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

September 29, 2022

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PART I – OVERVIEW

1. The Receiver of the property of the Respondent, Brad Duby Professional Corporation ("BDPC") seeks to impose a "sliding fee structure" in respect of BDPC claim for legal fees for work allegedly done on behalf of its former clients.

2. The proposed "sliding fee structure" is essentially a charging lien that the Receiver seeks to be applied in the following manner:

    a. Twenty percent (20%) on each case where total the New Counsel Fees are forty thousand dollars ($40,000) or higher;
    b. Fifteen percent (15%) on each case where the New Counsel Fees are less than forty thousand dollars ($40,000) but are twenty thousand dollars ($20,000) or higher; and,
    c. Ten percent (10%) on each case where the New Counsel Fees on such case are under twenty thousand dollars ($20,000)[1].

3. The Receiver seeks to have the "sliding fee structure" imposed without (a) satisfying its obligation to render fee accounts on behalf of BDPC as required under section 2(1) of the *Solicitors Act*, (b) without consideration or review of the individual contractual agreements entered into by BDPC and its former clients, and (c) bypassing the client's statutory right to an assessment under the *Solicitors Act*.

4. The Receiver also seeks an Order for "Determinable Information" that would not ordinarily be disclosed given the sensitive, confidential, and privileged nature of the information being sought.

5. Naimark Law Firm as New Counsel opposes the relief sought herein.

PART II – FACTS

6. New Counsel, Naimark Law Firm is retained by approximately 50 former clients of the late Mr. Brad Duby and Brad Duby Professional Corporation ("BDPC")[2].

[1] Moving Party's Factum at para 19.
[2] Responding Motion Record of New Counsel, Naimark Law Firm ["RMR-NLF"], Affidavit of Courtney Madison, at para 5.

7. Naimark Law Firm has negotiated different retainer agreements with the former BDPC clients[3].

8. In some cases, Naimark Law Firm has agreed upon settlement to pay any fees owing to BDPC from Naimark Law Firm's legal fees in an amount that is subject to the right of an assessment pursuant to the *Solicitor Act*[4].

9. In other cases, the clients have agreed to pay for BDPC fees in an amount that is also subject to a client's right of an assessment pursuant to the *Solicitor's Act*[5].

10. Naimark Law Firm retainers with the former BDPC clients does contemplate or reference a 'sliding fee structure' as proposed by the Receiver[6]. At the time Naimark Law Firm entered into the retainer agreements, the Receiver had not proposed a "sliding fee structure".

11. The late Mr. Duby committed fraud against some clients. For instance, there are some client files where Mr. Duby entered into settlement agreements on behalf of the clients without their consent, had forged documents, retained settlement monies and took out high interest rate loans on behalf of the clients without their knowledge. Mr. Duby also rendered disbursement accounts to counsel with those disbursements left unpaid[7].

12. Naimark Law Firm has applied to the Law Society of Ontario ("LSO") Compensation Fund for some of the former BDPC clients[8].

13. Mr. Duby's handling of some of the client files has negatively affected the settlement value for the client's claim(s). For instance, in respect of some files, Mr. Duby has missed limitations, has failed to respond to correspondences from the insurance company, has failed to request and provide records, or obtain reports that support the client's position. This has increased the amount of time Naimark Law Firm has expended and continues to do so, to address the issues caused by Mr. Duby and BDPC poor handling of the files[9]. This has also caused significant prejudice to our clients.

[3] RMR-NLF, Affidavit of Courtney Madison, at para 6.
[4] RMR-NLF, Affidavit of Courtney Madison, at paras 6-7.
[5] RMR-NLF, Affidavit of Courtney Madison, at para 8.
[6] RMR-NLF, Affidavit of Courtney Madison, at para 9.
[7] RMR-NLF, Affidavit of Courtney Madison, at para 10.
[8] RMR-NLF, Affidavit of Courtney Madison, at para 11.
[9] RMR-NLF, Affidavit of Courtney Madison, at para 13.

14. The BPDC contingency fee agreements with its former clients do not account for any "sliding fee structure"[10]. In fact, the agreements provide that upon termination of the agreement a legal bill will be rendered and only "reasonable charges" for work done would be sought[11].

15. There are some BDPC retainer agreements that provide for a 15% contingency fee payable to BDPC from the total damages and interest awarded. Some of these agreements also permit BDPC to retain any amounts recovered as "costs (from the Defendant)"[12].

16. The proposed "sliding fee structure" may result in a windful to the Receiver and does not reflect the legal profession's obligation to ensure that legal fees, including amounts claimed under a contingency fee agreement, is fair and reasonable.

17. Naimark Law Firm has not negotiated any "sliding fee structure" agreements and the imposition of such agreements was not contemplated at the time Naimark Law Firm accepted the retainers[13].

18. By way of letter dated April 5, 2021, the Receiver advised New Counsel as follows:

> Payment of legal fees owing to the Receiver can be deferred to the resolution of a Client's case as agreed or assessed in keeping with the usual contingency fee-based practices of personal injury lawyers and the expectation of the Client when he/she retained BDPC. However, BDPC did not docket their time. We understand this is not uncommon in personal injury plaintiff law practices. Consequently, the Receiver is left to either assign fees based on the work performed and the stage of litigation, as evidenced by the file contents, or agree to a fixed percentage of the fee to be paid to the Receiver on settlement of the matter as agreed upon now. **To avoid an assessment of the account, we are willing to accept an amount equal to twenty percent (20%) of your firm's total fee, excluding disbursements, on each case plus HST to be paid on conclusion of the case. If this is not acceptable, the Receiver will take steps to protect BDPC and the receivership estate's interest, including seeking a charging Order and take what other steps are available to preserve BDPC's entitlement to fees.** Should the case resolve before such an Order is obtained, the Receiver would caution you against disposing of funds which may be properly payable to BDPC. The Receiver also notes that the secured lender, The

[10] RMR-NLF, Affidavit of Courtney Madison, at para 21.
[11] MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix C and D – Redacted examples of contingency fee agreements for tort and accident benefit claims.
[12] RMR-NLF, Affidavit of Courtney Madison, at para 21, Exhibit C – Examples of BDPC retainer agreements, redacted accordingly.
[13] RMR-NLF, Affidavit of Courtney Madison, at paras 9, 15, and 21.

> Toronto-Dominion Bank also has a security interest in all disbursements and fees owed to BDPC[14] (emphasis added)

19. Naimark Law Firm has previously advised the Receiver that it is not only customary, but it is a requirement for a lawyer or law firm to render an account to a client upon termination of the retainer for the amount that is being claimed for legal fees. This is a legal obligation as per the *Solicitors Act* and provides the client with an understanding of the work completed on his or her file. It also affords the client an opportunity to have the account assessed should the amount claimed be unreasonable. Naimark Law Firm has also received accounts on behalf of prior lawyers even in unfortunate cases where the lawyer has passed away as in Mr. Duby's case[15].

20. Naimark Law Firm cannot agree to a fixed percentage for all the former BDPC files it has accepted as this would not be in the best interest for the clients and would not be a fair and reasonable reflection of the legal work completed by Mr. Duby and BDPC. There are some files where Mr. Duby did some work, there are also files where no work was completed and some files where Mr. Duby had poorly handled the files or committed fraud by entering settlement agreements on behalf of the clients without consent, forging loan and settlement documents and retaining settlement monies[16].

21. The Receiver for the sake of its own expedience and convenience seeks to set aside the contractual contingency fee agreements BDPC entered into with its former clients which are subject to the *Solicitors Act*. These agreements provide that upon termination of the agreement a legal bill will be rendered and only "reasonable charges" for work done would be sought[17].

22. Further, the agreements state in part that "the factors that would determine the reasonable charges where this agreement ends prior to resolution of the Claim, include the time effort required and spent by us; the usual hourly rates charged 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, degree of skill and

[14] Moving Party's Motion Record ["MP-MR"] First Report of the Receiver dated June 28, 2022, Tab 2, Appendix H – Redacted example of the Original Fee Arrangement letter.
[15] RMR-NLF, Affidavit of Courtney Madison, Exhibit A – Letters to Receiver.
[16] RMR-NLF, Affidavit of Courtney Madison, Exhibit A – Letters to Receiver.
[17] MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix C and D – Redacted examples of contingency fee agreements for tort and accident benefit claims.

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]. The legal account is also subject to the client's right of an assessment under the *Solictors Act*.

23. The Receiver is seeking a "single proceeding model" with respect to the recovery of BDPC legal fees, i.e., a "sliding fee structure" that has no appreciation for the actual work completed by BDPC and is not based on a quantum meruit assessment. The "sliding fee structure" is arbitrary, contrary to the *Solicitors Act* and contrary to the BDPC contractual agreements with its former clients.

PART III – ISSUES

24. It is submitted that the following are the issues to be considered:

a. Whether the Court's inherent jurisdiction permits a removal of the substantive statutory protections contained in *Solicitors Act*, R.S.O. 1990, c. S.1519?

b. Whether the "sliding fee structure" may be imposed?

c. Whether the Receiver is entitled to the "Determinable Information" it seeks?

PART IV – LAW AND ARGUMENTS

A. Assessments of lawyers' accounts are statutorily prescribed by the *Solicitors Act*

25. The *Solicitors Act* sets out a statutory scheme which governs written retainer agreements and affords clients protection under such agreements by requiring that the Superior Court determine the reasonableness of a lawyer's fees[20].

26. As explained by Wright, J. in *Re Solicitor*, at paragraph 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,

[18] MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix C and D – Redacted examples of contingency fee agreements for tort and accident benefit claims.
[19] *Solicitors Act*, R.S.O. 1990, c. S.15
[20] *Slan v Tanny*, 1998 CarswellOnt 2399, at para 3 ; see also *Balena v Beck*, 2000 CarswellOnt 419, at para 8

> 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[21]. (emphasis added)

27. As such, the *Solicitors Act* regulates all retainers between Ontario solicitors and their clients. It serves to protect against unreasonable and unwarranted fees. As explained by Lax, J. in *Slan v Tanny*, at paragraph 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[22] (emphasis added).

B. Assessments of lawyers' accounts may also be ordered at the direction of the Courts

28. In addition to the authority conferred by the *Solicitors Act*, the Court also has inherent jurisdiction to order an assessment of a solicitor's accounts[23].

29. The Court of Appeal has previously stated that "[t]he 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, but that "[tjhere is a public interest component relating to the performance of legal services and the compensation paid for them", which "requires that the court maintain a supervisory role over disputes relating to the payment of lawyers' fees"[24].

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[21] *Re Solicitor*, (1971), [1972] 1 O.R. 694 at para ; see also *Balena v Beck,* 2000 CarswellOnt 419, at para 8
[22] *Slan v Tanny*, 1998 CarswellOnt 2399, at para 5
[23] *Clatney v Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, at para 77.
[24] *Plazavest Financial Corporation v National Bank of Canada*, 2000 CanLII 5704 (ON CA), at para 14

30. The Court of Appeal has further stated that apart from the *Solicitors Act*, "a superior court has an inherent jurisdiction, as part of its disciplinary authority over lawyers, to direct the assessment of lawyers' fees"[25].

31. In *Clatney v Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, the Court of Appeal explained that this inherent and statutory jurisdiction responds 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[26].

32. In citing a prior decision, *Plazavest Financial Corp. v National Bank of Canada*, the Court of Appeal in *Clatney*, stated at paragraph 78:

> In *Plazavest Financial Corp. v. National Bank of Canada* (2000), 2000 CanLII 5704 (ON CA), 47 O.R. (3d) 641 (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), 1993 CanLII 5450 (ON SC), 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* [emphasis added]

33. In citing another prior decision, *Price v Sonsini*, the Court of Appeal in *Clatney*, stated at paragraph 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

[25] *Plazavest Financial Corporation v National Bank of Canada*, 2000 CanLII 5704 (ON CA), at para 15.
[26] *Clatney v Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, at para 77.

> 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.] [emphasis added][27]

34. In summarizing the position of the parties, the Court in *Cassels Brock & Blackwell LLP v. 1578838 Ontario Inc.,* cited the relevant principles with respect to a court's inherent jurisdiction over an assessment of a solicitors account at paragraph 34:

> … (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

[27] *Clatney v Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, at para 79

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*….[28]

35. The above principles were also reiterated recently by the Court of Appeal in *Ilic v Ducharme Fox LLP (Ducharme Weber LLP)*[29].

C. The Court does not possess any inherent jurisdiction to remove clients statutorily prescribed right to an assessment if the assessment would ordinarily be permitted under the *Solicitors Act*

36. At paragraph 36 to 37 of the Moving Party's Factum, the Receiver cites *Borden Ladner Gervais LLP v Cohen*, for the proposition that a client's right to an assessment may be taken away in "compelling circumstances".

37. Respectfully, this decision does not support the position the Receiver intends to make here, and the observation made by the Divisional Court must read in the context of the motion judge's decision and the reasons for the Divisional Court's intervention.

38. In *Borden,* the motion judge's decision was set aside, and an assessment of the solicitor fees were ordered irrespective that the client's request was not in perfect compliance with the provisions of the *Solicitors Act*. In ordering the assessment, the Divisional Court relied on its inherent jurisdiction to do so and stated at paragraphs 11 to 14:

> 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

[28] *Cassels Brock & Blackwell LLP v. 1578838 Ontario Inc.*, 2013 ONSC 4194, at para 34.
[29] *Ilic v Ducharme Fox LLP (Ducharme Weber LLP)*, 2022 ONCA 463, at paras 20-21.

> 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 [30][emphasis added]

39. While the Court has an inherent jurisdiction to determine whether a solicitor's account is fair and reasonable, this does not mean that the Court has an inherent jurisdiction to take away a client's right to an assessment when the assessment may ordinarily be permitted under the *Solicitors Act*.

40. Moreover, the Court of Appeal has made it abundantly clear that a party cannot contract out of his or her right to an assessment of whether a contingency fee is fair and reasonable[31], and that to do so would be contrary to the public interest given the statutorily prescribed rights granted to clients to have the accounts of their solicitor's assessed[32]. There is also no "compelling reason" for the court to do in the present circumstances.

41. It is respectfully submitted that it would be highly prejudicial to Naimark Law Firm and the former BPDC clients should the right to an assessment be taken away when such rights are statutorily

[30] *Borden Ladner Gervais LLP v Cohen*, 2005 CarswellOnt 244 (ON SCDC), rev'd 2004 CarswellOnt 6409, at paras 11-14
[31] *Jean Estate v Wires Jolley LLP*, 2009 ONCA 339, at paras 8-9 and 82-84.
[32] *Javornich v McCarthy*, 2007 ONCA 484, at paras 19-24

prescribed. There is also no rule or provision by way of statute or otherwise, that would preclude such a right. This also applies to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, and the Order upon which the court-appointed Receiver derives its authority.

42. There is also no provision in the *Solicitors Act* that would render it inoperable in cases where the solicitor is involved in bankruptcy proceedings, or the interest of the solicitor has been assigned to another party. In fact, section 2(1) of the *Solicitors Act* allows for "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…" to deliver its account for legal fees[33].

43. It is further submitted that absent any judicial authority to the contrary this Honourable Court does not have an "inherent right" to take away a client's right to an assessment if the requirements under the *Solicitors Act* are met. It is only when statutory requirements are not met that this Honourable Court may exercise its inherent authority to permit an assessment of a solicitor's account.

44. This is further supported by the judicial and legislative history of contingency fee retainers as outlined below.

D. The *Solicitors Act* was amended to permit and regulate the use of contingency fee retainers in non-class action matters which must adhere to the provisions of section 28.1

45. The *Solicitors Act* also contains specific provisions that regulate contingency fee agreements.

46. Prior to the Court of Appeal's decision in *McIntyre Estate v. Ontario (Attorney General)*, Ontario solicitors were prohibited from entering into contingency fee agreements with their clients. At paragraph 75, the Court of Appeal explained its reasoning in permitting contingency fee agreements:

> 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

[33] Section 2(1), *Solicitors Act*, RSO 1990, c S.15.

determine if the requirements for champerty are present[34].

47. The Court of Appeal held that non-class action contingency fee agreements are within the purview of the courts to regulate under the *Solicitors Act*. At paragraph 82, the Court of Appeal explained:

> 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[35].

48. The Court of Appeal also expressed opinion as to how the regulation of contingency fee agreements for non-class actions should be conducted:

> 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[36]. (emphasis added)

49. Following the decision in *McIntyre Estate*, the *Solicitors Act* was amended and now provides a comprehensive code for the regulation of Ontario solicitors' contingency fee agreements[37].

50. In *Koliniotis v. Tri Level Claims Consultants Ltd.*, the Court of Appeal held that the regulation of Contingency Fee Agreements under the *Solicitors Act* is considered essential to the administration of justice:

> 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 potential abuses associated with contingency fee arrangements to reduce the risk to the administration of justice

[34] *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA), at para 75
[35] *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA), at para 82
[36] *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA) at para 84
[37] *Koliniotis v Tri Level Claims Consultants Ltd.*, 2005 CanLII 28417 (ON CA) at paras 22-23

> 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[38]. [emphasis added]

51. Accordingly, the legislature enacted section 28.1 of the *Solicitors Act* which governs contingency fee agreements. Section 28.1(11) provides for the assessment of a solicitor's account:

> **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[39].

52. In *Williams v Bowler*, the Court explained that while section 28.1(1) provides that entering into a contingency fee agreement is optional, but once that is done, the agreement must be in accordance with the provisions of section 28.1. The Court explained at paragraph 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 s. 28.1. It is the "entering into" of the agreement that is optional, not the provisions of s. 28.1 once an agreement is in place…[40]

53. Therefore, it is submitted that BDPC retainer agreements, which are "contingency fee agreement" as contemplated under section 28.1, must adhere to the provisions under section 28.1. This includes the client's right to an assessment of the solicitor's account under section 28.1(11). This right may

[38] *Koliniotis v Tri Level Claims Consultants Ltd.*, 2005 CanLII 28417 (ON CA) at para 23
[39] Section 28.1, *Solicitors Act*, R.S.O. 1990, c. S.15.
[40] *Williams v Bowler*, 2006 CanLII 19466, at para 23.

not be obstructed by the Receiver or taken away by this Honourable Court as it was enacted by the legislature in order to allow for the contingency fee agreement to be utilized in the first place.

54. To date, the Receiver has not rendered any legal accounts on behalf of BDPC. As no bill has been rendered, the time allotted under section 28.1 of the *Solicitors Act* to seek an assessment has not begun to run.

E. The rights and provisions in the Solicitors Act may not be contracted out by the parties or waived

55. In *Javornich v McCarthy*, a case in which a fee agreement purported to limit the amount of time within which a client could have a solicitor's account assessed, the Court of Appeal held that it was 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. The Court of Appeal explained at paragraphs 19 to 24:

> Because the *Solicitors Act* does not contain a clause specifically prohibiting the parties from contracting out or waiving 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 *Solicitor's Act*.
>
> I would reject this ground of appeal for two reasons:
>
> 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.
>
> Second, there are public policy considerations that mete in favour of restricting the parties' ability to contract out of the rights and obligations of 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 and Elliott v. Barclay's Bank of Canada*, (1993), 15 O.R. (3d) […]
>
> 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[41].

[41] *Javornich v McCarthy*, 2007 ONCA 484, at paras 19-24

56. In *Andrew Feldstein & Associates Professional Corp. v Kermidopoulos*, this Honourable Court came to a similar conclusion in respect of a fee agreement which attempted to curtail a client's rights under the *Solicitors Act*:

> 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.
>
> Finally, I conclude the Retainer Agreement is inconsistent with the clients 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 *Royal Trust Co. v. Potash*, 31 D.L.R. (4th) 321 . 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[42]. (emphasis added)

57. In *Jean Estate v Wires Jolley LLP*, the Court of Appeal in permitting a contingency fee dispute be resolved by an arbitrator as opposed to a superior court judge, agreed that parties may not contract out of their right to an assessment with respect to the fair and reasonableness of a contingency fee. The Court explained at paragraph 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

[42] *Andrew Feldstein & Associates Professional Corporation v. Keramidopulos*, 2007 CanLII 40202 (ON SC) at paras 59-60

> 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[43] (emphasis added).

F. The Receiver has not rendered any fee accounts on behalf of BDPC as required by section 2(1) of the *Solicitors Act*

58. Section 2(1) of the *Solicitors Act* mandates that a solicitor deliver an account prior to seeking action for the recovery of fees, charges or disbursements:

> 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[44].

59. A court-appointed Receiver derives its authority from the order by which it is appointed. In this case, Justice Cavanagh's Order appointing the Receiver, at paragraph 3(m), expressly authorizes the Receiver "to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor"[45] (emphasis added).

60. Further, at paragraph 3(f), the Receiver is authorized to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor". At paragraph 3(g), the Receiver is authorized "to settle, extend or compromise any indebtedness owing to the Debtor"[46] (emphasis added).

61. As the Receiver is carrying on the business of BDPC, it "incurs any obligations in the ordinary

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[43] *Jean Estate v Wires Jolley LLP*, 2009 ONCA 339, at para 84.
[44] Section 2(1), *Solicitors Act*, R.S.O. 1990, c. S.15.
[45] MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix A - Receivership Order dated February 25, 2021, at para 3(m).
[46] MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix A - Receivership Order dated February 25, 2021, at paras 3(f) and (g).

course of business" and may receive and collect all monies and accounts owing to BDPC by "exercising all remedies of the BDPC".

62. Accordingly, it is the obligation of the Receiver to render an account on behalf of BDPC as would be required by BDPC in the ordinary course of business as provider of legal services. In terms of "remedies" available to BDPC, such would include a charging order pursuant to section 34(1) of the *Solicitors Act*; however, section 2(1) prohibits any action for recovery of fees until one month after a bill has been rendered.

63. The Receiver has not rendered any accounts on behalf of BDPC although Naimark Law Firm has requested that accounts be rendered[47]. Section 3(a) of the *Solicitor Act* permits a client to requisition an order for the delivery and the assessment of the solicitor's bill[48].

64. It is submitted that the Receiver brings this motion prematurely. The Court does not have jurisdiction to rule on the charging order sought under the guise of a "sliding fee structure" as no legal accounts have been rendered.

65. In *Rooz Law Professional v Hallett*, 2021 ONSC 3529, this Honourable Court set aside a prior motion judge's decision to grant the solicitor a charging order on the basis that the solicitor had not complied with section 2(1) of the *Solicitors Act* and therefore, the court lacked jurisdiction to entertain the charging order at a time when the mandatory 30-day period had yet to expire[49].

G. Section 9 of the *Solicitors Act* permits Naimark Law Firm to have BDPC accounts assessed should it be liable for BDPC fees

66. Paragraph 29 of Justice Cavanagh's Order makes it clear that any claim the Receiver may have with respect to the recovery of disbursements or fees are to the extent the disbursements have been incurred and fees properly earned or reflect the work in process:

> **THIS COURT ORDERS** that any transfer by the LSO of any client files to a successor or substituting lawyer, shall be done without prejudice to any claim that the Receiver may have with respect to the recovery of any and all outstanding out-of-pocket disbursements, to the extent payable, incurred by the Debtor and all work in process or fees earned by the Debtor in connection with

[47] RMR-NLF, Affidavit of Courtney Madison, Exhibit A – Letters to Receiver.
[48] Section 3, *Solicitors Act*, R.S.O. 1990, c. S.15.
[49] *Rooz Law Professional v Hallett*, 2021 ONSC 3529 at paras 28-33

> or arising from such file or files which is properly payable by the successor or substituting lawyer to the Debtor[50] (emphasis added)

67. A determination on whether the disbursements are properly incurred, or the fees claimed reflect the work in process would require the Receiver to first render an account that is subject to a client's right of an assessment. The Receiver's proposed "sliding fee structure" is also contrary to the authority conferred upon it by Order of Justice Cavanagh.

68. A right to an assessment is also preserved in respect of the client matters in which Naimark Law Firm has agreed to pay any legal fees determined to be owing to BDPC on behalf of the client out of its own legal fees. The right for Naimark Law Firm to request an assessment of BDPC fees is preserved under section 9 of the *Solicitors Act* which permits party other than the client to obtain an order referring a bill for assessment if they are liable to pay the bill and expands the range of circumstances that justify ordering the assessment.

69. 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[51].

70. In *Borden & Elliot v Barclays Bank of Canada*, the third party developer had obtained construction financing, and was obliged by a loan agreement to pay the reasonable legal fees thereby incurred by the lender. The developer brought an application to assess those fees. In granting the applicant, the Court held:

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[50] MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix A - Receivership Order dated February 25, 2021, at para 29.
[51] Section 9(1), (2), *Solicitors Act*, R.S.O. 1990, c. S.15.

> ...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[52].

71. Similarly in *Plazavest Financial Corporation v National Bank of Canada*, Plazavest Financial Corporation borrowed money from National Bank of Canada. The loan agreement provided that Plazavest would pay National's legal fees relating to the loan transaction. Plazavest brought an application for, *inter alia*, an Order directing that the bills for the legal fees be referred for assessment pursuant to section 9(1) of the *Solicitors Act*. The Court of Appeal granted the application on the following basis:

> 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"[53].

72. The application of section 9(2) of the *Solicitors Act* was also more recently considered by Court of Appeal in *Temedio v Niagara North Condominium Corporation No. 6*, 2019 ONCA 762, at paragraph 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), 2000 CanLII 5704 (ON CA), 47 O.R. (3d) 641, [2000] O.J. No. 1102

[52] *Borden & Elliot v Barclays Bank of Canada*, 1993 CarswellOnt 1071, at para 15
[53] *Plazavest Financial Corp. v National Bank of Canada*, 2000 CarswellOnt 1081 (Ont. C.A.), at para 19

(C.A.), at p. 651 O.R. The application judge failed to advert to and apply this principle[54].

73. Accordingly, it is submitted that Naimark Law Firm would not be precluded from seeking an assessment pursuant to section 9(1) of the *Solicitors Act* if Naimark Law Firm is said to be liable for covering BPDC legal bills. As explained by the Court of Appeal, third parties who are liable to pay a solicitor's fees on behalf of a client have the same right to assess the account just as the client would have the right to do so.

H. A solicitor's passing and lack of dockets are not proper grounds to refuse to render an and attempt to circumvent the *Solicitors Act*

74. Section 29 of the *Solicitors Act* provides as follows:

> 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[55] (emphasis added)

75. Section 30 of the *Solicitors Act* further provides as follows:

> 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,

[54] *Temedio v Niagara North Condominium Corporation No. 6,* 2019 ONCA 762, at para 28
[55] Section 29, *Solicitors Act*, R.S.O. 1990, c. S.15.

> improper delay or other conduct on his or her part affording reasonable ground to the client for the change of solicitor[56].

76. The above provisions of the *Solicitors Act* contemplate situations where a solicitor dies or becomes incapable of acting after agreement. In these cases, an application may be made to any court to assess the retainer agreement and should it be deemed fair and reasonable, the court may also order the amount in respect of the past performance of the solicitor to be ascertained by way of an assessment.

77. It is respectfully submitted that the passing of Mr. Duby does not preclude compliance with the *Solicitors Act*. The legislature specifically contemplated and provided directions in the case of an unfortunate passing of a solicitor, such as Mr. Duby. As per section 29 of the *Solicitors Act*, the manner and the amount in which the past performance is determined would be the same as if the lawyer had completed the retainer agreement and the right to an assessment is not removed.

78. It is further submitted that Mr. Duby's unfortunate passing does not obviate the requirement for the Receiver to render accounts on behalf of BDPC should it seek to make any claim for the recovery of BDPC legal fees. Section 2(1) of the *Solicitors Act* mandates that the "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…" to deliver its account for legal fees at least one month prior to bringing forward any action for recovery of fees, charges or disbursements for business done by the solicitor[57]. The Receiver in this case is an assignee that has stepped into the shoes of BDPC.

79. The Receiver has confirmed that no accounts have been provided by or on behalf of BDPC[58]. This is contrary to the *Solicitor's Act,* and the contingency fee agreements which refer to the delivery of a fee account for work performed to the time of the termination of the retainer[59]. There is also

[56] Section 30, *Solicitors Act*, R.S.O. 1990, c. S.15.
[57] Section 2(1), *Solicitors Act*, RSO 1990, c S.15.
[58] Moving Party's Factum at paras 50-53
[59] RMR – NLF, Affidavit of Courtney Madison, Exhibit C – BPDC retainer agreements; see also, MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix C and D – Redacted examples of contingency fee agreements for tort and accident benefit claims.

reference to a client's right of an assessment in respect of some BDPC retainers disclosed in the materials[60].

I. The Receiver provides no compelling reason for not rendering an account

80. The Receiver's reasons for not rendering account to date are twofold: (1) BDPC kept minimal records, and in particular, did not keep time dockets or current accounting records in relation to the Client Files. As Mr. Duby is deceased, he is unable to provide any clarification or information on the work he completed on the various Client Files; (2) the Receiver has limited resources and it is neither financially efficient nor practical for the Receiver to review each file and negotiate BDPC's interest or deal with assessments on a file-by-file basis[61].

81. While formal dockets may not have been kept, the Receiver has access to all the former BDPC files as they were prior to the transfer to New Counsel and may review said files to determine the amount of work completed as well as the stage in the litigation the matter was at prior to the transfer. Assessment hearings are also routinely completed even in cases where the solicitor may not have kept time dockets. Mr. Duby and BDPC's lack of record keeping is not a "compelling reason" to avoid an assessment hearing.

82. In *Newell v Sax,* 2019 ONCA 455, the Court of Appeal held that a *quantum meruit* assessment of a solicitor's account 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[62]. As such, "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[63]"

[60] MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix C and D – Redacted examples of contingency fee agreements for tort and accident benefit claims.
[61] Moving Party's Notice of Motion at paras 26-28; Moving Party's Factum, at paras 45-47.
[62] *Newell v Sax,* 2019 ONCA 455, at para 39
[63] *Newell v Sax,* 2019 ONCA 455, at para 43

83. Further, the allegation that the Receiver has "limited resources and it is neither financially efficient nor practical for the Receiver to review each file and negotiate BDPC's interest or deal with assessments on a file-by-file basis" is not a relevant or a compelling reason for not rendering an account. Respectfully, it does not fall upon New Counsel or the former BDPC clients to fund the receivership which is essentially what is being asked here. The Receiver is seeking to maximize its return to the creditors of BDPC's estate, but at the expense of New Counsel and the former BDPC clients without any regard the practice and procedures governing the legal profession or the contractual agreements between BDPC and its former clients. The proper administration of justice requires billing disputes to be dealt with fairly and equitably.

84. In this case, The Toronto-Dominion Bank ("TD Bank") who was the primary secured lender for BDPC, has engaged MNP Ltd as the Receiver in this matter[64]. While MNP alleges to have "limited resources", TD Bank is by no means of "limited resources". If the chosen receiver, that being MNP Ltd is of limited resources to carry out its court-appointed function, then TD Bank can easily seek to appoint another receiver or assist in expanding MNP's resources. It is not appropriate to compromise the rights of the clients due to the "limited resources" of the appointed Receiver.

85. It is respectfully submitted that Mr. Duby or any other solicitor would not be permitted to contract out of the *Solicitors Act* and seek to vary an agreement in the way the Receiver is seeking to do after an unfortunate change in circumstance.

86. In *Loreto v Little,* the Court explained that the possibility of multiple assessment hearings is not a compelling reason for a lawyer to not render an account. At paragraphs 41 to 42, the Court stated:

> 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.
>
> 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

[64] MP-MR, First Report of the Receiver dated June 28, 2022.

> 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[65] (emphasis added)

87. It is respectfully submitted that it is the Receiver bears the burden of any costs associated with its authority "to manage, operate, and carry on the business of the Debtor". This includes any costs associated with rendering accounts and proceeding with any assessment as would ordinarily be borne by BDPC.

J. The BDPC contingency fee agreements

88. The Receiver further cannot "contract out" or alter the contingency fee agreements BDPC entered into with its former clients for the sake of its own expedience and convenience. It is bound by those agreements. The Receiver 'steps into the shoes of BDPC' and accordingly, can enjoy no higher rights than BDPC.

89. In *Norame Inc. (Re),* 2008 ONCA 319, the Court of Appeal explained that a trustee in bankruptcy, an interim receiver, or any other assignee of the debtor "steps into the shoes of the debtor" [66]. Accordingly, the Receiver, who has stepped into the shoes of BDPC and cannot seek any greater rights than BDPC held vis a vis its former clients.

90. The BPDC contingency fee agreements with its former clients do not account for any "sliding fee structure"[67]. The former BDPC clients retained BDPC based on the terms contemplated and agreed to in the contingency fee agreements. The Receiver cannot now seek to alter a fundamental term of the contracts by seeking to impose a "sliding fee structure" and take away the client's right to an assessment.

[65] *Loreto v Little et al,* 2010 ONSC 755, at paras 41-42.
[66] *Norame Inc. (Re),* 2008 ONCA 319, at paras 11-19.
[67] RMR-NLF, Affidavit of Courtney Madison, at para 21.

91. Furthermore, there are some BDPC retainer agreements that provide for a 15% contingency fee payable to BDPC from the total damages and interest awarded. Some of these agreements also permit BDPC to retain any amounts recovered as "costs (from the Defendant)"[68].

92. The Receiver cannot now seek to alter the contingency fee rates and the terms upon which BDPC and its former clients agreed to have BDPC fees to be calculated. It is evident that in some cases the proposed "sliding fee structure" may result in a windful for the Receiver and at the expense of the clients. This runs contrary to the administration of justice which is to ensure that a solicitor's legal fees are fair and reasonable.

93. It is respectfully submitted that the Receiver has not referred to any decision or statutory provision that allow the Court or the receiver to remove a party's procedural right to an assessment of BDPC legal fees. It is further submitted that the decisions cited by the Receiver in support of the "single model proceeding" and by extension the "sliding fee structure" provides no authority or guidance to this Court in deciding the issues herein.

K. Former BDPC clients have a right to their counsel of choice which is a right that should not be interfered with

94. It is trite to say that a client has a right to counsel of their choice. While the Receiver has arranged for another "reputable personal injury firm" to accept any former BDPC clients, they cannot ask this Court to interfere or facilitate the transfer of any clients and their files.

L. Disclosure of information

95. It is respectfully submitted that the only items that would be relevant to the determination of the fees payable to BDPC by the former clients is the corresponding BDPC client files as it existed prior to the time of the transfers to New Counsel. These files have been preserved by the Law Society of Ontario under the Trusteeship Order[69]. A review of the files prior to transfer will allow any party to

[68] RMR-NLF, Affidavit of Courtney Madison, at para 21, Exhibit C – Examples of BDPC retainer agreements, redacted accordingly.
[69] MP-MR, First Report of the Receiver dated June 28, 2022, Tab 2, Appendix A - Receivership Order dated February 25, 2021.

determine the legal work undertaken by BDPC and assist in estimating the time spent by BDPC during the course of the solicitor-client relationship.

PART V – RELIEF SOUGHT

96. Naimark Law Firm respectfully requests the following relief:

a. An Order dismissing the Receiver's motion for New Counsel to disclose privileged information with respect to the Client Files;
b. An Order dismissing the Receiver's request for an Order that the Sliding Fee Structure;
c. An Order that the Receiver's render accounts for any legal fees sought to the former BDPC clients;
d. An Order that the BDPC's interest in the client files to be determined by way of assessment hearing in accordance with the provisions of the *Solicitor's Act;*
e. Costs of this motion, and
f. Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Ryan M. Naimark, Nergiz Sinjari

Lawyers for the Responding Party (New counsel),
Ryan Naimark Professional Corporation o/a Naimark Law Firm

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

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

FACTUM OF THE RESPONDING PARTY (NEW COUNSEL), NAIMARK LAW FIRM

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