hourly rates when Mr. Sax did not maintain dockets. As earlier noted, time spent and hourly rates are only two of the many factors to be considered on an assessment of the fairness and reasonableness of a solicitor's account.

48 While it was certainly open to the application judge to make significant deductions to Mr. Sax's account because of its serious deficiencies, the application judge's mechanical approach did not reasonably assess the value or *quantum meruit* of the account and led to an unreasonably low assessment.

49 While I agree that the amount of the assessment should be altered, I reject the appellants' submission that this matter should be sent back for reassessment. It is neither practical nor fair to do so given the advanced ages of the parties and the account. The Assessment Officer's findings not tainted by her error allow for reassessment of the amount of Mr. Sax's account.

50 I agree with the appellants' submission that the amount of $26,375.00 does not properly reflect the Assessment Officer's findings concerning the value of Mr. Sax's work. However, I also accept the respondent's position that even the discounted amount of $149,635.52 fails to properly take into account the deficiencies in Mr. Sax's account in accordance with the Assessment Officer's findings.

51 In following the correct approach on a *quantum meruit* analysis of a solicitor's account, I am mindful that to avoid a mechanical application, the *Cohen* and other factors relevant to the assessment should not devolve to mere checklists to be applied in a rote fashion, but should "serve as triggers for analysis and not substitutes for it": *Bales Beall LLP v. Fingrut*, 2012 ONSC 4991 (Ont. S.C.J.), at para. 15, aff'd, 2013 ONCA 266 (Ont. C.A.).

52 As earlier stated, I see no error in the Assessment Officer's detailed findings arising from her consideration of the evidence through the analytical lens of the *Cohen* factors. These included the importance of the $14 million transaction, the difficulties that arose, and the skill and effort expended by Mr. Sax to bring it to a successful conclusion, as well as Mr. Sax's failure to keep proper dockets and to substantiate the time actually spent, his hourly rate, or the basis for the calculation of the account.

53 In my view, these findings militate against merely accepting the face value of Mr. Sax's account. However, as the Assessment Officer correctly noted, Mr. Sax is entitled to be properly compensated for the value of the important work that he performed for the respondent's significant benefit. To put the value of Mr. Sax's significant work over several months on an important $14 million transaction into proper perspective, one need only recall in comparison that the application judge awarded $48,535.29 in costs to the respondent for the three-day assessment and one-day application, over a disputed $187,044.40 account.

54 In the circumstances of this case, I am of the view that a fair and reasonable assessment of Mr. Sax's account would be $100,000, inclusive of disbursement and taxes.

D. DISPOSITION

55 For these reasons, I would allow the appeal, set aside the order of the application judge, and order that Mr. Sax's account be assessed in the amount of $100,000.

56 The appellants' costs of the appeal should reflect their limited success. I would grant the appellant their partial indemnity costs in the amount of $10,000.

***K. Feldman J.A.*:**

I agree.

***Fairburn J.A.*:**

I agree.

Appeal allowed.

Original
2010 ONSC 755
Ontario Superior Court of Justice

Loreto v. Little

2010 CarswellOnt 916, 2010 ONSC 755, [2010] O.J. No. 679, 185 A.C.W.S. (3d) 230

Frank Loreto (Plaintiff) and Ian Little, Dianna Morello, Piera Segreto, Joseph John Vettese, Magdalena Del Borrello, Charlene Miranda, Regina Sawczak and Little, Morello, Vettese, Segreto LLP (Defendants)

Edward Belobaba J.

Heard: January 25-29, 2010; February 1, 2010
Judgment: February 22, 2010
Docket: CV-08-00359244-0000

Proceedings: additional reasons at *Loreto v. Little* (2010), 2010 CarswellOnt 1997, 2010 ONSC 1590 (Ont. S.C.J.)

Counsel: Jonathan Speigel for Plaintiff
Enzo Di Iorio, Melissa Mackovski for Defendants

Related Abridgment Classifications
Labour and employment law
II Employment law
II.2 Elements of employment relationship
II.2.b Duties of employee to employer
II.2.b.ii Fiduciary duties
Labour and employment law
II Employment law
II.2 Elements of employment relationship
II.2.b Duties of employee to employer
II.2.b.iii Use of confidential information
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.a Termination of employment by employer
II.6.a.i Constructive dismissal
II.6.a.i.D Miscellaneous
Professions and occupations
VIII Lawyers
VIII.1 Organization and regulation of profession
VIII.1.c Law firms
VIII.1.c.iii Miscellaneous

Headnote
Professions and occupations --- Barristers and solicitors — Organization and regulation of profession — Law firms — Miscellaneous

Plaintiff lawyer offered partnerships to defendants L, M, V and S, who were associates at his sole proprietorship law firm — Due to concerns about plaintiff's management style, defendants retained commercial lawyer to draft partnership agreement eliminating various irregularities — When draft was presented to plaintiff, he treated it as betrayal, and became furious and abusive — Defendants did not return to firm following day, and started new firm — Defendants contacted clients, telling each that lawyer was leaving firm and client could stay with plaintiff, go with departing lawyer or hire new lawyer — Most clients transferred to new firm so that defendants could continue to represent them — Three of plaintiff's law clerks left his employment to join defendant's firm — Plaintiff brought action against defendants, alleging breaches of contractual and fiduciary obligations and duties of confidentiality — Action dismissed — V and S were fired and L and M constructively dismissed — Normal rules applicable to fiduciary employees did not apply to lawyers and other professionals in view of personal nature of services provided and client's right to choose — Defendants' interactions with clients, offering them choices and assistance with file transfers was realistic and responsible — Defendants' use of firm client list to contact clients and provide them with choices was not breach of duty of confidentiality — Given that law firm had contingency agreements with most clients, plaintiff had right to be compensated for time spent on those files by law firm, on transfer to new firm.

Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Constructive dismissal — Miscellaneous

Plaintiff lawyer offered partnerships to defendants L, M, V and S, who were associates at his sole proprietorship law firm — Due to concerns about plaintiff's management style, defendants retained commercial lawyer to draft partnership agreement eliminating various irregularities — When draft was presented to plaintiff, he treated it as betrayal, and became furious and abusive — Defendants did not return to firm following day, and started new firm — Defendants contacted clients, telling each that lawyer was leaving firm and client could stay with plaintiff, go with departing lawyer or hire new lawyer — Most clients transferred to new firm so that defendants could continue to represent them — Three of plaintiff's law clerks left his employment to join defendant's firm — Plaintiff brought action against defendants, alleging breaches of contractual and fiduciary obligations and duties of confidentiality — Action dismissed — V and S were fired during plaintiff's immediate tirade and subsequent phone call — L and M were constructively dismissed, as they had good reason to conclude the plaintiff had crossed line and they could not reasonably return to work with him — There was no excuse for plaintiff's behaviour, as intensity of temper tantrum was beyond norm and directed at long-time colleagues to whom he never apologized.

Labour and employment law --- Employment law — Elements of employment relationship — Duties of employee to employer — Fiduciary duties

Plaintiff lawyer offered partnerships to defendants L, M, V and S, who were associates at his sole proprietorship law firm — Due to concerns about plaintiff's management style, defendants retained commercial lawyer to draft partnership agreement eliminating various irregularities — When draft was presented to plaintiff, he treated it as betrayal, and became furious and abusive — Defendants did not return to firm following day, and started new firm — Defendants contacted clients, telling each that lawyer was leaving firm and client could stay with plaintiff, go with departing lawyer or hire new lawyer — Most clients transferred to new firm so that defendants could continue to represent them — Three of plaintiff's law clerks left his employment to join defendant's firm — Plaintiff brought action against defendants, alleging breaches of contractual and fiduciary obligations and duties of confidentiality — Action dismissed — V and S were fired and L and M constructively dismissed — Normal rules applicable to fiduciary employees did not apply to lawyers and other professionals in view of personal nature of services provided and client's right to choose — Defendants' interactions with clients, offering them choices and assistance with file transfers was realistic and responsible.

Labour and employment law --- Employment law — Elements of employment relationship — Duties of employee to employer — Use of confidential information

Plaintiff lawyer offered partnerships to defendants L, M, V and S, who were associates at his sole proprietorship law firm — Due to concerns about plaintiff's management style, defendants retained commercial lawyer to draft partnership agreement eliminating various irregularities — When draft was presented to plaintiff, he treated it as betrayal, and became furious and abusive — Defendants did not return to firm following day, and started new firm

— Defendants contacted clients, telling each that lawyer was leaving firm and client could stay with plaintiff, go with departing lawyer or hire new lawyer — Most clients transferred to new firm so that defendants could continue to represent them — Three of plaintiff's law clerks left his employment to join defendant's firm — Plaintiff brought action against defendants, alleging breaches of contractual and fiduciary obligations and duties of confidentiality — Action dismissed — V and S were fired and L and M constructively dismissed — Normal rules applicable to duty of confidentiality did not apply to lawyers and other professionals in view of personal nature of services provided and client's right to choose — Defendants' use of firm client list to contact clients and provide them with choices was not breach of duty of confidentiality.

Table of Authorities

Cases considered by *Edward Belobaba J.*:

Bacher v. Obar (1989), 28 C.C.E.L. 160, 1989 CarswellOnt 769 (Ont. H.C.) — considered

Cressman, Foster Health Facility Inc. v. Furniss (2006), 2006 CarswellOnt 8932 (Ont. S.C.J.) — referred to

Goodman v. Newman (1986), 13 C.P.R. (3d) 48, 1986 CarswellOnt 157, 34 B.L.R. 23 (Ont. H.C.) — considered

Goodman v. Newman (1988), 1988 CarswellOnt 1027, 21 C.P.R. (3d) 260 (Ont. C.A.) — referred to

Layne v. Michaels (1990), 32 C.C.E.L. 144, 1990 CarswellBC 136, 46 B.C.L.R. (2d) 375, [1990] 5 W.W.R. 378 (B.C. S.C.) — considered

Lodwig v. Mather (1995), 29 Alta. L.R. (3d) 139, 11 C.C.E.L. (2d) 124, [1995] 7 W.W.R. 447, 168 A.R. 390, 1995 CarswellAlta 156 (Alta. Q.B.) — considered

Shah v. Xerox Canada Ltd. (1998), 99 C.L.L.C. 210-003, 1998 CarswellOnt 4130, 49 C.C.E.L. (2d) 30 (Ont. Gen. Div.) — followed

Vertlieb Anderson v. Nelford (1989), 40 B.C.L.R. (2d) 379, 90 C.L.L.C. 14,017, [1990] 2 W.W.R. 58, 1989 CarswellBC 206 (B.C. Co. Ct.) — considered

***Edward Belobaba J.*:**

1 On February 1, 2010, at the conclusion of the liability phase of the trial, I found that liability had not been established and I dismissed the action with reasons to follow. These are my reasons.

Background

2 The plaintiff, Frank Loreto sued four of his former associates (Little, Morello, Vettese and Segreto) for leaving his law firm without notice, taking more than 200 clients with them and setting up their own firm, LMVS. He alleged breaches of contractual and fiduciary obligation and duties of confidentiality. He also sued the three law clerks who left his firm several weeks later to join LMVS. [1] At the trial, I ordered a bifurcation and proceeded to deal first with the liability issues.

3 The issues on the liability phase were two-fold: (1) did the departing lawyers quit without reasonable notice or were they dismissed? (2) did the departing lawyers breach any contractual or fiduciary obligations or duties of confidentiality when they contacted clients using the firm's client-lists? If the answer to either question had been in the affirmative, the trial would have proceeded to the damages phase. As already noted, I concluded that liability had not been established and I dismissed the action.

Findings of fact

4 *The LLM law practice.* Frank Loreto was called in 1980 and set up his own firm, initially doing accident benefits and personal injury work. He hired Ian Little in 1995 and Dianna Morello a year later to do the personal injury work. Frank preferred to concentrate on corporate and commercial matters. Over time, he added John Vettese and Piera Segreto to the personal injury department. None of the four lawyers was required to sign an employment agreement.

5 Although "Loreto, Little and Morello" had been registered as a general partnership in 1997, I find that the firm was actually a sole proprietorship operating as Loreto, Little, Morello or LLM. Frank was the owner of the firm and the four defendant lawyers were his employees. They were salaried associates not partners.[2] Because the four lawyers had been given complete responsibility for the carriage of their personal injury files, they were likely fiduciaries and owed fiduciary obligations to the Loreto law firm.[3] This meant, for example, that upon departure they could not directly solicit the firm's clients or misuse confidential information.[4]

6 *Frank's offer of partnership.* By 2008, the firm's personal injury practice had more than 500 active files and accounted for more than 95% of the firm's billings. In March or April of that year, Frank told the four lawyers that he wanted them to become partners. He asked Ian to prepare a draft partnership agreement. The four lawyers were very pleased with this development. Ian had been a salaried associate for 13 years; Dianna, if you included her articling year, for 14 years; John had just finished seven years and Piera just under three. They all saw Frank's offer of partnership as a recognition of their significant contribution to the growth and success of the LLM law firm.

7 However, they also had concerns about Frank's management style- in particular, his extravagant spending habits; his use of the law firm's general account for both firm and personal expenses; his use of his so-called "companies of convenience" to minimize income tax obligations. The four lawyers wanted to eliminate these irregularities and, as Dianna put it, "operate like a real law firm." They retained and personally paid for an experienced commercial lawyer to help them draft the proposed partnership agreement.

8 The draft agreement was ready in early June, 2008. The four were "excited" about presenting the draft to Frank and they decided to do so together on June 11 at the end of the work day after Frank had returned from his regular tennis game.

9 *The events of June 11, 2008*. The tumultuous events of June 11 can be divided into three parts - the brief meeting in the firm's boardroom, the heated exchange in the office hallway and the late evening telephone discussion between Frank and Dianna and then Frank and Piera. Portions of the hallway exchange and the telephone discussion were audio-taped by one of the lawyers and transcribed. The audiotape of the hallway discussion was played in court. My findings about June 11, as set out below, are therefore based on the testimony of the plaintiff and the four defendants and on the transcribed audio tapes.

10 The plan was to meet Frank briefly in the boardroom, present him with the draft agreement, ask him to read it over the next five or six days and then meet again for a more detailed discussion. No one expected the blow-up that followed. Frank was known to be excitable, but his behaviour on June 11 was, even by his own admission, completely out of character. While flipping through the draft agreement, Frank became agitated, angry and then increasingly confrontational. He felt he was being ambushed and ganged-up on, "four against one." He resented the fact that the lawyers had presented him with the draft without any forewarning. He resented being given any kind of a deadline even one that was almost a week away and he was particularly upset when Dianna calmly suggested that instead of asking specific questions he should first read the entire document and then they would discuss it. Frank continued to grow more and more agitated.

11 At one point, Dianna decided to leave the boardroom and return to her office. Frank followed her hurling invectives. The others trailed behind. Dianna decided to slip a tape-recorder into her purse, return to the hallway and tape Frank's continuing tirade. Frank accused the four associates of ganging up on him and trying to take away his law firm. When Piera said, "Frank, don't act like this" he responded "Why don't you four go and open up your own firm!" He swore at them and called them names. He goaded one of the lawyers into admitting he didn't trust Frank and then called him a "fucking asshole" and fired him; he accused another lawyer of drug addiction and sexual infidelity; insulted another and accused her of insubordination and in the phone call later that evening he told Dianna that his opinion of the fourth lawyer "has gone rock-bottom."

12 He told the four lawyers, "You know what, you better not come in tomorrow." Dianna replied, "We'll be here first thing in the morning." The four defendants left. Frank went to his office, ripped up the draft partnership document and threw it into the garbage.

13 Later that evening he called Dianna and continued the heated, mainly one-sided discussion. Dianna could not get a word in edgewise. Frank complained about being the victim of a "power struggle;" that he had been "ambushed" by people who "had no class whatsoever;" that what the four of them did was "disgusting" and "disgraceful" and they were all basically traitors and phonies who couldn't be trusted. "You guys all want to leave, then go right ahead." As the taped portion of the call came to a close, Frank told Dianna to tell Ian that "the files are all mine...they belong to me." And, "if a client wants you to be her lawyer, then there are certain transitional provisions that apply." "No problem" replied Dianna, "we will deal with that. That's fine." Frank then commented about the need for "a professional transition." The cell phone battery failed at this point and the call continued on another phone but this portion was not recorded.

14 The four defendants did not go into work the next morning. Instead they met at John's house to decide what to do.

15 *The decision to form LMVS.* I accept Dianna's evidence that the decision that the four of them would leave and establish LMVS was not made until June 12 after they had reviewed what had happened the day before. Their formal letter of resignation was faxed to Frank's office on the evening of June 12. He saw it the next morning.

16 *Contacting the clients.* The lawyers' immediate concern was for the clients. Some of their clients had pre-hearings or mediations scheduled that week. It was imperative that these clients were contacted as quickly as possible. Ian called the Practice Advisory at the Law Society of Upper Canada to see how they should proceed. Based on the advice he received and using client lists that belonged to the firm, the four lawyers began calling their clients on June 12 and continued to do so over the next several weeks.

17 Each of the lawyers followed the same basic script. The client was told that the lawyer was leaving the firm and the client had three choices - to stay with Frank, go with the departing lawyer or hire another lawyer. Most of the clients decided to transfer their file to LMVS so that the departing lawyer could continue to represent them. (Many of them had never met Frank.) Within a few months, about 225 clients had signed the requisite authorizations terminating their retainer with Frank's firm and directing that their personal injury file be transferred to LMVS. [5]

18 *The retainer agreement.* The clients who retained LMVS were reassured that the retainer agreement that they had entered into with the LLM firm would continue. Except for a handful of "hourly rated files" the bulk of the LLM personal injury practice used a contingency retainer. The legal fee was 30% of the total amount recovered less disbursements which had to be paid in any event by the client. If the retainer was terminated by either LLM or the client (because, for example, the client wanted to transfer her file to another law firm) the client agreed to pay for the time that had been spent on the file to date at the prevailing hourly rates. Under section 4 of the retainer agreement, the client agreed to the following:

> I further acknowledge and agree that in the event that this retainer is terminated by either party prior to completion, an amount will be billed to me by LLM for legal fees based on their reasonable estimate of time spent by the lawyers and law clerks, at prevailing rates, in accordance with their levels of experience, together with GST and any unpaid disbursements.

19 In other words, if the retainer with Frank's firm was terminated and the client took his file to another firm (as happened here) Frank would be entitled to bill the departing client for the disbursements and for the estimated time spent on the file. LMVS agreed to protect Frank's entitlement to be reimbursed in accordance with the retainer agreement. Unfortunately, Frank took the position, contrary to the retainer agreement, that he was entitled to base

his bill on the final settlement amount that is eventually realized in each file. This is where the parties now find themselves. I will return to this issue later in these reasons.

20 My concern at his point, however, is to explain why the plaintiff's action for insufficient notice and breach of fiduciary duty was dismissed.

Analysis

(1) John and Piera were fired.

21 John was fired by Frank during the hallway discussion and told not to come back to work. The evidence on this point is uncontroverted and undisputed. Piera was fired during the telephone call. The exchange between Frank and Piera occurs at the end of the call during the portion that was not taped. Piera testified that "it was clear that I was fired and Frank did not want me back." I accept Piera's evidence. I do so not only because I believe her but also because her version is supported by what Frank had said about her just minutes earlier when he was talking to Dianna - namely, that his opinion of Piera "had gone rock bottom."

(2) Ian and Dianna were constructively dismissed.

22 Ian and Dianna say they were constructively dismissed - that they could not return to work with at LLM after the events of June 11. Both of them were long-time associates that over the years had developed strong bonds of friendship and trust with Frank and the lawyers and staff they worked with. On June 11, they both felt that they were personally and unfairly attacked. Ian described Frank's tirade as a "full frontal assault on all of us" that was not only uncalled for but "abusive." Ian knew he could not return to work at the firm: "I was done."

23 Dianna's evidence was similar in nature. Frank had attacked all of them without cause or justification. What he said and what he accused them of was deeply offensive. Dianna did not want to return to what would clearly be an uncomfortable, even hostile, work environment. I found Ian and Dianna, indeed all four lawyers, to be thoughtful and completely credible witnesses. I had no difficulty accepting their evidence in full.

24 The test for constructive dismissal, however, is an objective one. As Justice Cullity noted in *Shah v. Xerox Canada Ltd.*, [1998] O.J. No. 4349 (Ont. Gen. Div.) at para. 38:

> The test ... is whether the conduct of the [employer] was such that a reasonable person in the circumstances should not be expected to persevere in the employment ... each case must be decided on its own facts. The test should not be applied lightly. An employer is entitled to be critical of the unsatisfactory work of its employees and in general to take such measures -disciplinary or otherwise - as it believes to be appropriate to remedy. There is, however, a limit. If the employer's conduct in the particular circumstance passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable, there will in my view be constructive dismissal whether or not the employee purports to resign.

25 This is not a case where the employer was being critical of the four lawyers' unsatisfactory performance - indeed Frank had been so pleased with their work and the financial contribution they were making to the firm that he had just offered them a partnership and had asked Ian to prepare a draft of the agreement. This is a case where the employer became irrationally defensive and paranoid and uncontrollably angry. This is a case where the employer decided to throw a temper tantrum for no apparent reason.

26 But even so, not every workplace blow-up automatically results in a poisoning of the working environment or in the constructive dismissal of the targeted employees. Cooler heads prevail, apologies are made and accepted and the workplace returns to normal. Here, however, in my view, Ian and Dianna had good reason to conclude that Frank had crossed a line and they could not reasonably return to work with him at the LLM law firm. If they did, the office environment would be intolerable. I base this finding on the following:

• There was no excuse for Frank's behavior. The reason the lawyers were waiting for him on June 11 was to give him the very document he had requested. They were looking forward to a brief meeting following by a more detailed discussion a few days later after Frank had reviewed the draft. They were looking forward to becoming partners. To then be accused of ganging up on Frank or ambushing him was not only wrong and offensive, it also suggested a level of irrationality on Frank's part that must have been deeply disturbing, especially to Ian and Dianna who thought they knew him.

• The intensity of the temper tantrum was beyond the norm, even for Frank. What Frank said to the four of them was personal and demeaning and impugned their character and integrity. Unless this was dealt with and resolved immediately, the wounds and hurt feelings would be deep and long-lasting.

• Frank, however, never apologized for what he had said or how he had behaved.

• Frank's tirade was directed at colleagues who were part of a close-knit family and who were happy to be working at the LLM firm. The mutual trust that had been built up over a dozen years was destroyed in a few short hours and the damage was probably irreparable.

• In the days following the blow-up, whenever one of the four lawyers called to speak to his or her former secretary or law clerk, Frank could be heard in the background yelling, "Is that one of the traitors? One of the thieves?" When Dianna went back to pick up her personal belongings, she felt she needed a police escort. These subsequent events, although they do not figure in my decision, serve to reinforce Ian and Dianna's belief that the work environment would indeed have been intolerable.

27 In sum, I have no difficulty on the evidence before me in finding that Ian and Dianna could not reasonably have returned to work at Frank's firm. I find that they had been constructively dismissed and as such did not have to provide reasonable notice.

(3) No breach of any fiduciary duty

28 Departing employees, as a general rule, have certain obligations when they leave their employer. At the very least, in the absence of any restrictive contractual provisions, the departing employee has an implied duty of fidelity. She can set up shop in competition with her former employer; she can even contact customers or clients using a public telephone directory, but she cannot take and use customer lists to make these calls. [6]

29 Where the departing employee is a fiduciary, the rules became more restrictive. He cannot compete with his former employer or solicit clients for at least a reasonable period of time. And he certainly cannot use customer lists belonging to the employer to contact clients and solicit business. [7]

30 In cases involving lawyers or doctors or other professionals, however, these general rules do not apply. A different approach is taken primarily because of the personal nature of professional services and the client's right to choose. As Potts J. noted in *Goodman v. Newman*, [1986] O.J. No. 922 (Ont. H.C.), (aff'd by [1988] O.J. No. 298 (Ont. C.A.)):

> [P]rofessionals such as doctors, dentists and lawyers do not have the same proprietary right to their patients or clients as does a corporation to its customers. Professionals provide a personal service and establish a personal relationship with their clients, regardless of where or how the client or patient arrived at the firm or practice. The client or patient ought no[t] to be "handcuffed" to the business. Clients should have freedom of choice.

31 The same point was made by Saunders J in *Bacher v. Obar* (1989), 28 C.C.E.L. 160 (Ont. H.C.), a case in which a departing dentist, in the absence of a restrictive covenant, set up shop across the street and continued

to treat any patients who sought his services including those he had treated at the clinic he had just left. Justice Saunders said this at 174:

> Patients have the right to choose their dentist. They are not property to be bought and sold like inventory. Each dentist had the right to provide service to anyone who requested it.

32 Lysyk J. in *Layne v. Michaels*, [1990] B.C.J. No. 1382 (B.C. S.C.), put it this way:

> It is for the client to decide who will represent him. And if the client chooses to follow the departing associate, the firm does not have the power of veto.

33 The judge went on to quote with approval the following excerpt from *Vertlieb Anderson v. Nelford*, [1989] B.C.J. No. 2084 (B.C. Co. Ct.):

> If a client chooses to leave with an associate, the associate is obviously taking a business advantage which belonged to the firm. However, as set out in *Can. Aero*, there is a way of taking a business advantage which breaches one's fiduciary duty and a way that does not. The unique aspect of the associate's simultaneous and overriding fiduciary duty to his client means that it is the client and not the firm who actually sanctions the taking of the business advantage.

34 For the purposes of this decision, I will assume that the four departing defendants were fiduciaries and had fiduciary obligations because of the power and control they had been given over their files. The law that applies in these circumstances can be summarized as follows:

> • The departing lawyer not only has the right but the obligation to contact the client and tell her that he has left the firm. This does not constitute solicitation. [8]
>
> • When he contacts the client he must present three choices: the client can remain with the firm, transfer her file to the departing lawyer or hire another lawyer. [9]
>
> • If the client agrees to go with the departing associate and signs the requisite direction and authorization, the file should be transferred to the departing lawyer.

35 It is interesting to note that the language in the 2008 guideline promulgated by the LSUC on "Leaving a law or legal services firm" was uncertain, almost diffident in its approach and appeared to focus only the departing lawyer who was "intending" to leave the firm and had not yet left. [10] However, the 2009 version of this same guideline clearly mirrors the long-standing requirements of Canadian law:

> Clients should be told of their options for continued representation by the firm, by the departing firm member or by a new lawyer or paralegal chosen by the client ... If the firm will not agree or provide clear direction on how the clients will be notified of the lawyer's or paralegal's departure, the departing lawyer or paralegal should advise the clients in a neutral manner that he or she is leaving and of the client's options for continued representation.

36 In an ideal world, the firm and departing lawyer would cooperate and the firm would take the lead in contacting the affected clients and presenting them with the three options. However, as courts have recognized this ideal is rarely achieved. Here is how one judge described the more realistic scenario in a case involving three optometrists:

> The typical reaction of the senior professional where he/she learns of the junior professional's intent to leave the practice is for the senior person to lock the junior person out immediately. The instinctive reaction of the senior professional is that all the patients or clients are his/hers. The senior person is wrong in this. There is

no property in a dentist's patients and, similarly, in my view, there is no property in an optometrist's patients. Carol did not own the patients that Monica and Tammy had treated. These patients were free to follow Monica and Tammy and Monica and Tammy had a right and a duty to notify them of their new location.

11

37 This is what happened in this case as well. Frank (wrongly) took the position that the firm's clients were his personal clients and his property. Given the force of his tirade and of his view that all of the clients were firm property, it is almost a certainty that Frank would never have contacted the clients to offer them the three choices and arrange for file transfers as needed. What the departing lawyers did in the circumstances was both realistic and responsible. There was no breach of any fiduciary duties.

(4) No breach of any duty of confidentiality

38 Nor was there any breach of any duty of confidentiality. The plaintiff argues that the defendants' use of the firm's client list was a breach of their duty of confidentiality. It is true that in many situations, taking and using a firm's client list, even if the list is limited to "one's own" clients can amount to a breach of confidentiality.

39 The law takes a different approach, however, in the case of professionals such as doctors, lawyers or dentists. A departing lawyer or other professional is permitted to take, even to download, a list of the clients he has personally worked with in order to contact them and offer them the three choices discussed above. Some examples:

• *Lodwig v. Mather*, [1995] A.J. No. 382 (Alta. Q.B.) - the court found that a departing dentist has the right to print off a list of patients from the employer's computer in order to identify and contact the patients he personally treated. Picard J. said this: "A dentist who practises as an associate or even as an employee of another dentist, has the right to have access to or retain the names of the patients with whom he or she has had an exclusive or primary dentist-patient relationship and to advise those patients of the change of location of his or her practice."

• *Goodman v. Newman*, supra -

the court found that a departing dentist who took with him a list of the five or six hundred patients that he had personally treated did not breach any duties of confidentiality. The client list was not confidential information.

• Cressman, supra -

the court concluded that downloading a list of patients who the departing optometrist was scheduled to see over the next two months, contacting them and telling them about her departure and then giving them a choice of staying with her or with the old practice was something the optometrist "had both a right and a duty to do."

40 The case law is clear that the defendant lawyers' use of the firm's client list to contact their clients and provide them with the required three choices was not a breach of any duty of confidentiality.

(5) Going forward

41 A brief comment about Frank's right to be compensated for the 200 plus files that his former clients have transferred to LMVS. This is a matter that is governed by the terms of the retainer agreement. The disbursements have now been paid in full. All that remains is to estimate the time that was spent on each file before it was transferred and submit the appropriate account. One of the problems for Frank, a problem of his own creation, is that the personal injury lawyers were not required to docket their time and keep track of their hours - they were only to focus on getting a recovery and then billing the contingency fee.

42 Nonetheless, the "time spent" accounts should be forwarded to LMVS. Frank and LMVS may prefer to resolve this matter in some global fashion perhaps by way of a lump sum settlement. Neither side wants 200 assessment hearings. But this, of course, is for the parties to decide. My contribution is simply to remind Frank that the accounts he forwards to LMVS must be based on the "time spent" before the retainer was terminated and not on the amount of any eventual financial recovery. There is nothing unfair about this. This is precisely what Frank had agreed in the client's retainer agreement.

Conclusion

43 In sum, the four departing lawyers complied with the requirements set out in Canadian law. They did not solicit the firm's clients. They breached no fiduciary duties or duties of confidentiality. The lawsuit has no merit.

Disposition

44 The plaintiff's action is dismissed.

45 If the parties are unable to agree on costs, I will be pleased to receive brief written submissions within ten days from the defendants and seven days thereafter from the plaintiff.

46 I thank counsel for their co-operation and for the quality of their advocacy

Action dismissed.

Footnotes

1 The action against the three law clerks (Del Borrello, Miranda and Sawczak) was quite limited in scope. If the defendant lawyers had been found liable for breaching fiduciary duties by contacting their clients as they did, then the law clerks, who assisted in this process, would also have been found liable.

2 This is clear from the firm's financial statements; the lawyers' income tax filings; the language used in the Offer to Lease documentation; the lawyers' LSUC filings; Ian's memo to the "newbies" (new employees) describing Frank's role in the office as "the boss"; the language used in the draft 2008 partnership proposal; and the defendant lawyers' own admissions - for example, Dianna's reminder to Frank during the telephone call on June 11 that he was "the owner" of the firm.

3 *Vertlieb Anderson v. Nelford*, [1989] B.C.J. No. 2084 (B.C. Co. Ct.).

4 *Ibid.*

5 About 235 of the personal injury files remained with the Loreto firm. These were either clients who were being represented by the two other personal injury lawyers who were working at the firm at the time or clients who had elected to stay with Mr. Loreto.

6 England, Wood and Christie, *Employment Law in Canada*, (4th ed., looseleaf 2009) at 11. 142 et seq.

7 *Ibid.*, at 11.168 et seq.

8 *Layne v. Michaels*, [1990] B.C.J. No. 1382 (B.C. S.C.)

9 *Ibid.*

10 The 2008 version of the LSUC guideline suggested that "*it would seem inappropriate* for the employed or associate lawyer or paralegal *intending* to leave a firm to approach the firm's clients without the consent of the firm. *It is expected* that the law firm or legal services firm would contact those clients who might be affected by the departure of the

firm member to inform them of the lawyer's or paralegal's *impending* withdrawal. *It might be courteous* to give some indication of the departing firm member's future plans." (Emphasis added.)

11 *Cressman, Foster Health Facility Inc. v. Furniss*, [2006] O.J. No. 5594 (Ont. S.C.J.) at para. 143.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canadian Imperial Bank of Commerce v. Nadiscorp Logistics Group Inc. | 2009 CarswellOnt 5771, 66 C.B.R. (5th) 1, 180 A.C.W.S. (3d) 572, 89 M.V.R. (5th) 71 | (Ont. S.C.J. [Commercial List], Sep 25, 2009)

 Original
2008 ONCA 319
Ontario Court of Appeal

Norame Inc., Re

2008 CarswellOnt 2323, 2008 ONCA 319, [2008] W.D.F.L. 2904, [2008] O.J. No. 1580, 166 A.C.W.S. (3d) 1041, 235 O.A.C. 273, 41 C.B.R. (5th) 179, 90 O.R. (3d) 303

IN THE MATTER OF the Bankruptcy of NORAME INC., of the City of Vaughan, in the Regional Municipality of York, in the Province of Ontario

S.E. Lang, J. MacFarland, H.S. LaForme JJ.A.

Heard: February 25, 2008
Judgment: April 28, 2008
Docket: CA C47219

Proceedings: affirming *Norame Inc., Re* (2008), 2008 CarswellOnt 2392 (Ont. S.C.J.)

Counsel: H. Richard Bennett for Appellant, Paddon + Yorke Inc., Trustee in Bankruptcy
Michael A. Handler for Respondent, Vitran Corporation Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.5 Trust property
VIII.5.a General principles
Transportation
I Carriers
I.3 Contract of carriage
I.3.b Carriage of goods
I.3.b.iii Miscellaneous

Headnote
Bankruptcy and insolvency --- Property of bankrupt — Trust property — General principles
N Inc. was load broker, arranging transportation of goods for its clients, including D Ltd. — N Inc. engaged V Corp. as carrier to ship goods of D Ltd. — Before its assignment into bankruptcy, N Inc. co-mingled moneys it received from its shipper-customers with its own funds, rather than segregating those funds in trust account as required under Load Brokers Regulation — After N Inc. made assignment into bankruptcy, it was ordered that all monies owed by shippers in respect of carriage services be paid to trustee in bankruptcy to be held in separate account — V Corp. commenced action against N Inc. and D Ltd. for payment of outstanding carrier accounts — D Ltd. paid monies for V Corp.'s shipping services to trustee — In response to trustee's motion for determination of priority and entitlement to monies, motions judge held that monies, which trustee had segregated, satisfied conditions for trust and so had to be paid to V Corp. — Trustee appealed — Appeal dismissed — Load broker's

contractual entitlement to monies received from shippers was limited to its fees for services rendered — Purpose of Regulation was to provide means by which contractual entitlement of carrier could be preserved in context of payment arrangements designed to ensure payment to load broker of its fee, and preservation of client relationships — Bankruptcy and Insolvency Act did not entitle load broker's creditors to monies paid to trustee in bankruptcy in respect of carrier's shipping services where those funds could be segregated in trust — Monies trustee received from D Ltd. and placed in separate trust account bore character of trust property.

Transportation --- Carriers — Contract of carriage — Carriage of goods — Miscellaneous

N Inc. was load broker, arranging transportation of goods for its clients, including D Ltd. — N Inc. engaged V Corp. as carrier to ship goods of D Ltd. — Before its assignment into bankruptcy, N Inc. co-mingled moneys it received from its shipper-customers with its own funds, rather than segregating those funds in trust account as required under Load Brokers Regulation — After N Inc. made assignment into bankruptcy, it was ordered that all monies owed by shippers in respect of carriage services be paid to trustee in bankruptcy to be held in separate account — V Corp. commenced action against N Inc. and D Ltd. for payment of outstanding carrier accounts — D Ltd. paid monies for V Corp.'s shipping services to trustee — In response to trustee's motion for determination of priority and entitlement to monies, motions judge held that monies, which trustee had segregated, satisfied conditions for trust and so had to be paid to V Corp. — Trustee appealed — Appeal dismissed — Load broker's contractual entitlement to monies received from shippers was limited to its fees for services rendered — Purpose of Regulation was to provide means by which contractual entitlement of carrier could be preserved in context of payment arrangements designed to ensure payment to load broker of its fee, and preservation of client relationships — Bankruptcy and Insolvency Act did not entitle load broker's creditors to monies paid to trustee in bankruptcy in respect of carrier's shipping services where those funds could be segregated in trust — Monies trustee received from D Ltd. and placed in separate trust account bore character of trust property.

Table of Authorities

Cases considered by *H.S. LaForme J.A.*:

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), *(*sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, *(*sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, *(*sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 18(a) — referred to

s. 30(1)(c) — referred to

s. 67(1)(a) — considered

Truck Transportation Act, R.S.O. 1990, c. T.22

Generally — referred to

Regulations considered:

Truck Transportation Act, R.S.O. 1990, c. T.22

Load Brokers, O. Reg. 556/92

Generally — referred to

s. 15 — considered

***H.S. LaForme J.A.*:**

Overview

1 This case raises an issue about whether monies paid to a load broker's trustee in bankruptcy for the shipping services of an independent carrier are held by the trustee in trust pursuant to the provisions of the *Load Brokers Regulation* O. Reg. 556/92, made under the *Truck Transportation Act*, R.S.O. 1990, c.T.22, as amended (the "Regulation"). The motion judge held that the funds, which the trustee had segregated, satisfied the conditions for a trust and, accordingly, must be paid to the carrier. As a result, they were not available for distribution to the load broker's creditors on the basis of their priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the *BIA*).

2 The only guiding authority, was considered by the motion judge: *GMAC Commercial Credit Corp. — Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382 (Ont. C.A.). In my opinion, the motion judge correctly concluded that *GMAC* — which dealt with an interim receiver who collected carrier fees as required by the Regulation — also applies to the similarly situated trustee in bankruptcy. As a result, and for the reasons that follow, I would dismiss the appeal.

Background

3 Norame Inc. ("Norame") carried on business as a load broker, arranging transportation of goods for its clients, including Dimplex North America Limited ("Dimplex"), by way of truck transportation. Norame engaged Vitran Corporation ("Vitran") as the carrier to ship the goods of Dimplex.

4 Before its voluntary assignment in bankruptcy, Norame had co-mingled the monies it received form its shipper-customers and consignees with its own funds, rather than segregating those funds in a trust account for the carriers as required under the Regulation. After the bankruptcy, Paddon + Yorke Inc. ("Paddon" or the "Trustee"), brought an application for advice and directions. Pitt J. ordered that all monies owed by shippers in respect of carriage services were to be paid to the Trustee to be held in a separate account, pending further order of the court. This order specified that nothing in the order would have the effect of giving rights that did not exist before the order was made.

5 Vitran later commenced an action against Norame and Dimplex seeking payment of its outstanding carrier accounts. Subsequently, Mesbur J. issued a consent order, which provided that, pursuant to the order of Pitt J., Dimplex pay the sum of $30,194.60 CDN and $10,596.23 USD to Paddon for Vitran's shipping services and that Paddon deposit these monies into a separate trust account. Dimplex complied.

6 Paddon brought a motion seeking a determination of the priority and entitlement to the funds. On the return of the motion, Vitran argued that it was entitled to the funds pursuant to s. 67(1)(a) of the *BIA*, the Regulation and the order of Mesbur J. Paddon argued that it held the funds for distribution to Norame's creditors pursuant to the *BIA*.

Statutory Provisions

7 Section 67(1)(a) of the *BIA* provides that a bankrupt's property available for distribution to creditors does not include "property held by the bankrupt in trust for any other person ..." Section 15 of the *Load Brokers Regulation* provides that every load broker "shall hold in trust for the benefit of the carriers to whom the load broker is liable" all money that the load broker receives in respect to the carriage of goods. For this purpose, a load broker must hold the monies in a segregated trust account.

Issues

8 On this appeal, the Trustee challenges the decision of the motion judge that Vitran was entitled to the monies. In doing so, it raises two issues:

> 1. Whether the trust obligations imposed by s. 15 of the Regulation apply to carrier fees paid to and held by a trustee in bankruptcy, and;
>
> 2. Whether the carrier fees segregated by the Trustee were held in trust pursuant to s. 67(1)(a) of the *BIA*.

Analysis

9 In *GMAC*, Feldman J.A. concluded that any statutory deemed trust created by the *provincial* Regulation would not be a trust within the meaning of s. 67(1)(a) of the *federal BIA*, and thereby excluded from distribution to creditors, unless it otherwise conformed with the three common law trust principles of the certainties of intention, object, and subject matter. However, Feldman J.A. also determined at para. 29 that a creditor's security interest "is subject to the trust mandated by s. 15, so long as the debtor carries out the trust obligation." In other words, a creditor's security interest does not take priority over carriers' fees provided that the monies received for those fees have been segregated in a trust account.

10 Feldman J.A. also concluded at para. 36 that an interim receiver, who is carrying on the business of a load broker, is bound by the Regulation's trust obligation with regard to carrier fees that it collects after the receivership's commencement and that it is required to segregate those fees in trust. This she reasoned, is because, irrespective of subsequent court orders, the interim receiver "stands in the shoes of the [load broker], and is furthermore acting as an officer of the court". Although a secured creditor's rights in a bankrupt load broker's accounts receivable are frozen upon bankruptcy, this does not apply to the carrier's fee. In other words, *GMAC* held that security interests do not attach to those fees, provided that the fees collected are properly segregated. With these observations concerning *GMAC*, I turn to my discussion of the issues in this case.

i. Applicability of the Trust Obligations of the Load Brokers Regulation to a Trustee in Bankruptcy

11 The Trustee challenges the applicability of *GMAC* primarily on the basis that, unlike an interim receiver, a trustee in bankruptcy does not "step into the shoes of the debtor or of the bankrupt". Rather, it argues, a trustee in bankruptcy is merely "an assignee of the assets of the debtor", and is "neither an agent, nor a substitute of the debtor". Accordingly, "none of the provisions of the *Truck Transportation Act* (Ontario) apply and the provisions of the *BIA* govern".

12 There are several reasons for rejecting this argument. First, the premise that a trustee in bankruptcy cannot step into the shoes of a bankrupt is erroneous. While the role of a trustee in bankruptcy is often limited to effecting an orderly liquidation of the bankrupt's assets for the benefit of creditors, s. 18(a) of the *BIA* explicitly empowers a trustee in bankruptcy to continue running the business of a bankrupt. The trustee can do so on its own initiative as a conservatory measure prior to the first meeting of creditors, and with the permission of the inspectors thereafter (s. 30(1)(c)).

13 It makes no sense that a trustee's obligations to comply with the Regulation differ depending upon whether or not it continues operating the load broker's business. If that were the case, a trustee continuing to operate the business could broker a shipper and then effectively deny that shipper its fee simply by ceasing operations. That cannot be right.

14 Second, the difference between an interim receiver and a trustee in bankruptcy advanced by the Trustee to distinguish *GMAC* is not a principled distinction with respect to the issue at hand. While the Trustee relies on the difference between the formal status of a trustee in bankruptcy versus an interim receiver, it offers no plausible reason, and cites no authority, to explain why this difference should determine the applicability of the Regulation's

trust obligations. Indeed, to the contrary, *GMAC Commercial Credit Corp. — Canada v. TCT Logistics Inc.*, [2006] S.C.J. No. 36 (S.C.C.) confirmed that, like an interim receiver, a trustee in bankruptcy is also an officer of the court.

15 Lastly, in my view there is nothing in *GMAC* that supports the Trustee's argument that the trust obligation only arises after bankruptcy provided that the bankrupt actually segregated carriers' fees prior to bankruptcy.

16 *GMAC* only holds that property held by a bankrupt that is subject to a deemed trust under provincial law, but not held in accordance with general trust principles, does not qualify under s. 67(1)(a) *BIA* for exclusion from distribution to creditors. This is a different issue from whether a trustee in bankruptcy is required to comply with the Regulation by segregating the carrier fees received after the bankruptcy. Accordingly, the Trustee has not provided a purposive argument in favour of its interpretation of the *BIA*.

17 I agree with the motion judge's observation at para. 7 of his reasons that a load broker's "contractual entitlement to monies received from shippers is limited to its fees for such services rendered" and that the purpose of the Regulation is to "provide a means by which the contractual entitlement of a carrier can be preserved in the context of payment arrangements designed to ensure payment to a load broker of its fee and preservation of its client relationships". I also agree with the motion judge's conclusion that the *BIA* does not entitle a load broker's creditors to monies paid to its trustee in bankruptcy in respect of a carrier's shipping services where those funds can be segregated in trust.

18 To hold otherwise would provide an unexpected and unfair windfall for the other creditors of a load broker. It would also force carriers who selected the bankrupt load broker only as a middleman, to compete as unsecured creditors for the carriage fees that shippers intended they be paid. This would produce a result entirely at odds with both the perception of the parties engaged in the transaction, as well as the load brokerage regime enacted by Ontario's legislature. Accordingly, I would dismiss this ground of appeal.

ii. Trust Character of the Funds Collected by the Appellant

19 Given my conclusion that *GMAC* applies generally to trustees in bankruptcy as it does to interim receivers, it is clear that the Trustee cannot succeed in its argument that the carrier fees it received and placed in a separate trust account lacked the character of trust property in accordance with general trust principles. If the carrier fees the interim receiver in *GMAC* collected and held in trust bore the character of trust property, then so do the identically situated fees segregated by the trustee in bankruptcy in this case.

20 *GMAC* concludes at para. 35 that, even though court orders subsequent to the appointment of an interim receiver "have no substantive effect on the legal rights of any of the parties", neither are those rights frozen upon bankruptcy. Similarly, the subsequent orders in this case have no substantive effect. However, other actions and events may affect the parties' legal rights. One such event is the receipt by an interim receiver — or, in this case, a trustee in bankruptcy — of carrier fees that are subject to the trust obligations of the Regulation. Accordingly, I would also reject this ground of appeal.

Disposition

21 For the foregoing reasons, I would dismiss the appeal. In doing so, I would award costs of the appeal to the respondent in the amount of $8,000 inclusive of disbursements and GST.

***S.E. Lang J.A.*:**

I agree.

***J. MacFarland J.A.*:**

I agree.

Appeal dismissed.

Ontario

Français

Solicitors Act

R.S.O. 1990, CHAPTER S.15

Consolidation Period: From July 1, 2021 to the e-Laws currency date.

Last amendment: 2018, c. 8, Sched. 31.

Legislative History: [+]

CONTENTS [−]

UNAUTHORIZED PRACTICE

Penalty on persons practising without being admitted as solicitors

1 (1) Subject to subsection (2), if a person commences, prosecutes or defends in his or her own name, or that of any other person, any action or proceeding without having been admitted and enrolled as a solicitor, he or she is incapable of recovering any fee, reward or disbursements on account thereof, and is guilty of a contempt of the court in which such proceeding was commenced, carried on or defended, and is punishable accordingly. R.S.O. 1990, c. S.15, s. 1; 2013, c. 17, s. 27 (1).

Exceptions

(2) Subsection (1) does not apply to a person who is,

(a) a party to the proceeding; or

(b) a person licensed under the *Law Society Act* to provide legal services in Ontario. 2013, c. 17, s. 27 (2).

Section Amendments with date in force (d/m/y) [+]

SOLICITOR'S COSTS

Solicitors to deliver their bill one month before bringing action for costs

2 (1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof, subscribed with the proper hand of the solicitor, his or her executor, administrator or assignee or, in the case of a partnership, by one of the partners, either with his or her own name, or with the name of the partnership, has been delivered to the person to be charged therewith, or sent by post to, or left for the person at the person's office or place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill. R.S.O. 1990, c. S.15, s. 2 (1).

Not necessary in first instance to prove contents of bill delivered

(2) In proving compliance with this Act it is not necessary in the first instance to prove the contents of the bill delivered, sent or left, but it is sufficient to prove that a bill of fees, charges or disbursements subscribed as required by subsection (1), or enclosed in or accompanied by such letter, was so delivered, sent or left, but the other party may show that the bill so delivered, sent or left, was not such a bill as constituted a compliance with this Act. R.S.O. 1990, c. S.15, s. 2 (2).

Charges in lump sum

(3) A solicitor's bill of fees, charges or disbursements is sufficient in form if it contains a reasonable statement or description of the services rendered with a lump sum charge therefor together with a detailed statement of disbursements, and in any action upon or assessment of such a bill if it is deemed proper further details of the services rendered may be ordered. R.S.O. 1990, c. S.15, s. 2 (3).

Order for assessment on requisition

3 Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,

(a) by the client, for the delivery and assessment of the solicitor's bill;

(b) by the client, for the assessment of a bill already delivered, within one month from its delivery;

(c) by the solicitor, for the assessment of a bill already delivered, at any time after the expiration of one month from its delivery, if no order for its assessment has been previously made. R.S.O. 1990, c. S.15, s. 3; 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y) [+]

No reference on application of party chargeable after verdict or after 12 months from delivery

4 (1) No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances to be proved to the satisfaction of the court or judge to whom the application for the reference is made. R.S.O. 1990, c. S.15, s. 4 (1).

Directions as to costs

(2) Where the reference is made under subsection (1), the court or judge, in making it, may give any special directions relative to its costs. R.S.O. 1990, c. S.15, s. 4 (2).

When officer may assess bill without notice

5 In case either party to a reference, having due notice, refuses or neglects to attend the assessment, the officer to whom the reference is made may assess the bill without further notice. R.S.O. 1990, c. S.15, s. 5.

Delivery of bill and reference to assessment

6 (1) When a client or other person obtains an order for the delivery and assessment of a solicitor's bill of fees, charges and disbursements, or a copy thereof, the bill shall be delivered within fourteen days from the service of the order. R.S.O. 1990, c. S.15, s. 6 (1).

Credits, debits, etc., on reference

(2) The bill delivered shall stand referred to an assessment officer for assessment, and on the reference the solicitor shall give credit for, and an account shall be taken of, all sums of money by him or her received from or on account of the client, and the solicitor shall refund what, if anything, he or she may on such assessment appear to have been overpaid. R.S.O. 1990, c. S.15, s. 6 (2).

Costs on reference

(3) The costs of the reference are, unless otherwise directed, in the discretion of the officer, subject to appeal, and shall be assessed by him or her when and as allowed. R.S.O. 1990, c. S.15, s. 6 (3).

No action

(4) The solicitor shall not commence or prosecute any action in respect of the matters referred pending the reference without leave of the court or a judge. R.S.O. 1990, c. S.15, s. 6 (4).

When payment due

(5) The amount certified to be due shall be paid by the party liable to pay the amount, forthwith after confirmation of the certificate in the same manner as confirmation of a referee's report under the Rules of Civil Procedure. R.S.O. 1990, c. S.15, s. 6 (5).

Client's papers

(6) Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, shall deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power belonging to the client. R.S.O. 1990, c. S.15, s. 6 (6).

Contents of order

(7) The order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variation therefrom and any other directions that the court or judge sees fit to make. R.S.O. 1990, c. S.15, s. 6 (7).

What order presumed to contain

(8) An order for reference of a solicitor's bill for assessment shall be presumed to contain subsections (2) to (6) whether obtained on requisition or otherwise, and by the solicitor, client or other person liable to pay the bill. R.S.O. 1990, c. S.15, s. 6 (8).

Motion to oppose confirmation

(9) A motion to oppose confirmation of the certificate shall be made to a judge of the Superior Court of Justice. R.S.O. 1990, c. S.15, s. 6 (9); 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y) [+]

Costs of unnecessary steps in proceedings

7 (1) Upon assessment between a solicitor and his or her client, the assessment officer may allow the costs of steps taken in proceedings that were in fact unnecessary where he or she is of the opinion that the steps were taken by the solicitor because, in his or her judgment, reasonably exercised, they were conducive to the interests of his or her client, and may allow the costs of steps that were not calculated to advance the interests of the client where the steps were taken by the desire of the client after being informed by the solicitor that they were unnecessary and not calculated to advance the client's interests. R.S.O. 1990, c. S.15, s. 7 (1).

Application

(2) Subsection (1) does not apply to solicitor and client costs payable out of a fund not wholly belonging to the client, or by a third party. R.S.O. 1990, c. S.15, s. 7 (2).

When actions for costs within the month may be allowed

8 A judge of the Superior Court of Justice, on proof to his or her satisfaction that there is probable cause for believing that the party chargeable is about to depart from Ontario, may authorize a solicitor to commence an action for the recovery of his or her fees, charges or disbursements against the party chargeable therewith, although one month has not expired since the delivery of the bill. R.S.O. 1990, c. S.15, s. 8; 1993, c. 27, Sched.; 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y) [+]

Assessment where a party not being the principal, pays a bill of costs

9 (1) Where a person, not being chargeable as the principal party, is liable to pay or has paid a bill either to the solicitor, his or her assignee, or personal representative, or to the principal party entitled thereto, the person so liable to pay or paying, the person's assignee or personal representative, may apply to the court for an order referring to assessment as the party chargeable therewith might have done, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable. R.S.O. 1990, c. S.15, s. 9 (1).

What special circumstances may be considered in such case

(2) If such application is made where, under the provisions hereinbefore contained, a reference is not authorized to be made except under special circumstances, the court may take into consideration any additional special circumstances applicable to the person making it, although such circumstances might not be applicable to the party chargeable with the bill if he, she or it was the party making the application. R.S.O. 1990, c. S.15, s. 9 (2).

Order for delivery of a copy of the bill

(3) For the purpose of such reference, the court may order the solicitor, his or her assignee or representative, to deliver to the party making the application a copy of the bill upon payment of the costs of the copy. R.S.O. 1990, c. S.15, s. 9 (3).

Assessment at instance of third person

(4) When a person, other than the client, applies for assessment of a bill delivered or for the delivery of a copy thereof for the purpose of assessment and it appears that by reason of the conduct of the client the applicant is precluded from assessing the bill, but is nevertheless entitled to an account from the client, it is not necessary for the applicant to bring an action for an account, but the court may, in a summary manner, refer a bill already delivered or order delivery of a copy of the bill, and refer it for assessment, as between the applicant and the client, and may add such parties not already notified as may be necessary. R.S.O. 1990, c. S.15, s. 9 (4).

Application of s. 6

(5) The provisions of section 6, so far as they are applicable, apply to such assessment. R.S.O. 1990, c. S.15, s. 9 (5).

When a bill may be reassessed

10 No bill previously assessed shall be again referred unless under the special circumstances of the case the court thinks fit to direct a reassessment thereof. R.S.O. 1990, c. S.15, s. 10.

Payment not to preclude assessment

11 The payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case, in the opinion of the court, appear to require the assessment. R.S.O. 1990, c. S.15, s. 11; 2002, c. 24, Sched. B, s. 46 (1).

Section Amendments with date in force (d/m/y) [+]

Assessment officer may request assistance of another assessment officer

12 Where a bill is referred for assessment, the officer to whom the reference is made may request another assessment officer to assist him or her in assessing any part of the bill, and the officer so requested shall thereupon assess it, and has the same powers and may receive the same fees in respect thereof as upon a reference to him or her by a court, and he or she shall return the bill, with his or her opinion thereon, to the officer who so requests him or her to assess it. R.S.O. 1990, c. S.15, s. 12.

How applications against solicitors to be entitled

13 Every application to refer a bill for assessment, or for the delivery of a bill, or for the delivering up of deeds, documents and papers, shall be made *In the matter of (the solicitor)*, and upon the assessment of the bill the report of the officer by whom the bill is assessed, unless set aside or varied, is final and conclusive as to the amount thereof, and payment of the amount found to be due and directed to be paid may be enforced according to the practice of the court in which the reference was made. R.S.O. 1990, c. S.15, s. 13.

What to be considered in assessment of costs

14 In assessing a bill for preparing and executing any instrument, an assessment officer shall consider not the length of the instrument but the skill, labour and responsibility involved therein. R.S.O. 1990, c. S.15, s. 14.

Compensation Agreements

Definitions

15 In this section and in sections 16 to 33,

"client" includes a person who, as a principal or on behalf of another person, retains or employs or is about to retain or employ a solicitor, and a person who is or may be liable to pay the bill of a solicitor for any services; ("client")

"contingency fee agreement" means an agreement referred to in section 28.1; ("entente sur des honoraires conditionnels")

"services" includes fees, costs, charges and disbursements. ("service") R.S.O. 1990, c. S.15, s. 15; 2002, c. 24, Sched. A, s. 1.

Section Amendments with date in force (d/m/y) [+]

Agreements between solicitors and clients as to compensation

16 (1) Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated. R.S.O. 1990, c. S.15, s. 16 (1).

Definition

(2) For purposes of this section and sections 20 to 32,

"agreement" includes a contingency fee agreement. 2002, c. 24, Sched. A, s. 2.

Section Amendments with date in force (d/m/y) [+]

Approval of agreement by assessment officer

17 Where the agreement is made in respect of business done or to be done in any court, except the Small Claims Court, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by an assessment officer. R.S.O. 1990, c. S.15, s. 17.

Opinion of court on agreement

18 Where it appears to the assessment officer that the agreement is not fair and reasonable, he or she may require the opinion of a court to be taken thereon. R.S.O. 1990, c. S.15, s. 18.

Rejection of agreement by court

19 The court may either reduce the amount payable under the agreement or order it to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be assessed in the same manner as if the agreement had not been made. R.S.O. 1990, c. S.15, s. 19.

Agreement not to affect costs as between party and party

20 (1) Such an agreement does not affect the amount, or any right or remedy for the recovery, of any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by the person to or from the client to be assessed in the ordinary manner, unless such person has otherwise agreed. R.S.O. 1990, c. S.15, s. 20 (1).

Idem

(2) However, the client who has entered into the agreement is not entitled to recover from any other person under any order for the payment of any costs that are the subject of the agreement more than the amount payable by the client to the client's own solicitor under the agreement. R.S.O. 1990, c. S.15, s. 20 (2).

Awards of costs in contingency fee agreements

20.1 (1) In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client's solicitor is being compensated in accordance with a contingency fee agreement. 2002, c. 24, Sched. A, s. 3.

Same

(2) Despite subsection 20 (2), even if an order for the payment of costs is more than the amount payable by the client to the client's own solicitor under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his, her or its solicitor. 2002, c. 24, Sched. A, s. 3.

(3) REPEALED: 2018, c. 8, Sched. 31, s. 2.

Section Amendments with date in force (d/m/y) [+]

Claims for additional remuneration excluded

21 Such an agreement excludes any further claim of the solicitor beyond the terms of the agreement in respect of services in relation to the conduct and completion of the business in respect of which it is made, except such as are expressly excepted by the agreement. R.S.O. 1990, c. S.15, s. 21.

Agreements relieving solicitor from liability for negligence void

22 (1) A provision in any such agreement that the solicitor is not to be liable for negligence or that he or she is to be relieved from any responsibility to which he or she would otherwise be subject as such solicitor is wholly void. R.S.O. 1990, c. S.15, s. 22.

Exception, indemnification by solicitor's employer

(2) Subsection (1) does not prohibit a solicitor who is employed in a master-servant relationship from being indemnified by the employer for liabilities incurred by professional negligence in the course of the employment. 1999, c. 12, Sched. B, s. 14.

Section Amendments with date in force (d/m/y) [+]

Determination of disputes under the agreement

23 No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being the Small Claims Court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Superior Court of Justice. R.S.O. 1990, c. S.15, s. 23; 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y) [+]

Enforcement of agreement

24 Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner. R.S.O. 1990, c. S.15, s. 24.

Reopening of agreement

25 Where the amount agreed under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Superior Court of Justice may, upon the application of the person who has paid it if it appears to the court that the special circumstances of the case require the agreement to be reopened, reopen it and order the costs, fees, charges and disbursements to be assessed, and may also order the whole or any part of the amount received by the solicitor to be repaid by him or her on such terms and conditions as to the court seems just. R.S.O. 1990, c. S.15, s. 25; 2002, c. 24, Sched. B, s. 46 (2); 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y) [+]

Agreements made by client in fiduciary capacity

26 Where any such agreement is made by the client in the capacity of guardian or of trustee under a deed or will, or in the capacity of guardian of property that will be chargeable with the amount or any part of the amount payable under the agreement, the agreement shall, before payment, be laid before an assessment officer who shall examine it and may disallow any part of it or may require the direction of the court to be made thereon. R.S.O. 1990, c. S.15, s. 26; 1992, c. 32, s. 26.

Section Amendments with date in force (d/m/y) [+]

Client paying without approval to be liable to estate

27 If the client pays the whole or any part of such amount without the previous allowance of an assessment officer or the direction of the court, the client is liable to account to the person whose estate or property is charged with the amount paid or any part of it for the amount so charged, and the solicitor who accepts such payment may be ordered by the court to refund the amount received by him or her. R.S.O. 1990, c. S.15, s. 27.

Purchase of interest prohibited

28 A solicitor shall not enter into an agreement by which the solicitor purchases all or part of a client's interest in the action or other contentious proceeding that the solicitor is to bring or maintain on the client's behalf. 2002, c. 24, Sched. A, s. 4.

Section Amendments with date in force (d/m/y) [+]

Contingency fee agreements

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section. 2002, c. 24, Sched. A, s. 4.

Remuneration dependent on success

(2) A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided. 2002, c. 24, Sched. A, s. 4.

No contingency fees in certain matters

(3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,

(a) a proceeding under the *Criminal Code* (Canada) or any other criminal or quasi-criminal proceeding; or

(b) a family law matter. 2002, c. 24, Sched. A, s. 4.

Written agreement

(4) A contingency fee agreement shall be in writing. 2002, c. 24, Sched. A, s. 4.

Maximum amount of contingency fee

(5) If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceeding, the amount to be paid to the solicitor shall not be more than the maximum percentage, if any, prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, how ever the amount or property is recovered. 2002, c. 24, Sched. A, s. 4.

Greater maximum amount where approved

(6) Despite subsection (5), a solicitor may enter into a contingency fee agreement where the amount paid to the solicitor is more than the maximum percentage prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, if, upon joint application of the solicitor and his or her client whose application is to be brought within 90 days after the agreement is executed, the agreement is approved by the Superior Court of Justice. 2002, c. 24, Sched. A, s. 4.

Factors to be considered in application

(7) In determining whether to grant an application under subsection (6), the court shall consider the nature and complexity of the action or proceeding and the expense or risk involved in it and may consider such other factors as the court considers relevant. 2002, c. 24, Sched. A, s. 4.

(8) REPEALED: 2018, c. 8, Sched. 31, s. 3 (1).

Enforceability of greater maximum amount of contingency fee

(9) A contingency fee agreement that is subject to approval under subsection (6) is not enforceable unless it is so approved. 2002, c. 24, Sched. A, s. 4; 2018, c. 8, Sched. 31, s. 3 (2).

Non-application

(10) Sections 17, 18 and 19 do not apply to contingency fee agreements. 2002, c. 24, Sched. A, s. 4.

Assessment of contingency fee

(11) For purposes of assessment, if a contingency fee agreement,

(a) is not one to which subsection (6) applies, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment; or

(b) is one to which subsection (6) applies, the client or the solicitor may apply to the Superior Court of Justice for an assessment within the time prescribed by regulation made under this section. 2002, c. 24, Sched. A, s. 4; 2018, c. 8, Sched. 31, s. 3 (3).

Regulations

(12) The Lieutenant Governor in Council may make regulations governing contingency fee agreements, including regulations,

(a) governing the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee, including but not limited to,

(i) setting a scale for the maximum percentage that may be charged for a contingency fee based on factors such as the value of the recovery and the amount of time spent by the solicitor, and

(ii) differentiating the maximum percentage that may be charged for a contingency fee based on factors such as the type of cause of action and the court in which the action is to be heard and distinguishing between causes of actions of the same type;

(b) governing the maximum amount of remuneration that may be paid to a solicitor pursuant to a contingency fee agreement;

(c) in respect of treatment of costs awarded or obtained where there is a contingency fee agreement;

(d) prescribing standards and requirements for contingency fee agreements, including the form of the agreements and terms that must be included in contingency fee agreements and prohibiting terms from being included in contingency fee agreements;

(e) imposing duties on solicitors who enter into contingency fee agreements;

(f) prescribing the time in which a solicitor or client may apply for an assessment under clause (11) (b);

(g) exempting persons, actions or proceedings or classes of persons, actions or proceedings from this section or any other provision in sections 16 and 20 to 32 in relation to contingency fee agreements, or from a regulation made under this section or any provision of such a regulation. 2002, c. 24, Sched. A, s. 4; 2018, c. 8, Sched. 31, s. 3 (4).

Section Amendments with date in force (d/m/y) [+]

Where solicitor dies or becomes incapable of acting after agreement

29 Where a solicitor who has made such an agreement and who has done anything under it dies or becomes incapable of acting before the agreement has been completely performed by him or her, an application may be made to any court that would have jurisdiction to examine and enforce the agreement by any person who is a party thereto, and the court may thereupon enforce or set aside the agreement so far as it may have been acted upon as if the death or incapacity had not happened, and, if it deems the agreement to be in all respects fair and reasonable, may order the amount in respect of the past performance of it to be ascertained by assessment, and the assessment officer, in ascertaining such amount, shall have regard, so far as may be, to the terms of the agreement, and payment of the amount found to be due may be ordered in the same manner as if the agreement had been completely performed by the solicitor. R.S.O. 1990, c. S.15, s. 29.

Changing solicitor after making agreement

30 If, after any such agreement has been made, the client changes solicitor before the conclusion of the business to which the agreement relates, which the client is at liberty to do despite the agreement, the solicitor, party to the agreement, shall be deemed to have become incapable to act under it within the meaning of section 29, and upon any order being made for assessment of the amount due him or her in respect of the past performance of the agreement the court shall direct the assessment officer to have regard to the circumstances under which the change of solicitor took place, and upon the assessment the solicitor shall be deemed not to be entitled

to the full amount of the remuneration agreed to be paid to him or her, unless it appears that there has been no default, negligence, improper delay or other conduct on his or her part affording reasonable ground to the client for the change of solicitor. R.S.O. 1990, c. S.15, s. 30.

Bills under agreement not to be liable to assessment

31 Except as otherwise provided in sections 16 to 30 and sections 32 and 33, a bill of a solicitor for the amount due under any such agreement is not subject to any assessment or to any provision of law respecting the signing and delivery of a bill of a solicitor. R.S.O. 1990, c. S.15, s. 31.

Security may be given to solicitor for costs

32 A solicitor may accept from his or her client, and a client may give to the client's solicitor, security for the amount to become due to the solicitor for business to be transacted by him or her and for interest thereon, but so that the interest is not to commence until the amount due is ascertained by agreement or by assessment. R.S.O. 1990, c. S.15, s. 32.

Contingency fee agreements and other licensees

32.1 (1) The provisions of this Act and the regulations that apply in relation to contingency fee agreements apply with necessary modifications to persons licensed under the *Law Society Act* to provide legal services in Ontario in the same manner as to solicitors, subject to any exceptions or modifications that may be prescribed under subsection (2). 2018, c. 8, Sched. 31, s. 4.

Regulations

(2) The Lieutenant Governor in Council may make regulations for the purposes of subsection (1) providing that any provision of this Act or a regulation made under this Act that applies in relation to contingency fee agreements does not apply to persons licensed under the *Law Society Act* to provide legal services in Ontario, or applies with specified modifications, including that it applies only with respect to specified actions or proceedings or classes of actions or proceedings. 2018, c. 8, Sched. 31, s. 4.

Section Amendments with date in force (d/m/y) [+]

Interest on unpaid accounts

33 (1) A solicitor may charge interest on unpaid fees, charges or disbursements, calculated from a date that is one month after the bill is delivered under section 2. R.S.O. 1990, c. S.15, s. 33 (1).

Interest on overpayment of accounts

(2) Where, on an assessment of a solicitor's bill of fees, charges and disbursements, it appears that the client has overpaid the solicitor, the client is entitled to interest on the overpayment calculated from the date when the overpayment was made. R.S.O. 1990, c. S.15, s. 33 (2).

Rate to be shown

(3) The rate of interest applicable to a bill shall be shown on the bill delivered. 2009, c. 33, Sched. 2, s. 70.

Disallowance, variation on assessment

(4) On the assessment of a solicitor's bill, if the assessment officer considers it just in the circumstances, the assessment officer may, in respect of the whole or any part of the amount allowed on the assessment,

(a) disallow interest; or

(b) vary the applicable rate of interest. 2009, c. 33, Sched. 2, s. 70.

Regulations

(5) The Lieutenant Governor in Council may make regulations establishing a maximum rate of interest that may be charged under subsection (1) or (2) or that may be fixed under clause (4) (b). 2009, c. 33, Sched. 2, s. 70.

Section Amendments with date in force (d/m/y) [+]

Solicitors' Charging Orders

Charge on property for costs

34 (1) Where a solicitor has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements in the proceeding. R.S.O. 1990, c. S.15, s. 34 (1); 2006, c. 19, Sched. C, s. 1 (1).

Conveyance to defeat is void

(2) A conveyance made to defeat or which may operate to defeat a charge under subsection (1) is, unless made to a person who purchased the property for value in good faith and without notice of the charge, void as against the charge. R.S.O. 1990, c. S.15, s. 34 (2).

Assessment and recovery

(3) The court may order that the solicitor's bill for services be assessed in accordance with this Act and that payment shall be made out of the charged property. R.S.O. 1990, c. S.15, s. 34 (3).

Section Amendments with date in force (d/m/y) [+]

Solicitors as Mortgagees, etc.

Interpretation

35 (1) In this section,

"mortgage" includes any charge on any property for securing money or money's worth. R.S.O. 1990, c. S.15, s. 35 (1).

Charges, etc., where mortgage is made with solicitor

(2) A solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which the solicitor is a member, is entitled to receive for all business transacted and acts done by the solicitor or firm in negotiating the loan, deducing and investigating the title to the property and preparing and completing the mortgage, all the usual professional charges and remuneration that he or she or they would have been entitled to receive if the mortgage had been made to a person not a solicitor and the person had retained and employed the solicitor or firm to transact such business and do such acts, and such charges and remuneration are accordingly recoverable from the mortgagor. R.S.O. 1990, c. S.15, s. 35 (2).

Right of solicitor with whom mortgage is made to recover costs, etc.

(3) A solicitor to or in whom, either alone or jointly with any other person, a mortgage is made or is vested by transfer or transmission, or the firm of which the solicitor is a member, is entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted and acts done by the solicitor or firm subsequent and in relation to the mortgage or to the security thereby created or the property therein comprised all such usual professional charges and remuneration as he or she or they would have been entitled to receive if the mortgage had been made to and had remained vested in a person not a solicitor and the person had retained and employed the solicitor or firm to transact such business and do such acts, and accordingly the mortgage shall not be redeemed except upon payment of such charges and remuneration. R.S.O. 1990, c. S.15, s. 35 (3).

Solicitor-director, right to charge for services to trust estate

(4) A solicitor who is a director of a trust corporation or of any other company, or the firm of which the solicitor is a member is entitled to receive for all business transacted or acts done by the solicitor or firm for the corporation or company in relation to or in connection with any matter in which the corporation or company acts as trustee, guardian, personal representative or agent, all the usual professional fees and remuneration that he or she or they would be entitled to receive if the solicitor had not been a director of the corporation or company, and the corporation or company had retained and employed the solicitor or firm to transact such business and do such acts, and such charges and remuneration are accordingly recoverable from the corporation or company and may be charged by them as a disbursement in the matter of such trusteeship, guardianship, administration or agency. R.S.O. 1990, c. S.15, s. 35 (4).

Salaried Solicitors

Costs, salaried counsel

36 Costs awarded to a party in a proceeding shall not be disallowed or reduced on assessment merely because they relate to a solicitor or counsel who is a salaried employee of the party. R.S.O. 1990, c. S.15, s. 36.

Français

THE TORONTO-DOMINION BANK
Plaintiff

-and-

BRAD DUBY PROFESSIONAL CORPORATION
Defendant

Court File No. Court File No.: CV-21-00657656-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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