

The Unleashing of Contingency Fees in Ontario

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ABSTRACT

The long and uncertain past of contingency arrangements has finally come to a halt. The highest court of Ontario has made two landmark decisions. First, in *McIntyre v. Attorney General of Ontario*³ (“*McIntyre*”), the Court of Appeal declared that contingency arrangements are not per se illegal. Contingency arrangements that meet the requirements of reasonableness and fairness are not only enforceable, but also desirable. Properly constructed contingency arrangements can help alleviate the large and currently overlooked access to justice problem experienced by the middle class. Second, in *Raphael Partners v. Lam*⁴ (“*Lam*”) the Court of Appeal has articulated the common law test to be used to determine whether a particular contingency agreement meets requirements of fairness and reasonableness. If the requirements are met, the contingency arrangement is an enforceable contract. Although, *Lam* has alleviated some of the uncertainty left in the wake of *McIntyre*, the question remains if this common law test of reasonableness and fairness is desirable as a matter of policy. If not, the ball is in the court of the Ontario Legislature to pass legislation that prescribes politically desirable standards and limits of contingency arrangements.

INTRODUCTION

Until recently, case law has traditionally held that the courtroom is not the forum for amending policy directives of the province. In a democracy, policy lies in the hands of elected officials. Having said that, in certain situations, there also comes a time when the judiciary feels its hand is forced by the prolonged ambivalence of the legislature.

As compared to other provinces, Ontario has been waiting legislative changes in the area of contingency fees for decades. A useful chart⁵ setting out the state of the law across Canada in

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³ Docket: C36074 (2002), 53 O.R. (3d) 137

⁴ Docket: C36894 (2002)

⁵ attached hereto as Appendix “A”

respect of contingent arrangements was prepared by Madam Justice Wilson in the trial level decision in *McIntyre*. The first province or territory to permit contingency arrangements legislatively was Manitoba in 1890. The province that has most recently enacted such legislation was Newfoundland in 1986. Ontario is the only jurisdiction in Canada left without regulation. Of the eleven regulated provinces and territories, two have a particular percentage limit on contingent arrangements⁶, five have no particular percentage cap but are guided by a reasonableness limit⁷, and the other four have neither a cap nor a reasonableness limit⁸.

This article begins with a historical overview followed by a discussion of the underlying policy. It will canvas policy reasons in favour of contingency fees, and answer policy concerns commonly voiced by opponents of instituting contingency fees in Ontario. Next, this paper reviews the pre-*McIntyre* lower court decisions, followed by the decision in *McIntyre* at both the Superior Court of Justice and Court of Appeal levels. The decision in *Lam* will then be reviewed for judicial guidance as to whether a contingency fee arrangement will be approved. Finally, the recent movement at the legislative end will be briefly set out.

HISTORICAL UNDERPINNINGS

The suppression of contingency fee arrangements in Ontario stems from traditional principles against maintenance and champerty. *Champerty* is

a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving parts of any judgment proceeds; it is one type of "maintenance", the more general term which refers to maintaining, supporting, or promoting another person's litigation.⁹

⁶ Quebec and British Columbia.

⁷ Manitoba, Alberta, Saskatchewan, Prince Edward Island, and Newfoundland

⁸ Nova Scotia, New Brunswick, Northwest Territories, and Yukon.

⁹ *Black's Law Dictionary*, 6th ed., s.v. "champerty".

Champerty is a subset of maintenance which seeks to avoid a stranger funding litigation in return for a portion of the proceeds. Both champerty and maintenance are prohibited by common law. In addition, there are two statutes in Ontario that prohibit contingency arrangements. First, the Ontario legislature codified the common law prohibition of champerty in *An Act Respecting Champerty*¹⁰ (“*Champerty Act*”) in 1897. This Act makes all champertous agreements forbidden and invalid¹¹. Similarly, section 28 of the *Solicitors Act*¹² provides that in contentious matters, solicitors are prohibited from making arrangements for payment with a client, which are contingent upon success or determined by a percentage of recovery. In other areas of the law such as real estate and corporate law, contingent arrangements do not run afoul of the law in that they are not champertous, simply put they do not encourage litigation. However, by virtue of both common law and statute, contingent arrangements in the respect of contentious matters are outlawed in Ontario. They are illegal contracts and therefore unenforceable.

There is one important exception to the outlawing of contingent arrangements in litigious matters, namely for class action lawsuits. In 1992, contingency arrangements became lawful in class actions. The very fact that an exception has been made puts the policy concerns raised by those who oppose contingent arrangements into question.

¹⁰ R.S.O. 1897, c. 327.

¹¹ *Ibid*, s.2.

¹² R.S.O. 1990, c. S-15.

POLICY REASONS THAT SUPPORT CONTINGENCY ARRANGEMENTS

a) Access to Justice

One of the most common arguments in favour of permitting contingency arrangements surrounds access to justice¹³. If the common person cannot afford to pursue legitimate claims, then justice is nothing more than an illusory right. At present, justice is generally only available to the richest among us, as well as some of the poorest among us through legal aid. Contingent arrangements offer a private mechanism to facilitate access to justice for the largest segment of society, individuals that fall in between¹⁴. This group is realistically often left without legal recourse because of financial constraints.

b) Risk-Sharing

Secondly, contingency arrangements offer a much needed compromise between a lawyer and a litigant. It is not reasonable, nor practical to expect a lawyer to have an entirely pro bono practice. Contingency agreements permit risk-sharing¹⁵ as between lawyer and client. Such arrangements offer a balance between the rights and needs of a client to pursue a claim, and the rights and needs of a lawyer to be compensated for work effort.

c) Aligning Interests of Lawyers and Clients

A third rationale to support legalizing contingency arrangements is that such arrangements serve to align the interests of a lawyer and the client. Much like an officer being

¹³ M. Trebilcock, "The Case for Contingent Fees: The Ontario Legal Profession Rethinks Its Position", (1989) 15 Canadian Bar Journal 360.

¹⁴ *Stribbell v. Bhalla* (1990), 73 O.R. (2d) 748 at 745-754 per Osborne J.

¹⁵ *Ibid.*

paid to act for the best interests of a corporation, while providing stock options as a way to increase productivity by aligning the interests of the officer and the corporation.

Notwithstanding lawyers owe an ethical duty to act in the best interests of their clients, the same reasoning applies to lawyer-client relationships and endeavors. Contingency arrangements serve to invoke the best efforts of a lawyer as an advocate.

d) Payment Contingent on Success

A contingency arrangement offers a client some solace in the fact that the lawyer does not get paid unless he or she produces results. Under the conventional billable hour model, clients are required to pay regardless of outcome. Many clients are unable to evaluate the value of time spent and time required in legal matter. They are also unable to monitor time spent¹⁶ Contingency arrangements help to remove the reservations of a client in respect of accounts rendered by a lawyer or having to police a lawyer in this regard.

f) Disparity in Access to Justice Between Provinces

Another disheartening effect that the failure of the Ontario government to legislate in the domain of contingency fees in litigious matters has caused is a gap in access to justice between Ontarians and residents in all other provinces. Tort law ought not depend on geography¹⁷. Tort law is a compensation regime which all Canadians should have access to equally.

¹⁶ *Ibid.*

¹⁷ *Supra* note 4, (Oral argument, intervenor on appeal, Advocates' Society)

ANSWERING THE CRITICS

The usual criticisms surrounding the sanctioning of contingency arrangements in Ontario fall into three categories. There are criticisms that deal with the trust relationship between a lawyer and a client, a second tier that addresses implications on the practice of law, and a final tier of practical concerns in authorizing such arrangements in Ontario

a) Contingency Fees Fall Outside the Breadth of the Champerty Act

The *Champerty Act* is comprised of the following two sections:

1. Champertous be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
2. All champertous agreements are forbidden, and invalid.

An argument that has been made to the Court of Appeal by the respondent in *McIntyre*¹⁸ was that the Champerty Act was never meant to apply to lawyers¹⁹. Lawyers do not move lawsuits, they do not put their names to actions they argue under contingency arrangements. Instead, the Champerty Act was meant to prevent third parties from funding law suits for the purpose of a monetary gain. Lawyers, on the other hand, provide a service to clients.

A similar argument was voiced by the Advocates' Society, which was granted intervenor status in the *McIntyre* appeal. The Advocates' Society argued that the word "for" in section 1 of the *Champerty Act* was most telling. "For" indicates an assessment or determination of intention is required in under that section. It was contended that "for" could apply to a third party but not to a lawyer in respect of his or her client.

¹⁸ *Supra* note 4.

¹⁹ *Supra* note 4, (Oral argument, applicant)

Furthermore, according to the definition provided in the *Champerty Act*, a champertor must also in some way be the driving force behind bringing the action to the surface. With respect to the lawyer-client relationship, by the time a client goes to a lawyer to seek advice, the decision to bring litigation has arguably already been made. The only questions that may remain by that point are ‘how’ or with which lawyer?²⁰

b) Bolstering, Rather Than Hindering Trust

As noted previously, the first and foremost policy reason supporting validating contingency arrangements is the nature of the lawyer-client relationship itself. Concerns of maintenance and champerty through idle investment do not hold true. Lawyers play an active part in facilitating justice and it is argued here that this role takes lawyers out of the champertous arena. However, this relationship of trust is also cited as a concern, the idea being that there is no place for financial gains in a relationship of trust²¹.

In short, the apprehension is that a solicitor and client share a trust-like relationship which prohibits any bargain between them.²² There ought to be no obstacles within the confines of this relationship. In answer to this concern, it is maintained that in reality, contingency arrangements align the interests of a lawyer and client. As between lawyer and client, the alliance is markedly more robust under a contingency arrangement than it would be under the present billable hour regimen.

²⁰ *Supra* note 4, (Oral argument, intervenor, The Advocates’ Society) and (Intervenor’s (The Advocates’ Society) factum at 5).

²¹ M.Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 1987)

²² *Supra* note 7 at 752 O.R.

c) Benefits to the Practice of Law

There are also concerns about degrading standards of the legal profession. Along these lines, the typical argument launched against contingency arrangements are:

- 1) Lawyers will be encouraged to partake in unethical practices in order to advance the lawsuit in exchange for personal monetary gain.
- 2) Litigation will be encouraged.
- 3) Lawyers will only accept good cases, therefore still leaving some without access to justice.

There are three safeguards that can provide full answer to these types of concerns.

i) Rules of Professional Conduct

First, critics seem to equate installing contingency regulations in Ontario, with abolishing ethical and similar constraints on lawyers. They seem to forget that The Rules of Professional Conduct and other such constraints will survive the passage of contingency regulations. Lawyers are officers of the court as well as advocates for their clients. They are required to act for the best interests of both. As such, a lawyer should advise his or her client against bringing an unmeritorious claim.

In fact, it can be argued that lawyers would be more veracious under contingent arrangements because they will be stripped of the comfort in knowing regardless of outcome, their fees are payable. Contingent arrangements force lawyers to be more vigilant in screening cases. Accordingly, lawyers will also be more candid in advising

clients on the merits of their cases and their best options. This would suggest that fewer claims would be commenced.

ii) Disciplinary Procedures

Second, there is no reason to handle lawyers with kid gloves. There are disciplinary procedures and measures to ensure lawyers are ethical. A lawyer who fails in his or her duties can be made to answer for it in due course. Adopting a regime for contingency arrangements does not abrogate from existing procedures.

iii) Assessment of Costs

Third, there is the assessment of costs process well bred into the legal system. The assessment of costs process permits lawyers or clients to request fees to be assessed for reasonableness and fairness. An assessment officer who is a knowledgeable authority in the area, will evaluate the fees in the context of the case with particular attention paid to factors such as time spent, outcome, complexity of the matter, etc. Contingency fee arrangements can still be assessed.

d) Practical Concerns

i) Contingency arrangements do not render claims commodities

It is conceded that maintenance and champerty should be prohibited in the common marketplace. It is undesirable for claims to be commodities whereby those with deep pockets can yield large monetary returns from the misfortunes of others. However,

the difference between champerty and maintenance in the general marketplace, and contingency arrangements, is that lawyers are not idle investors who merely invest money and passively await a return. Instead, lawyers are the vehicles through which justice is sought and ultimately achieved. They are officers of the court who have ethical duties and obligations. Under contingency arrangements lawyers not only invest money, they invest their time and expertise, often forgoing other opportunities. Lawyers put their own professional reputations on the line.

It is suggested here that while champerty and maintenance should apply to prevent commercialization of claims generally, they have limited application to contingency arrangements. In particular, these principles should only be applied for the purposes of keeping gains of the lawyers commensurate with risk and effort.

ii) Reduced Net Recovery for the Plaintiff

Practically speaking a number of concerns have been voiced. One concern is that the net recovery of a plaintiff will be less because a portion of the recovery under a contingency arrangement is payable to the lawyer. In the nature of compromise, it seems appropriate that a lawyer ought to be rewarded for both the risk taken and the outcome achieved. Concerns surrounding quantum can effectively be answered by legislation and the reservation of discretion to the judiciary and assessment officers. A balance is ascertainable as between lawyer and client to address this consideration.

iii) Inflated Damage Awards

A companion argument is that judges will inflate damage awards to account for contingency fees to the detriment of defendants. This criticism places little faith in the experience and decision-making abilities of the judiciary. Furthermore, this is yet another area of concern which can be legislatively addressed. In view of that, judges can be made aware of their duties and this potential danger by legislative boundaries. The legislation may even have groundwork for appeals or review on quantum.

iv) Congestion of Courts

Another concern is the congestion of the courts. This concern is short-sighted in that it fails to recognize the 'natural selection' type of mechanism contingency arrangements carry. As alluded to previously, such arrangements will force lawyers to take a closer look at the merits of a case, and to do so at the outset. Lawyers should be trusted to have the expertise to decide which cases should be taken to trial. In addition, there is no reason to believe the proportion of cases that settle will change significantly and implications of settlement can be set out in a contingency arrangement.

v) Disproportionate Recovery for Lawyers

Some critics also argue that lawyers will receive fees disproportionate to what they deserve under contingency arrangements. Depending on the issues, duration, parties, and resources available to the lawyer, the risk can be enormous. Again, this is not a mere idle investment in stocks or bonds, but it invokes hours of services and

resources. The reward should rightly vary with risk, outcome, etc. This is yet another criticism that is capable of statutory control.

Having reviewed policy considerations, it is evident there are powerful reasons to legalize contingency arrangements in Ontario. In fact, for the majority of the concerns the solution lies in enacting legislation. Policy is not the obstacle we face in Ontario, not anymore. The obstacle we face is getting the Ontario Legislature to answer the call for legislation.

e) Contingency Fees are Expressly Permitted in Class Proceedings

As mentioned earlier, the Class Proceedings Act expressly permits contingency arrangements in civil actions. It is hypocritical, to say the least, that the very government that shuns the use of contingency fees in one domain, sees fit to sanction them in another domain. On one hand, the Ontario government rejects contingency fees on policy grounds and by clinging to an outdated statute, which may not apply in any case. On the other hand, it is maintained that contingency arrangements are wrong as a matter of policy. This goes to show that the policy behind the prohibition is feeble, moreover it confirms the compelling policy reasons in favour of permitting such arrangements as discussed in this paper. There is no reason in principle why a group of plaintiffs is more deserving of access to justice than one plaintiff standing alone. The number of plaintiffs is irrelevant to the underlying principles involved. Moreover, the government should not be allowed to cling to certain policy reasons when convenient to do so.

PRE-MCINTYRE JUDICIAL ENVIRONMENT

Until quite recently, the judiciary stood by the policy decisions of the legislature by refusing to enforce contingency arrangements and finding them to be champertous²³. For the most part, these authorities will not be reviewed here in that this article is primarily concerned with the recent common law subsequent to older cases that outlawed contingency arrangements.

In 1999, in a case called *Robinson v. Cooney* (“*Robinson*”)²⁴, the first step was made by Cullity J. He held that the contingency arrangement at issue was illegal and therefore unenforceable. As an illegal contract, no award could be made on a *quantum meruit* basis either. However, Cullity J. went on to comment that the law was ready for change and if the legislature did not make changes, the judiciary might. He indicated that in an appropriate case he would be prepared to hear policy considerations and arguments, to effect such change, but he was not prepared to do so in that particular case because those types of arguments were not put before him.

As of late, it is becoming apparent that like the Ontario Bar, the Ontario judiciary has become impatient. There are three other decisions at the trial level in Ontario on this issue which have taken steps to effect change in this area of the law. In particular, there are two cases that put the obiter of Cullity J in *Robinson* into practice. The first case was *Bergel & Edson v. Wolf* (“*Bergel*”)²⁵, decided by Mr. Justice H. Spiegel in September of 2000. When faced with an existing contingency arrangement, Spiegel J. found the arrangement was not an illegal contract as it was not in contravention of either the *Solicitors Act* or the Rules of Professional Conduct.

²³ *Re Solicitor* (1907), 14 O.L.R. 464 (H.C.); *Trendtax Trading Corporation v. Credit Suisse*, [1980] 1 Q.B. 629 (C.A.);

²⁴ (1999), 29 C.P.C. (4th) 72 (Ont. Gen. Div.).

²⁵ *Supra* note 1.

On the issue of champerty, Spiegel J. relied a great deal on the Court of Appeal decision of Griffiths J.A. in *Buday v. Locator of Missing Heirs Inc.* (“*Buday*”)²⁶

...for an agreement to be champertous, it first must have all the ingredients necessary to constitute maintenance. Therefore, the element of “officious intermeddling”, that is, the stirring up of the parties to litigate in an endeavor to enforce rights they would not otherwise pursue, must be present.²⁷

Griffiths J.A. held that a bona fide business agreement to assist the plaintiff to recover an interest which the Plaintiff considered a valid claim, was not officious intermeddling. In *Bergel*, Spiegel J. found the retainer agreement though contingent, was not champertous as there was no evidence of the requisite officious intermeddling.

There is also some support for judicial intervention in *Raphael Partners v. Lam*²⁸. This case involved a motion to oppose confirmation of a decision of an Assessment Officer. The Assessment Officer had reduced the account of a solicitor under a contingency agreement. On hearing the motion, Molloy J. took no issue with the enforceability or legality of the account and therefore implicitly validated the agreement.

All of the above decisions stood in stark contrast to decades of statutory and common law striking down contingent arrangements. These more recent decisions reflect the change in policy views of society as outlined above.

²⁶ (1993), 16 O.R. (3d) 257 (C.A.)

²⁷ *Ibid* at 267.

²⁸ (2001), 55 O.R. (3d).

THE MCINTYRE DECISION

a) The Facts

The *McIntyre* case is essentially a product liability case pertaining to tobacco. The widow of Ronald McIntyre seeks to sue Imperial Tobacco and Venturi Inc., for the wrongful death of her husband. The plaintiff did not have the financial resources to fund the litigation absent the use of a contingent arrangement. As a preliminary matter, an application was brought for a declaration by the court that a proposed contingency arrangement was not prohibited under the *Champerty Act*. The Attorney General of Ontario was named as the respondent in the application. It was argued that without such approval, the plaintiff would not be able to financially sustain the intended action. What turned out to be the critical factor in this case which forced the hand of the court, was the limitation period. The plaintiff only had two years from the date of death to commence the action, and did not have time to wait for legislation.

b) Superior Court of Justice (Trial Level)

The application came before the Superior Court of Justice in March of 2001. Based on the urgency of the case imposed by the limitation period and the lack of legislative authority, and notwithstanding her view that the legislature ought to establish a regulatory framework, Madam Justice Wilson felt compelled to make a decision. The issue was whether the contingent arrangement between the Plaintiff and her counsel was prohibited as champerty. That is to say that Wilson J. crafted a judicial exception to *prospectively* permit contingency arrangement in a litigious matter involving a single plaintiff.

I conclude that the preferred approach to the contingency fee issue is for legislative changes to be introduced to establish regulation respecting the form, content and manner of proceeding for such agreements. In this case, however, the limitation period will expire on December 22, 2001. Understandably, until the legality of the retainer is clarified to ensure that counsel will receive fair and reasonable compensation, counsel is not prepared to proceed with the claim.....In my view, it is not reasonable to expect Mrs. McIntyre to wait almost another year for possible legislation.²⁹

Wilson J. has expressed and demonstrated willingness to move the law forward in the area of contingency fees in circumstances such as these. In her reasons, Wilson J canvassed the history and various policy considerations and made inter-provincial comparisons. Based on all of this information, the court held that the agreement was not champertous on its face. The agreement would have to be reviewed on disposition of the case to determine its fairness and reasonableness.

c) Ontario Court of Appeal

Given the possible implications of the case, the Attorney General of Ontario appealed the decision. Intervenor status was granted to both the Advocates' Society and the Ontario Trial Lawyers' Association. In examining the words of the *Champerty Act* and the context in which it was enacted, the court concluded that the legislation does not show a clear legislative intent. Accordingly, common law requirements of who is a champertor should be treated as part of the *Champerty Act*. This interpretation is consistent with the underlying objective of the legislation to protect the administration of justice.

²⁹ *Supra* note 2 at 156.

The Court looked to some of the policy concerns traditionally cited to prohibit the use of contingency arrangements. The court went on to find that many of the concerns do not hold true any longer, and in any event contingency arrangements are legalized in all the other provinces and other countries. There is no evidence of the materialization of any of the common objections. The Associate Chief Justice also indicated that the driving force behind the use of these arrangements is to promote access to justice, particularly for the middle class. Those who earn too much to qualify for legal aid, but realistically do not earn enough to be able to fund the high costs of litigation.

The court made reference to the assessment process under the *Solicitors Act* and the *Rules of Professional Conduct* as safeguards. Together they function as a sufficient regulatory framework to prevent abuse. The court also took the opportunity to examine the legality of contingent arrangements in relation to the *Solicitors Act*. In accordance with other decisions, the court in obiter commented that the provisions of this Act, in particular, section 28, do not prohibit contingency arrangements.

The court was clear in its finding that the ruling is not that contingency arrangements can never be champertous, but that they are not *prima facie* champertous. At the end of the day, a court will have to examine the conduct of the parties and the motive of the alleged champertor. When making the determination of motive, the court should look at the nature and amount of the fees such that the amount should not be so much as to be a windfall to the lawyer. There is no reason not to reward lawyers for the element of risk-taking implicit in contingency arrangements, so long as the compensation therefor is reasonable and fair to the client. The court also made a clear plea to the Ontario legislature to enact legislation to regulate contingency arrangements comparable to other jurisdictions.

Despite these findings, the court felt restricted in relation to the circumstances of the case at hand. Recall that the question before the court was whether Madam Justice Wilson erred in endorsing the contingency arrangement between the plaintiff and her counsel as not offending the *Champerty Act*. The court's final determination was that Madam Justice Wilson's declaration that the agreement was not champertous was inappropriate. It was too early to make such a determination. The lower court classified the arrangement as non-champertous prospectively. Although Wilson J attached the caveat that as a non-champertous agreement, it would still have to be evaluated for reasonableness and fairness, this was wrong. The determination of reasonableness and fairness of the arrangement is part and parcel to determining whether or not it was champertous, and consequently illegal. Absent regulation, the appellate court held that the determination of whether an arrangement is champertous can only be made retrospectively.

At the end of the day, the outcome is tremendous for clients generally in Ontario, but not as favourable as counsel for Mrs. McIntyre in this particular situation would have liked. The decision does not provide certainty in respect of the particular arrangement between the parties. This unfortunate outcome only reinforces the court's plea to the legislature, especially from the outlook of the plaintiff's counsel. In any event, there is some solace in knowing that the arrangement is not champertous and unenforceable ab initio.

THE LAM DECISION: THE AFTERMATH OF MCINTYRE

Given the overall sanctioning of contingency arrangements in Ontario, in *McIntyre*, it is suspected that the Ontario legislature has never had a greater push or better motivation to table legislation to regulate contingency arrangements. Absent legislative action, the courts are left to establish common law guidelines. In fact, very shortly after the Court of Appeal decision in *McIntyre*, a companion decision was reached in *Lam* where the court shed some light on what the ‘reasonable and fair’ test entails at common law.³⁰

a) Facts

Mr. Lam had a tragic accident at the University of Windsor while practicing judo, rendering him quadriplegic. Mr. Lam retained the firm, Raphael Partners to litigate the matter. The parties agreed to a contingency arrangement where the firm would receive no more than 15% of the first \$1,000,000 and 10% of each dollar thereafter, plus any costs awarded. Without this arrangement, Mr. Lam would be unable to afford the costs of litigation. Although there was no written retainer per se, the arrangement was confirmed in letter prepared at the outset of the matter. In addition, the arrangement was discussed on several occasions with illustrative examples between the lawyer and client.

At the second round of settlement negotiations, three and a half years after Raphael Partners were retained, the parties were at the point of reaching a settlement for damages of \$2,500,000. At that time, the remuneration of the firm was discussed once again with the client. The firm proposed to the client fees of \$500,000 plus disbursements leaving him with recovery of \$2,000,000. Mr. Lam signed written instructions agreeing to both the settlement terms and the legal fees. However when it came time to sign a direction and authorization to Raphael Partners

about a month later, Mr. Lam refused to sign. The firm sent another letter with a breakdown of the agreement reached at the settlement negotiations in accordance with the initial arrangement. The firm sought and obtained an order for an assessment. Mr. Lam ended up signing the direction and authorization under protest and reserving his rights under the assessment.

b) Assessment and Motion to Oppose Confirmation

The assessment officer determined that the fees sought by the firm were patently excessive and reduced the fees by half to \$230,000 plus G.S.T. The disbursements were not challenged. Dissatisfied with this result, the firm opposed the confirmation of the assessment and moved to set it aside. The motions judge agreed that the Assessment officer's analysis was incorrect, however the same result ensued with the finding that the fees were excessive and properly subject to reduction. That decision was appealed to the Court of Appeal by Raphael Partners.

c) Court of Appeal

In her reasons, Madam Justice Cronk on behalf of the panel acknowledged at the outset, that there was no issue raised as to the legality of the contingency arrangement. The court held that the initial contingency arrangement arising from a verbal agreement and evidenced by nothing more than a letter, is not enforceable as it is not a written agreement as required by section 16 of the *Solicitors Act*³¹. The only written contingency agreement was the one pursuant to Mr. Lam's written instructions at the settlement negotiations some three and a half years after the firm was retained. This latter agreement was the only agreement that could be enforceable if

³⁰ *Supra* note 4.

³¹ R.S.O. 1990, c. S.15.

it met the requirements of reasonableness and fairness. The court held that in these situations, the lawyer bears the burden of satisfying the court that the way in which the agreement was reached was both fair and reasonable.

i) Fairness

To meet the fairness threshold, the lawyer must prove that the client fully understood and appreciated the nature of the contingency arrangement. In this case, the court held that the written contingency arrangements reached between the parties during settlement negotiations were formal instructions from Mr. Lam to the firm. Furthermore, the arrangement was consistent with the informal agreement between the parties when the firm was first retained approximately three and a half years earlier. On several previous occasions, the arrangement had been explained to Mr. Lam and agreed to by Mr. Lam. The court held that based on the sequence of events, the lawyers satisfied their duty to prove the manner in which the formal arrangement was made was fair. Mr. Lam agreed to the arrangement and made no objection to it for three and a half years. No objection was voiced until after the settlement was successfully negotiated, minutes of settlement were signed by the parties, and Mr. Lam signed instructions for payment of fees under the said contingency arrangement.

In this case, Mr. Lam had doubts arising after the settlement, which is not necessarily enough to avoid his obligations under an otherwise legally binding contract. Furthermore, it is acknowledged that legal fees are a proper consideration of a client when negotiating a settlement. As such, it was advantageous to Mr. Lam to know this exact amount before reaching a settlement, so that the fees could be accounted for in the

settlement amount. The court concluded that the fairness branch of the test was satisfied in this case in that Mr. Lam freely made the agreement.

ii) Reasonableness

Turning to the reasonableness threshold, the court held that the principle considerations are well-established: time expended, legal complexity, result achieved, and risk assumed. Cronk J.A, referred to findings of the motions judge in relation to whether to confirm the decision of the assessment officer, and applied these findings to the reasonableness standard. In addition, Cronk J.A. made additional findings and commentary, all of which are summarized below under the headings of the principal considerations.

I) Time Expended

The court pointed out that the contingency arrangement did not incorporate this factor. The fact that no accounts were rendered support this perspective. As such, although the time spent is a relevant factor it is not the primary factor to determine the quantum of fees that could be charged to Mr. Lam. In any event, it took three years for the settlement to be reached in this case during which time considerable work was performed by the lawyers.

II) Legal Complexity

The liability and contributory negligence issues in this case were complex.

III) Results Achieved

The results achieved in the settlement approximated the best results the client could have hoped to achieve at trial. Furthermore, success includes the achievement of these results early, before trial of the matter and without the risks and uncertainty of trial.

IV) Risk Assumed

The risk assumed in this case was significant. The firm funded all of the disbursements and took the risk of non-payment if unsuccessful. Of particular note in this case, adverse findings for liability and contributory negligence were very real possibilities. Furthermore, even if success was achieved at trial, the return on the solicitor's investment would not likely be immediate.

In light of all these factors together with the considerations of reasonableness, the Court of Appeal found the terms of the contingency arrangement to be both fair and reasonable. The fees were approved at \$461,313.62, being 18.5% of the settlement amount of \$2,500,000.00. Having found the arrangement to satisfy the fair and reasonable test, the court held it was enforceable.

RECENT LEGISLATIVE INITIATIVE

Following the Court of Appeals decisions in *McIntyre* and *Lam*, there has been recent movement at the legislative end of the legal system. Two initial steps have been towards formally sanctioning contingency arrangements in Ontario. First, in order to deal with the

restrictions against contingent arrangement in the *Solicitor's Act*, a private member's Bill was set before the legislature. Second, convocation authorized discussions with the Attorney General concerning a regulatory scheme for contingency arrangements in Ontario. The possibility of a regulatory framework has been tossed around for a long time. It appears that formal steps to implement the framework we now be taken

CONCLUSION

To no avail, Ontario has been awaiting legislative action for decades sanctioning the use of contingency fee arrangements in civil litigation matters. Before September 10, 2002, there was no clear answer to the question of the validity and enforceability of contingency arrangements in Ontario. We had legislation that is over a century old, divergent policy objectives, and conflicting decisions. The September 10, 2002 decision of the Ontario Court of Appeal in *McIntyre*, has finally granted common law authority to use contingency agreements. However, the decision does not grant lawyers a carte blanche. As in any case, principles of reasonableness and fairness will play a role. Although *McIntyre* was able to clarify the legal status of contingency arrangements, it left behind uncertainty as to the appropriate test to meet to satisfy conditions of reasonableness and fairness. Shortly after *McIntyre*, the Court of Appeal released reasons *Lam* which helped to clarify the proper test to apply. The question still remains if the test set out in *Lam* is the proper test as a matter of policy. The court has taken a strong position and it is now up to the legislature to respond with set guidelines and regulations to provide certainty to lawyers and clients alike.