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

FACTUM OF NEW COUNSEL CHORNEY SIDHU INJURY LAWYERS

(Motion Returnable October 13, 2022)

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TO: SERVICE LIST ATTACHED

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I. POSITION OF THE RESPONDING PARTY

1. New Counsel Chorney Sidhu Injury Lawyers opposes the imposition of the Sliding Fee Structure, and the disclosure of the Determinable Information sought by the moving party, with the exception of a copy of the Brad Duby Professional Corporation ("BDPC") file as preserved by the Law Society of Ontario ("LSO").

II. SINGLE PROCEEDING MODEL

2. The moving party asserts that the Single Proceedings Model applies to the accounts of the former clients, and that the Court's application of the Sliding Fee Structure would be consistent with the Single Proceedings Model.[1]

3. Even if the Single Proceedings Model is found to apply to the accounts owing to BDPC by the former clients, the Single Proceedings Model does not justify the imposition of the Sliding Fee Structure.

4. The Single Proceedings Model if applicable, dictates jurisdiction and would result in the claims of BDPC being resolved in the receivership proceedings rather than another forum. It does not remove the necessity for the claims of BDPC to be proven.

5. The Superior Court already has jurisdiction over the assessment of the BDPC accounts, pursuant to the Solicitor's Act and the Court's inherent jurisdiction.[2]

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[1] Factum of the Receiver, at paras 38 to 41 and para 48(s).
[2] *Borden Ladner Gervais LLP v. Cohen* 2005 CanLII 21114 [*Cohen*] at paras 10-11.

6. In *Royal Bank of Canada v. Mundo Media Ltd.*, the application of the Single Proceeding Model resulted in the mutual claims of Mundo and SPay being resolved in the Ontario receivership proceedings, setting aside a contractual choice of forum that dictated that disputes between Mundo and SPay would be subject to commercial arbitration in New York.[3]

7. In *Essar Steel Algoma Inc. (Re)*, the Single Proceeding Model was applied to determine whether an order regarding Essar's rights under a contract with one of its suppliers of iron ore, Cliffs, was "made under" the *Companies Creditors Arrangement Act* ("*CCAA*") proceedings in order to determine whether Cliffs required leave to appeal under s. 13 of the *CCAA*.[4]

8. In both *Mundo* and *Essar*, the disputes in issue were decided on their merits. What the Single Proceeding Model allowed the Superior Court to do was to assume jurisdiction. The decision in *Essar* arose in the context of a contract dispute motion brought by Essar against Cliffs before the CCAA judge.[5] In *Mundo*, SPay was permitted to defend the receiver's claim for funds owing to Mundo, and to assert its set-off counterclaim before the Superior Court of Justice.[6] The Court specifically noted that "all of the relevant procedural protections available in a New York arbitration are capable of being reproduced, if necessary and appropriate for the just and equitable management of this case, within the context of the Receiver's claim in the receivership proceedings[…]"[7]

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[3] *Royal Bank of Canada v. Mundo Media Ltd.* 2022 ONSC 2147 [*Mundo*] at paras 14 and 38
[4] *Essar Steel Algoma Inc. (Re)* 2016 ONCA 138 [*Essar*] at paras 35 and 41.
[5] *Essar*, at para 11.
[6] *Mundo*, at para 39.
[7] *Mundo*, at para 39.

9. What the moving party is requesting in the present case is to strip the former clients of their right to have the fees claimed by their former lawyer proven in *any* forum by the imposition of the Sliding Fee Structure.

10. The moving party asserts that the Sliding Fee Structure can be imposed pursuant to section 243 of the *Bankruptcy and Insolvency Act* ("*BIA*"), which permits the Court to appoint a receiver to, among other things, take charge of the accounts receivable and other property of the insolvent person or bankrupt. The moving party also relies on the authority vested in the Court by s. 243 of the *BIA*, which has been interpreted as providing supervising judges with the broadest possible mandate in insolvency proceedings.[8]

11. The moving party has not pointed to any case law or statutory provision that allows the Court or the receiver to strip a party of their procedural right to have a claim against them adjudicated and decided on its merits. The cases relied upon by the moving party contemplate a hearing of the dispute between the parties on its merits by the Superior Court. These cases do not support the contention that former clients can be stripped of their right to assess BDPC's accounts.

12. It is trite to say that the receiver can only collect what is actually owing, however, through the imposition of the Sliding Fee Structure, the receiver is attempting to mandate the value of the accounts receivable without ascertaining the actual amount owing.

[8] Receiver's Factum, at paras 41 to 43.

III. THE SOLICITOR'S ACT AND CLIENT'S RIGHT TO ASSESS

13. The right to procedural fairness and to have any dispute as to the amounts owing to BDPC decided on its merits is critical because the accounts receivable arise from fee accounts owing to a lawyer by his former clients. The Court has repeatedly held that there are significant public policy considerations attached to the assessment of lawyer's accounts.

14. In *Price v. Sonsini*, Justice Sharpe writing for the Court of Appeal highlighted the policy grounds underpinning the assessment of accounts:

> **Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure of 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 solicitor's 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.[9]

15. In *Borden Ladner Gervais LLP v. Cohen*, the Divisional Court indicated that rendering fair and reasonable accounts is a lawyer's professional obligation:

> In the present case, the motion judge erred in granting summary judgment 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.[10]

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[9] *Price v. Sonsini* 2002 CanLII 41996 [*Sonsini*] at para 19. [emphasis added]
[10] *Cohen* at para 13. [emphasis added].

16. The moving party relies on the *Cohen* decision for the proposition that the right of a client to assess a lawyer's account can be taken away in compelling circumstances**.** This comment was obiter and follows a discussion of the Court's inherent jurisdiction to order an assessment of a lawyer's account notwithstanding the passage of time.[11] The Court did not enumerate or rely on any compelling circumstances and in fact set aside the earlier judgment and referred the lawyer's accounts to the Assessment Officer for assessment.[12]

17. In *Almalki v. Canada (Attorney General)*, the Court of Appeal characterized the *Solicitor's Act* as consumer protection legislation, further justifying rigorous oversight by the Court.[13]

18. These fundamental public policy considerations are evident in the rulings of the Court protecting a client's right to assess in various scenarios. For example, clients retain the right to assess a solicitor-client account even when they have entered into a contingency fee arrangements and fees have been charged on the basis of the contingency fee agreement. The fees must still be fair and reasonable and are subject to assessment even if the contingency fee retainer agreement itself was previously approved by the Court.[14]

19. In addition, the Courts have held that parties cannot contract out of the protections of the *Solicitor's Act* including a client's right to assess a lawyer's account. In finding that the retainer agreement did not extinguish the client's right under the *Act* in *Andrew Feldstein & Associates Professional Corporation v. Keramidopulos*, Murray J. stated:

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[11] *Cohen* at paras 11 -12.
[12] *Cohen* at paras 12 – 14.
[13] Almalki v. Canada (Attorney General) 2019 ONCA 26 at para 49.
[14] *Connolly and Connolly Obagi LLP* 2019 ONSC 1693 at paras 41-42; Oakley *& Oakley Professional Corporation v. Aitken* 2011 ONSC 5613 at para 13.

> Finally, I conclude that the Retainer Agreement is inconcisstent with the client's rights under the *Solicitor's Act*. The Solicitor's 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 these legislative provisions enacted in the public interest and designed to allow a client protection against unwarranted or unreasonable legal fees. 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.[15]
>
> […]
>
> 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 lawyer's 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' account 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**.[16]

IV. ASSESSMENT OF BDPC ACCOUNTS

20. The moving party suggests that it is impossible or impractical to assess the former client accounts because BDPC did not keep dockets and its principal, Mr. Duby is deceased and cannot assist the receiver.[17]

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[15] *Andrew Feldstein & Associates Professional Corporation v. Keramidopulos* 2007 CanLII 40202 *[Keramidopulos]* at para 60.
[16] *Keramidopulos* at para 63. [emphasis added]
[17] Receiver's Factum, at para 51.

21. It is respectfully submitted that the former client accounts can easily be assessed by reviewing the BDPC file as it existed at the date of transfer to ascertain what steps had been taken and estimate the time spent by BDPC during the course of the retainer.

22. The retainer agreements entered into by BDPC with the former clients, to the extent that they have been located, indicate that where a client transfers their file, BDPC will be entitled to its "reasonable charges" which are stated to include "the time and effort required and spent by us, the usual hourly rates charges by us for non-contingency work, the complexity of the case and the responsibility and risk we assumed by representing you in the case, the difficulty and importance of your case, the expertise, experience and degree of skills and competency demonstrated by us in representing you, whether special skill or service was required and provided, the amount involved and/or value of the claim, results obtained by us and other relevant circumstances."[18]

23. A lawyer's right to recovery is limited by the terms of the retainer agreement. The fact that a lawyer did not docket and is no longer available to provide evidence of the work completed during the course of a retainer is not a compelling reason to avoid an assessment. As stated by Justice Belobaba in *Loreto v. Little et al*:

> 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.

[18] Chorney Affidavit, Exhibits E, F, J and U. Motion Record of New Counsel Chorney Sidhu Injury Lawyers.

> 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.[19]

24. It is clear from the decision in *Loreto* that the number of files transferred is not a compelling reason to take away a client's right to an assessment.[20]

25. The moving party's position that the fees owing to BDPC should be valued based on the eventual recovery on the file, rather than the time spent pursuant to the terms of the retainer, was rejected by the Court in *Loreto*. Justice Belobaba found no unfairness in the requirement that Loreto reproduce accounts or proceed to an assessment.[21]

26. In *Lofranco v. Azevedo*, a prior lawyer account appeared to include charges for work that had not been completed. Justice Favreau stated that to ensure public confidence in the legal system, where there are questions as to the amount of fees claimed, the use of the Court's inherent power to order an assessment is warranted, because the lawyer should not be able to retrieved the full amount of its account without further scrutiny.[22] Similarly, in the present case it is critical that former clients of BDPC are not overcharged for work that was not completed on their files through the application of the Sliding Fee Structure.

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[19] *Loreto v. Little* et al 2010 ONSC 755 [*Loreto*] at paras 41 -42.
[20] *Loreto*, at paras 41-42.
[21] *Loreto* at paras 41-42.
[22] *Lofranco v. Azevedo* 2018 ONSC 1660 at para 59.

V. SLIDING FEE STRUCTURE PREJUDICES FORMER CLIENTS

27. Contrary to the moving party's assertion, the former clients will be prejudiced if the Sliding Fee Structure is adopted. The prejudice stems from the very real possibility that the receiver will recover more in fees than BDPC is entitled to based on the work completed during the retainer.

28. For instance, in the case of Peterpole Rajakone, the client transferred his file to New Counsel prior to Mr. Duby's death, and a fee account was rendered, claiming $4,672.55 plus HST on account of fees from August 23 ,2017 when BDOC was retained to the date of transfer on August 8, 2019.[23]

29. Setting aside issues with the account rendered, the Sliding Fee Structure would result in a windfall to BDPC on any settlement resulting in fees earned by New Counsel greater than $31,000.00.

30. It is unacceptable for the receiver to receive a windfall at the expense of a former client of BDPC. While the windfall to the receiver may even out due to a lower recovery on other claims, the injustice to the individual former client who overpays will not.

VI. CLAIMS INVOLVING NEGLIGENCE/MISCONDUCT

31. With respect to the claims where professional negligence is being alleged, neither the Sliding Fee Structure or an Assessment is appropriate. In Re Fellows, McNeil and Kansa Canada Management Services Inc. it was held that where a claim for professional negligence is being

[23] Chorney Affidavit, Exhibit "X". Motion Record of Chorney Sidhu Injury Lawyers.

litigated, it is inappropriate to disengage the assessment of the lawyer's account from the remainder of the litigation. The accounts of the lawyer ought to be dealt with in the litigation.[24]

VII. DISCLOSURE OF INFORMATION

32. It is respectfully submitted that the only documents relevant to the determination of the fees payable to BDPC by the former clients is the file of BDPC related to the individual client matter, as it existed at the time of transfer. These files have been preserved by the LSO under the Trusteeship Order.[25]

VIII. RELIEF REQUESTED

33. We respectfully request that this Honourable Court refuse to approve and make binding the Receiver's proposed Sliding Fee Structure, and Order that the accounts of Brad Duby Professional Corporation be assessed pursuant to the *Solicitor's Act*.

All of which is respectfully submitted this 29th day of September, 2022.

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Per:

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New Counsel

[24] *Re Fellowes, McNeil and Kansa Canadian Management Services Inc. et al*. 34 O.R. (3d) 301; 1997 CanLII 733 (ONCA).
[25] First Report, Receiver's Motion Record, Tab 2, at para 50.

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