

Noteworthy

2002 No.10

Contingency Fees

HUGHES AMYS LLP
BARRISTERS & SOLICITORS

by *Laila Brabander*

Lawyers in Ontario have for years entered into private agreements with their clients before the commencement of litigation specifying that the lawyer would get a proportion of the amount that is recovered if the lawsuit is successful. These agreements are commonly known as contingency fee agreements.

Such agreements are legislatively permitted and regulated in every Canadian province and territory other than Ontario. In Ontario, the concern for lawyers in proposing contingency agreements to their clients has historically been that the courts would deem the agreements illegal and thus invalid because they are in breach of a piece of 1897 legislation.

This concern has now abated due to a recent decision released by the Ontario Court of Appeal, *McIntyre v. Ontario (Attorney General)*, [2002] O.J. No. 3417. The Court held that contingency fees are not *per se* illegal, and condoned “fair and reasonable” contingency fee arrangements. Subsequent to this decision, the Ontario Rules of Professional Conduct have been amended to allow such arrangements and there has been increased legislative support for two draft bills that would permit and regulate such agreements in Ontario.

Background

Contingency fees have historically been considered a form of champerty and maintenance, terms that date back to 14th century England. Maintenance is the stirring up of the parties to litigate by a person who has neither interest in the action nor motive justifying such interference, an action often described as “officious intermeddling.” Champerty is a particular kind of maintenance in that the “officious intermeddler” shares in the profits of the litigation. The two were common law crimes until the Canadian Parliament abolished such crimes in 1954. The basis for castigation of the acts of maintenance and champerty was the belief that such arrangements would promote perjury and a perversion of justice by allowing greedy or unethical lawyers to make tactical decisions that could harm their clients.

Champerty continues to be prohibited in Ontario under *An Act Respecting Champerty*, R.S.O. 1897, c. 327 (the “*Champerty Act*”) and any agreement that is deemed champertous may be declared null and void by the Courts.

However, in the past decade, there has been a move to allow contingency fee arrangements in Ontario. For example, The *Class Proceedings*

(Continued on page 2)

IN THIS ISSUE

Contingency Fees

Laila Brabander

Noteworthy

(Continued from page 1)

Act 1992, S.O. 1992, c. 6 contains a provision permitting contingency fees, under court supervision, in class actions. Further, in September 2000, the Ontario Superior Court held in *Bergel & Edson v. Wolf*, [2000] 50 O.R. (3d)777 that a contingency fee agreement was not against public policy provided it was entered into for a *bona fide* motive and not for reasons of “officious intermeddling”.

However, the most dramatic changes in the courts and Legislature have come in the past few months.

In *McIntyre v. Ontario*, (2001) 53 O.R. (3d)137 the plaintiff, the estate of Ronald McIntyre, represented by Mr. McIntyre’s widow, brought an action against Imperial Tobacco Limited alleging responsibility for the illness and death of Mr. McIntyre, who died from lung cancer. Ms. McIntyre could not afford to hire a lawyer. Therefore, she asked the court to validate a contingency fee agreement between herself and her lawyer that provided for compensation based solely on a percentage of damages recovered by declaring that the agreement is not prohibited by the *Champerty Act* so that her lawyer could move the case forward. The applications judge, Wilson, J. granted the declaration and the Attorney General appealed the judgment, arguing that the *Champerty Act* constitutes an absolute prohibition of all contingency fee arrangements.

The Court of Appeal considered

whether the applications judge erred in holding that the proposed agreement between the respondent and her lawyer did not offend the *Champerty Act*.

In the decision, delivered by O’Connor, A.C.J.O., the *Champerty Act* was reviewed by the Court. The Court held that the almost 110 year old Act should be interpreted as incorporating the common law requirements of whom should be considered a champertor. The Court then looked at the common law of champerty. A review of the jurisprudence indicated that the concerns that have traditionally

Whether a particular agreement is champertous will depend on whether it is “fair and reasonable.”

fueled the courts’ intolerance are now dated and cited as proof the fact that there is no evidence of a deleterious effect in the other provinces and common law jurisdictions that have adopted legislation permitting and governing such agreements.

The Court concluded that contingency fee agreements should no longer be considered *per se* champertous. Further, whether

a particular agreement is champertous will depend on whether it is “fair and reasonable.” To determine this, the courts should look at the conduct of the parties involved and the motive of an alleged champertor:

“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 overcompensates 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.”

The Court found that due to the nature of the fee structure provided for in the agreement in issue (which was based on a percentage of the damage that may be recovered), it was premature at an early stage of the litigation to assess whether the fees that might become payable under the proposed agreement would be reasonable and fair.

The Court, therefore, allowed the appeal and set aside the declaration that the proposed agreement did not contravene the *Champerty Act*. The applica-

(Continued from page 2)

tion was stayed, instead of being dismissed, on the basis that it was premature. The Court held that the determination of whether agreements like this one, where fees are based on a percentage of the recovery, are champertous would normally have to await the outcome of the litigation.

While the Court clearly rejected the suggestion that only the Legislature can change how the law regarding champerty is interpreted, it encouraged the Legislature to take steps to regulate contingency fee agreements by stating:

“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 advice that it has been given for many years to enact legislation permitting and regulating contingency fee agreements in a comprehensive and co-ordinated manner.”

Case law and Legislation following *McIntyre*

Within weeks of the *McIntyre* decision, the Ontario Court of Appeal looked at a specific contingency fee arrangement in *Raphael Partners v. Lam* to determine if it was “fair and reasonable”. In so doing, Cronk, J. outlined what may make a contingency arrangement “fair

and reasonable”. She held that the agreement must be in writing, and that the client must fully understand and appreciate the nature of the agreement that was executed. In determining its reasonableness, factors to be considered include the complexity of the matter, the risk the solicitor assumes in accepting the case, and the results achieved. Applying these factors to the *Lam* agreement, the Court found that \$550,000, inclusive of fees and disbursements (the maximum recovery under the agreement)

Factors to be considered include the complexity of the matter, the risk the solicitor assumes in accepting the case and the results achieved

on a \$2.5 million award was both fair and reasonable.

The language of “fair and reasonable” was also recently adopted by the Law Society of Upper Canada during the October Convocation wherein the Law Society passed a new rule of professional conduct outlining ways to ensure contingency fees are “fair and reasonable”. Rule 2.08(3) states that the agreement must contain “a statement of the

method by which the fee is to be determined, including the percentage that may accrue to the lawyer in the event of a settlement, trial, or appeal.” It must also have “a statement that the client may apply to the Superior Court of Justice for a determination of whether the contingency fee is fair and reasonable.”

Further proposed reform has come in the form of **two** draft bills. The first, *An Act to amend the Solicitor’s Act to permit and to regulate contingency fee agreements*, introduced by Liberal justice critic Michael Bryant, recently passed its second reading. It allows lawyers to be hired on a contingency-fee basis for most court cases, with the exception of family and criminal matters. Judges would be given the power to review all contingency fee arrangements to determine if they are “fair and reasonable” and caps (a 30% limit is proposed) would be placed on the fees potentially recouped by lawyers if the lawsuit is successful. The second, the *Justice Statute Law Amendment Act 2002*, was introduced on November 26, by Attorney-General David Young. It is worded in a similar fashion to the bill introduced by Mr. Bryant, however it omits any reference to a specific cap.

Mr. Young is proposing more consultation on the idea of a cap as he wants to avoid the situation of a lawyer claiming one-third of the proceeds of a successful multi-million dollar

(Continued on page 4)

settlement after only a short period of litigation. Whether the solution is a sliding scale or a fixed cap remains to be seen.

Conclusion

It appears that the Court of Appeal has led the way in ensuring that the contingency fee

agreements will to some extent be based on the work that the lawyer performs, rather than merely a percentage of what is recovered. It will be interesting to see how the law respecting what is “fair and reasonable” develops in light of the recent case law, the amendments to the Rules of Professional Con-

duct, and the proposed amendments to the legislation and whether it will effectively discourage the greedy behaviour of unethical lawyers, which was the deep rooted fear that the Ontario Legislature and the more traditional legal community had held for so long.