IS A CONTINGENCY FEE AGREEMENT WORTH THE PAPER IT'S WRITTEN ON?

A REVIEW OF *MIDE-WILSON v. HUNGERFORD TOMYN LAWRENSON AND NICHOLS*

By John Noel Laxton, Q.C.

The abbreviated facts of *Mide-Wilson v. Hungerford Tomyn Lawrenson and Nichols*[1] are that a millionaire[2] freely chooses a contingency fee agreement ("CFA") over a time-based contract, but when the law firm wins $100 million for the client, in a very short time, the client succeeds in having the legal fee payable under the CFA substantially reduced. At first instance, the registrar refused to cancel or modify the CFA, and awarded to the lawyers legal fees in the amount of approximately $9 million.[3] The chambers judge, Mr. Justice Goepel, then substituted a fee of $5 million, and the Court of Appeal saw no reason to interfere with the chambers judge's determination. There is no suggestion that the law firm involved failed in any of its fiduciary duties to the client.

The case raises three points of contention:

- Did the registrar commit an error in principle justifying the Supreme Court's overturning the registrar's exercise of discretion?
- Are the law's historical prejudice against CFAs and the B.C. courts' apparent preference for time-based contracts between lawyers and their clients supportable today?
- Should s. 71(4) of the *Legal Profession Act*[4] be severely curtailed in its application to CFAs since it allows a CFA to be rejected by reliance on hindsight and makes meaningless the registrar's mandatory confirmation of the CFA under s. 68(5) if the registrar finds the CFA fair and reasonable?

Over the centuries, the development of the law of contract has mainly heeded the rule of limited judicial interference, on the commonsense ground that there is no "principled" way of evaluating in law what is good consideration and what is not. This of course led to the well-known principle that "the law will not inquire into the adequacy of consideration".[5] Basically, the law of contract leaves it up to the parties and there is a longstanding pol-

icy of non-interference by the courts except in cases of unconscionability. The Supreme Court of Canada recently cautioned against "*ad hoc* judicial moralism" and "palm tree justice" in the contractual context.[6]

But contracts between lawyers and their clients have been treated differently, with the Court of Appeal in *Hungerford* pointing out that "historically, CFAs were considered incompatible with the integrity and honour of the legal profession".[7] The Court of Appeal referred at length to the rather murky history behind CFAs,[8] starting with "the dim mists of the common law" (1783) when a "barrister could not make an express contract with a client for future fees". The court did mention that champerty and maintenance were abolished by Parliament as common law offences in 1954;[9] it also mentioned, somewhat parenthetically, that the enmity toward CFAs has diminished in recent years and cited an Ontario case which noted that the "advantages to the administration of justice from permitting properly regulated contingency fee agreements in the form of increased access to justice are compelling".[10] However, the overall tenor of the reasons does not give one confidence that this unfortunate history is now behind us, with the court's observations regarding "properly regulated" CFAs and "access to justice" still a seeming afterthought.[11]

It is well settled that an error of principle is necessary to overturn a registrar's exercise of discretion. As set out in case law cited at para. 64 of the Court of Appeal's reasons:

> That the Court will not as a general rule interfere with the exercise of discretion "where [the master] has not acted upon any wrong principle" is so well established as to need little, if any, authority … but it may be that an error in quantum is so gross as to indicate an error in principle [referring to the 1907 *Yorkshire Miners* case[12]].

The Court of Appeal also reminded itself of the warning in the 1942 House of Lords case *Osenton v. Johnston*:

> The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. The appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way.[13]

Finally, the court referred to Mr. Justice Smith's judgment in the *Canadian Red Cross* case:

> In my opinion, to say that the fee is "simply too much" invites a completely arbitrary assessment, one that depends upon the subjective opinions and whims of the particular judge hearing the application. If the proposed fees are to be reduced on the ground that they impair the integrity of the profession, some principled basis must be suggested for doing so. None has been suggested and I cannot agree that the proposed

> fee should be reduced by an arbitrary amount ostensibly to protect the integrity of the profession.[14]

Despite these stringent restrictions, the courts have shown little reluctance in CFA cases to do what is forbidden.

One clue as to why the Court of Appeal in *Hungerford* ended up refusing to allow the CFA to operate as intended may be found in the philosophy that "[s]haring in the proceeds of litigation could tempt lawyers to exaggerate their client's claims, to suppress evidence, to modify advice given to clients or otherwise to depart from the professional attitudes and conduct expected of them".[15]

The Court of Appeal noted that "[t]hese concerns have not abated in recent years".[16] The regrettable implication is clear—CFA lawyers cannot be trusted.

The hundreds, probably thousands, of lawyers who, at risk to themselves, toil away offering contingency agreements to clients in all levels of society might well wonder why they have been singled out for such an unprovoked and non-evidence-based attack.

The Court of Appeal may also have provided another clue to its basis for interfering with the CFA by referring at para. 42 to *Nathanson, Schachter & Thompson v. Inmet Mining Corp*.[17] In that case, the court had concluded that the firm involved there "breached its duty to advise Inmet fully and fairly regarding the terms of the retainer and is estopped from claiming a fee greater than the sum of the fees already paid".[18] (Incidentally, no such breach was alleged against the firm in *Hungerford*.)

However, the *Inmet* case does not support the theory that CFA lawyers cannot be trusted and require special treatment. The *Inmet* case was about a law firm that did not have a contingency agreement (though no doubt, after the case was won, wished it had). In fact the firm claimed to have no fee agreement at all with the client and therefore claimed to be entitled to a fee based on *quantum meruit*.

WHERE WAS THE ERROR OF PRINCIPLE?

The B.C. Supreme Court's grounds (upheld by the Court of Appeal) in *Hungerford* for overturning the registrar's discretion were outlined in the Court of Appeal's reasons as follows:

- *Giving "too much weight" to the CFA*[19]
  Is this an error in principle? Given that the chambers judge himself made a serious error in principle (acknowledged by the Court of Appeal) in giving no weight to the CFA, how much faith should be placed in the chambers judge's opinion that the registrar gave too much

weight to the CFA? Isn't the "amount of weight" exactly the kind of issue that calls for the registrar's discretion and expertise? There is no right or wrong amount; there is no "principle" at stake; there is only the subjective discretionary opinion of the registrar.

- *Failing to give "sufficient weight to the integrity of the profession"*[20]
  The reference to professional integrity is unconvincing. Any brave lawyer or judge can provide a general description of "professional integrity", but attempting to apply the concept to a particular set of facts demonstrates how hopelessly vague, subjective and ultimately meaningless the term is. If the court agrees with the fee, the fee does not harm professional integrity. If the court does not agree with the fee, it harms professional integrity. Where's the principle?

- *Failing to properly evaluate the relationship between the "work done" and the amount of the fee.*[21]
  With respect, since the courts were dealing with a CFA, the focus should have been on the result achieved (which was the focus of the agreement), not on the amount of work done. Work done is merely time spent, and in a CFA, time spent is totally irrelevant to both the lawyer and the client. Better to have spent less time and won the case than to have spent a lot of time (which, according to the court's rationale, would have earned a bigger fee) and lost the case. There also can be a big difference between "time *per se*" and "productive" time; they cannot be valued the same way.

  The Ontario Court of Appeal in a recent case, *Bank of Nova Scotia v. Diemer*,[22] made this point very forcefully. In a straightforward receivership case, the court reduced an hourly bill from $328,000 to $157,500, saying "[t]here is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its clients and has built-in incentives for inefficiency" and "value provided should predominate over the mathematical calculation in the hours times hourly rate equations … The focus on the fair and reasonable assessment should be on what was accomplished not on how much time it took."[23]

  In any event, the amount of work done in *Hungerford* was very similar to the amount of work done in *Commonwealth No. 2*,[24] where the court described the work as "only a few well timed and well-argued motions". In that case, the contingency fee was largely upheld.

  As for the argument in *Hungerford* that the case was ended earlier than expected, justifying a reduction in the fee, the parties themselves specifically contemplated and allowed for this in their agreement,[25] which had a reduced fee if the case was settled in the first year. What

possible reason is there for the court to ignore this aspect of the CFA? When the parties themselves agree on a reduced fee if the case settles quickly, what "principle" is involved in overruling the registrar's discretion that the parties' agreement on the reduction is a reasonable one? It is also a perplexing notion that the happy event of an early resolution to a legal dispute should be a reason to reduce the lawyer's fee.

- *"… that $9 million did not strike a right balance between an amount that handsomely rewarded the firm and one that grossly over-rewarded it."*[26] This simply gets us back full circle to Mr. Justice Smith's comments in the *Canadian Red Cross* case, quoted above. The Court of Appeal further indicated that the registrar had "overemphasized the importance of holding parties to their bargains in this context".[27] Most lawyers would have the same instinctive reaction to this complaint. It is surely one of the most fundamental tenets of a legal system priding itself on following the rule of law that parties be held to their bargains. That this should be used as a reason to overturn the registrar's exercise of discretion is hard to figure.

PREFERENCE FOR TIME-BASED AGREEMENTS IS MISPLACED

It is clear that the perception of the difference between contingency fees and hourly fees in litigation cases is a cultural one. Hourly-fee lawyers tend to look at a case on the basis of the amount of billable hours it can produce—the "opportunity cost", as one of the experts in *Hungerford* put it. From one perspective, under the hourly rate regime, what kind of case it is and whether it can be won or not, are secondary to the main interest of the lawyer, which is how long the case will take (the longer the better) and how much he or she can bill. The contingency agreement, on the other hand, is focused solely on the client's interest, which is winning the case in the shortest time possible and knowing exactly what it will cost in legal fees. Thus only in the CFA case are the client's and the lawyer's interest not in conflict.

This cultural divide is manifest in most of the case law dealing with CFAs. The courts have mainly been on the side of hourly rates (which is the only kind of billing most judges experienced in practice). Hence they have obligated CFA lawyers to provide time sheets. Why should CFA lawyers have to provide what they contractually agreed they need not provide (keeping time can be a lot of work for the lawyer and his or her staff) and which the client does not want? By contrast, the current preference for hourly-based agreements seems to be based on the notion that they are free of the "evils" of CFAs.[28] The potential "evils" in hourly fee arrangements, including the

temptation to overcharge or "pad" bills calculated on the number of hours recorded, or to claim unapproved premiums on top of the hourly rate, are rarely brought up in CFA cases.[29]

THE PROBLEM WITH S. 71(4)

Under s. 71(4) of the *Legal Profession Act*, at a review of a lawyer's bill the registrar must consider all the "circumstances", which basically mirror the circumstances set out in the *Yule v. Saskatoon* case.[30] However, *Commonwealth No. 2* (which the *Hungerford* court noted is "generally regarded as the seminal case"[31] and which the courts have continued to apply through the various refinements made to the *Legal Profession Act* over the years) recognized that this process is quite arbitrary.

The Court of Appeal in *Commonwealth No. 2* said:

> Furthermore, the process suggested by Mr. Nathanson requires this Court to assess the expert evidence and apply arbitrary values to a variety of factors to reach a base figure and then to add a further arbitrary amount for risk and expectation which, in turn, would produce an arbitrary fee. In this kind of a process, it would be just as reasonable to measure the *Yule* factors at $1.5 million as at $500,000, and although a Registrar would have to do that in the absence of an agreement, I do not think that would be the correct way to approach this problem.[32]

Commonwealth No. 2 also emphasized another problem with the *Yule*-type review process: that it could lead the court into relying on hindsight. The Supreme Court wrote:

> The scope and pace of the success achieved was due, I believe, to the very able counsel work manifested by the respondent law firm. There was skill in research, skill in tactical approach and skill in execution. After the event, many things in human affairs look a great deal simpler. Matters as disparate as the Civil War or the latest Super Bowl are generally susceptible of a clear view post event but those engaged in contested human endeavours know how much more confused and inchoate matters can appear from "the trenches". It would be fundamentally unjust to not recognize the immense achievement of the law firm here. It is all too easy in hindsight to underestimate the task and the performance. In the CIS case, a superb result for the client was achieved by highly skilled effort and for this the respondent law firm is entitled to very substantial remuneration, not everything that it initially bargained for but certainly a sizeable portion of what it bargained for.[33]

It should be noted that under s. 68(5) of the *Legal Professional Act*, the registrar "must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into". Obviously such "confirmation" is meaningless if the registrar under s. 71(4) can change his or her mind with

the benefit of hindsight. In my view, once a CFA is found to be fair and reasonable, that should generally be the end of it. There may be exceptions—for example, if the lawyer fails to do anything or does very little, he or she may not be able to claim a full fee—but the registrar's power under s. 71(4) should be severely curtailed.

Finally, the Court of Appeal in *Commonwealth No. 2* acknowledged that when subjective opinions are involved, as they are under s. 71(4), one judge's opinion may not be any better than another judge's opinion:[34]

> While I would not have reduced Mr. Laxton's recovery from 25 per cent to a range of 10 per cent in these circumstances, I cannot say Hall J. was wrong in doing so or that my assessment of the appropriate fee for post-1986 realizations would be any better than his.[35]

(Similarly, is there any reason why Mr. Justice Hall's opinion should be considered better than the Chief Justice's opinion?)

Ultimately, the Court of Appeal in *Hungerford* justified judicial intervention in CFAs by stating that CFAs are never between two equal parties:

> [W]hile both parties to such an arrangement share a financial interest in the outcome of the litigation, the essential relationship is not one between two equal parties: the lawyer owes a fiduciary duty to the client and professional duties to the court; he or she has expertise the client lacks; the lawyer takes on most, or all, of the financial risk; the client is entitled to discharge the lawyer at any time regardless of the terms of the agreement (see *McQuarrie, Hunter v. Foote* (1982) 1982 CanLII 489 (BC CA), 41 B.C.L.R. 123 (C.A.) at 126–27); and the public interest is served by ensuring that the lawyer retains the appropriate degree of independence. As long as these conditions remain extant, it seems to me that the statutory and judicial constraints on lawyers' fees that I have described must remain in place and be meaningfully enforced by courts of law – allowing, however, for access to justice to be considered as well.[36]

With respect, while the theme of this passage is a little difficult to follow, the question should have been whether the two parties are equal in bargaining power. If they are, then the court's rationale for intervention falls away.

It should be remembered that Mr. Justice Hall in the *Commonwealth No. 2* case had held that "[a]greements freely entered into between parties of equal bargaining power are not lightly to be disturbed".[37] The parties in *Hungerford* and *Commonwealth No. 2* were equal in bargaining power with their lawyers, but in *Hungerford*, the Court of Appeal in the end still resorted to arbitrary opinion rather than upholding the agreement.

CONCLUSION

It takes a huge stretch of the imagination not to conclude that, notwithstanding the eminence of the court, the *Hungerford* decision has left the pro-

fession with a fee assessment process that is still nothing more than the expression of a purely subjective and personal opinion as to what the lawyer should charge.

There seems to be no escaping the conclusion that when contingency fee lawyers sign a contingency fee agreement with their clients, there is likely very little they can do to prevent a court from later setting aside or departing from the agreement—which may, if the lawyers wish to defend it (as in the *Hungerford* case), also result in a 20-day hearing with expert witnesses before a registrar,[38] a five-day hearing before a chambers judge, and a three-day hearing before the Court of Appeal and a possible application to the Supreme Court of Canada (a total of five more years of litigation), just with the hope of getting paid on the terms they agreed to previously with their client.[39]

The Court of Appeal's message in *Hungerford* is clear. Lawyers who enter into CFAs have no assurance such agreements will be upheld or applied, regardless of whether the terms are carefully crafted, agreed upon by sophisticated and fully informed parties and found to be reasonable and fair by a registrar under s. 68(5). The Court of Appeal approved the chambers judge's statement that a CFA is not a lottery ticket,[41] but getting paid under a CFA, even where the client's expectations are completely satisfied, is a lottery.

ENDNOTES

1. *Mide-Wilson v. Hungerford Tomyn Lawrenson and Nichols*, 2013 BCCA 559 at para 82 [*Hungerford (CA)*], aff'g *Mide-Wilson v Hungerford Tomyn Lawrenson and Nichols*, 2013 BCSC 374.
2. I use the expression "millionaire" to denote that the client could pay a lawyer's bill on a time basis no matter how expensive the costs.
3. *Hungerford Tomyn Lawrenson and Nichols v Mide-Wilson*, 2011 BCSC 1440. With taxes and disbursements, it was over $10 million.
4. SBC 1998, c 9.
5. *Cheshire and Fifoot Law of Contract*, 8th ed, at 69.
6. *Bhasin v Hrynew*, 2014 SCC 71 at para 70.
7. *Hungerford (CA)*, *supra* note 1 at para 82.
8. *Ibid* at paras 80–87.
9. The court noted that "the rules against maintenance and champerty—originally criminal offences—also effectively precluded contingent fee agreements. As one author observes, such agreements were believed to offend both maintenance and champerty, as a lawyer under a contingent fee agreement is 'maintaining' his or her client during the course of proceedings, and is engaging in champertous conduct by contracting for a share of the proceedings of the trial": *ibid* at para 83.
10. *Ibid* at para 89.
11. In his bestselling book *At Home*, Bill Bryson notes that "private life was completely transformed in the 19th century socially, intellectually, technologically, hygienically, conceptually, sexually and in almost any other respect that could be made into an adverb. Mr. M was born (in 1822) into a world that was still essentially medieval—a place of candlelight, medicinal leeches, travel at walking pace, news from afar that was always weeks or months old—and lived to see the introduction of one marvel after another: steam ships and speeding trains, telegraphy, photography, anesthesia, indoor plumbing, gas lighting anti sepsis in medicine, refrigeration, telephones, electric lights recorded music, cars and planes, skyscrapers, motion pictures, radio, and literally tens of thousands of tiny things more" (p. 528). Access to justice, on the other hand, has hardly changed at all in the last 100 years.
12. *Denaby and Cadeby Main Collieries (Ltd) v Yorkshire Miners' Association* (1907), 23 TLR 635.
13. [1942] AC 130 (HL).
14. *Endean v Canadian Red Cross Society*, 2000 BCSC 971 at para 85, cited at para 93 of *Hungerford (CA)*, *supra* note 1.
15. *Ibid* at para 86.
16. *Ibid* at para 87.
17. 2009 BCCA 385 [*Inmet*].
18. *Ibid* at para 73.
19. *Hungerford (CA)*, *supra* note 1 at para 98.
20. *Ibid*.
21. *Ibid* at para 102.
22. 2014 ONCA 851 at paras 36, 45.
23. The client's expert in the *Hungerford* case, John Hunter, Q.C., stated: "In my opinion, a fee of $16

million for legal work having an opportunity cost of about $1 million and which involved drafting two pleadings, arguing two motions (plus a leave application) and assisting and setting a productive strategic course cannot be described as a reasonable fee": *Hungerford (CA)*, *supra* note 1 at para 30.

24. *Commonwealth Investors Syndicate Ltd v Laxton*, 117 DLR (4th) 382, 1994 CanLII 462 (BCCA) [*Commonwealth No 2*]. This case involved the author.
25. As set out in para 14 of *Hungerford (CA)*, *supra* note 1, the firm's fees were to be (a) 20 per cent of any settlement entered into before December 9, 2009; (b) 25 per cent of any settlement entered into after December 8, 2009, but before December 9, 2009; (c) 1/3 of any settlement entered into on the earlier of: (i) December 9, 2011, or thereafter, and (ii) 6 weeks before first day of any trial; or (d) 1/3 of any judgment.
26. *Ibid.* at para 98.
27. *Ibid.*
28. *Hungerford (CA)*, *supra* note 1, quoting Loraine Minish, "The Contingent Fee: A Re-Examinae", (1979) 10 Man LJ 65.
29. The surprising aspect in the *Inmet* case was the submission of the law firm that it had no agreement with the client and was therefore entitled to *quantum meruit* based on s. 71(4), which of course allowed the firm to claim a bonus for any success even though it had taken no risk of non-payment if the case was lost.
30. (1955), 1 DLR (2d) 540 (Sask CA).
31. *Hungerford (CA)*, *supra* note 1 at para 66.
32. *Supra* note 24 at para 46 (citing to CanLII).
33. 1992 CanLII 1666 [*Commonwealth (SC)*].
34. *Commonwealth No 2*, *supra* note 24 at para 52.
35. In *Commonwealth (SC)*, Hall J. (then of the B.C. Supreme Court) approved a 25 per cent fee (the agreed percentage) on the first $6.5 million recovered but reduced the fee to 10 per cent on the balance of the recovery on the ground that most of the heavy lifting was done recovering the first $6.5 million. This was upheld on appeal. On appeal, the Chief Justice was very complimentary of the firm's work in that case, but it is safe to say that the firm would gladly have exchanged this fulsome praise for the full fee to which the client had agreed.
36. *Hungerford (CA)*, *supra* note 1 at para 92.
37. *Commonwealth (SC)*, *supra* note 33.
38. The Court of Appeal stated (at para 4) that the registrar's reasons "were exceedingly thorough and numbered 141 pages".
39. Of course, the lawyer can refuse to do the case at all on a contingency fee basis—which, except in the cases of large corporations, probably means the client will not be able to proceed with the litigation.
40. *Hungerford (CA)*, *supra* note 1 at para 79.