MEMORANDUM #1

To:	The MOJ/CJC Damages-based Agreements Working Group
From:	Rachael Mulheron
Date:	29 May 2012
Re:	Relevant Ontario case law

Dear Colleagues,

The purpose of this report is to summarise the legal issues which have arisen, in relation to Ontario Regulation 195/04, which was implemented on 1 October 2004 to authorise the use of contingency fee agreements in Ontario legal practice.

It is hoped that a summation of the primary issues which have been litigated since 2004, to do with the operation, drafting, and practical effects of Ontario contingency fee agreements, will assist the Damages-based Agreements Working Group to consider what lessons could perhaps be learnt from the Ontario experience.

I have deliberately excluded from consideration, at this stage, those cases arising from *other* Canadian provinces which have given rise to contingency-fee-related issues, given (1) the focus upon the Ontario regime which forms part and parcel of the Working Group's terms of reference, and (2) the time pressures under which the Working Group is operating.

The report does **not** purport to be comprehensive of *every* legal issue which has arisen in contingency fee litigation in Ontario since their implementation, but it refers to an array of the key issues which have been litigated to date. The research is up-to-date as at 29 May 2012,

Best wishes

Rachael

Prof. Rachael Mulheron
Department of Law
Queen Mary University of London
r.p.mulheron@qmul.ac.uk

***

© Rachael Mulheron 2012

THE LEGAL ISSUES CONSIDERED IN THIS REPORT

Issue #1 **What factors are relevant to the award of a contingency fee agreement for class actions in Ontario?**

Issue #2 **Can the claimant's lawyer, who is charging the contingency fee, be liable for adverse costs personally, should the claimant lose?**

Issue #3 **Reg 195/04 prescribes certain content for the contingency fee agreement between client and solicitor. Is this content mandatory, or recommended?**

Issue #4 **If the contingency fee agreement does not comply with Reg 195/04, does that automatically make the agreement void?**

Issue #5 **If the contingency fee agreement is challenged as being void, because it is not 'fair and reasonable', what factors does a court have regard to, in deciding whether it is void?**

Issue #6 **On what basis, if any, can a contingency fee agreement be held to be void at common law, as offending public policy?**

Issue #7 **If the contingency fee agreement between law firm and client is 'unjustified' or 'invalid' or 'void', on what basis are the fees to be assessed?**

Issue #8 **What happens if the contingency fee agreement provides that, as part of the remuneration, the solicitor will recover part of the *costs* awarded to the claimant?**

Issue #9 **What happens if the costs incurred by the successful claimant's solicitor are out of all proportion to the amount of the agreed contingency fee?**

Issue #10 **What particular circumstances apply, if the claimant who had entered into a contingency fee agreement is disabled?**

Issue #11 **What termination-of-agreement issues have been litigated so far in Ontario?**

Issue #12 **Is the contingency fee amount recovered a percentage of the entire amount recovered excluding disbursements recovered, or a percentage of the entire amount recovered which includes the disbursements recovered?**

Issue #13 **Can a solicitor obtain a charging order over settlement proceedings, if a contingency fee agreement is entered into but which does not comply with the requirements of Reg 195/04?**

© Rachael Mulheron 2012

THE ONTARIO MODEL

In his *Preliminary Report*, Jackson LJ described the Ontario model in this way *(Review of Civil Litigation costs: Preliminary Report*, vol 2), at paras 3.4 and 3.5 (internal citations omitted):

> *Where a party with a contingency fee agreement succeeds in litigation, costs are awarded in favour of that party on the conventional basis, without regard to any of the terms of the contingency fee agreement. ...*
>
> *The success premium of a plaintiff (whether a multiple of the regular fee or a percentage of the damages) must be borne by the client. It is irrecoverable from an unsuccessful defendant. The Supreme Court of Canada has affirmed that all litigants face the same cost risks: 'Unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation involving similar conduct and counsel, regardless of what arrangements the particular plaintiff may have concluded with counsel'* (per *Walker v Ritchie* [2006] 2 SCR 428, at [28]). *... I understand from Professor Watson of Osgoode Hall Law School that Canadian lawyers and academics find the English 'recoverability" principle most surprising.*

The Working Group understands that the Ontario model therefore means that, in the following example, the claimant's lawyer total recovery **cannot** exceed £25,000:

ILLUSTRATIVE EXAMPLE

Claimant's solicitor and C enter into a 25% contingency fee agreement – C recovers £100,000 in damages from D – C recovers £10,000 in costs from D:

The claimant's solicitor **cannot** recover £25,000 from the damages + £10,000 from D.

Rather, the claimant's solicitor can **only** recover £25,000 all up (£15,000 from the damages + £10,000 from D as costs).

This model is derived from the following provisions of the Solicitors' Act, RSO 1990, c S 15:

Agreements between solicitors and clients as to compensation

s 16. (1) Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated.

Definition

(2) For purposes of this section and sections 20 to 32, ‘agreement’ includes a contingency fee agreement.

...

Agreement not to affect costs as between party and party

20. (1) Such an agreement does not affect the amount, or any right or remedy for the recovery, of any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by the person to or from the client to be assessed in the ordinary manner, unless such person has otherwise agreed.

(2) However, the client who has entered into the agreement is not entitled to recover from any other person under any order for the payment of any costs that are the subject of the agreement more than the amount payable by the client to the client’s own solicitor under the agreement.

Awards of costs in contingency fee agreements

s 20.1 (1) In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client’s solicitor is being compensated in accordance with a contingency fee agreement.

(2) Despite subsection 20 (2), even if an order for the payment of costs is more than the amount payable by the client to the client’s own solicitor under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his, her or its solicitor.

(3) If the client recovers the full amount under an order for the payment of costs under subsection (2), the client is only required to pay costs to his, her or its solicitor and not the amount payable under the contingency fee agreement, unless the contingency fee agreement is one that has been approved by a court under subsection 28.1 (8) and provides otherwise.

© Rachael Mulheron 2012

Issue #1	**What factors are relevant to the award of a contingency fee agreement for class actions in Ontario?**

Source of factors — legislation and case law:

Any agreement relating to fees and disbursements between class counsel and representative claimant for the class must comply with the requirements of s 32(1) of the Class Proceedings Act 1992 (e.g., in writing; state whether contingent or otherwise; give an estimate of the fee); AND it must comply with the requirements of both the Solicitors' Act, RSO 1990, and Reg 195/04; AND it must be 'fair and reasonable, having regard to the factors set out in the case law' (per ***Vitapharm Canada Ltd v F Hoffmann-LaRoche Ltd*** [2005] OJ No 1117 (SCJ) [67]).

In fact, percentage contingency fees were permitted in Ontario class actions well before the introduction of Reg 195/04. Section 33 of the Class Proceedings Act 1992 had expressly permitted contingency fees, to be calculated on a lodestar (multiplier) basis. No reference was made in the Class Proceedings Act to a percentage contingency fee, however, and so it was assumed (early in the life of the class actions statute) that such contingency fees were not permitted in Ontario class actions. However, in 1996, a percentage contingency fee was permitted in an Ontario class action (in ***Nantais v Telectronics Pty (Canada) Ltd*** (1996), 134 DLR (4th) 470, 28 OR (3d) 523 (Gen Div) [10]–[12]), because it was reasoned that the multiplier approach referred to in the Class Proceedings Act was simply one method authorised by the Act. Following that decision, recoveries of up to 30% of class recovery were permitted by Ontario courts under class action contingency fee agreements.

The Class Proceedings Act was notable, in that it permitted contingency fees, but only under strict judicial approval, which was prescribed by the Class Proceedings Act (and adjuncted to by the provisions of the Solicitors' Act and by Reg 195/04). (For further discussion, see: R Mulheron, ***The Class Action in Common Law Legal Systems: A Comparative Perspective*** (Hart Publishing, 2004) 473–75).

Relevant principles:

Moyle v Cash Money Cheque Cashing Inc [2011] ONSC 7491 was a recent class action, in which class counsel entered into a contingency fee agreement, whereby they could recover 25% of the amounts recovered for the benefit of the class, subject to court approval (which was granted).

The case contains a useful and recent summary of the principles governing the judicial approval of

© Rachael Mulheron 2012

contingency fee agreements in class actions in Ontario. Summarising these (per [37]–[42]):

- the fairness and reasonableness of the fee awarded in class actions is to be determined in light of the risk undertaken by the lawyers in conducting the litigation, and the degree of success or result achieved (e.g., ***Smith v National Money Mart*** [2010] OJ No 873 (SCJ) [19]–[20]);

- where the fee arrangements are a part of a class actions settlement, the court must decide whether the fee arrangements are fair and reasonable; and the fees must not bring about a settlement that is in the lawyers' interests, but not in the best interests of the class members as a whole (***Smith***, [22]);

- fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class action and to do it well (***Smith***, [23]);

- factors relevant in assessing the reasonableness of the fees of class lawyers include (***Smith***, [19]–[20]):

  (a) the factual and legal complexities of the matters dealt with;
  (b) the risk undertaken, including the risk that the matter might not be certified;
  (c) the degree of responsibility assumed by class lawyers;
  (d) the monetary value of the matters in issue;
  (e) the importance of the matter to the class;
  (f) the degree of skill and competence demonstrated by class lawyers;
  (g) the results achieved;
  (h) the ability of the class to pay;
  (i) the expectations of the class as to the amount of the fees; and
  (j) the opportunity cost to class lawyers in the expenditure of time in pursuit of the litigation

Case example:

In ***Robinson v Rochester Financial Ltd*** [2012] ONSC 911, the contingency fee, which was 25% of total recovery, was held to be 'fair and reasonable', having regard to the following 10 factors (per [23]):

'(1) the action would never have been commenced, let alone successfully resolved, had it not been been for the initiative, tenacity and persistence of class counsel in the face of widespread apathy on the part of all class members;

© Rachael Mulheron 2012

(2) class counsel funded disbursements of almost $200,000, making it unnecessary to apply to the Class Proceedings Fund;

(3) class counsel have gone without any compensation at all through four years of litigation;

(4) class counsel gave an indemnity to the representative plaintiffs with respect to any adverse costs award – the assumption of a significant risk of not only receiving no fees and disbursements, but the possibility of a substantial six figure costs award against them;

(5) the matter was complex and the outcome was far from certain;

(6) the result achieved is financially significant and every class member will receive actual cash compensation;

(7) in addition to the cash value of the settlement, class members will receive the added benefit of a declaration that their loans and promissory notes are unenforeceable, a matter of some concern to class members;

(8) the time spent by class counsel was about 4,600 hours, and the proposed fee represents a multiplier of less than 2;

(9) there has been no real opposition to class counsel's fees by class members ... ;

(10) the payment of the proposed fee does not significantly dilute the recovery by class members, and their ability to pay the fee is not an issue.'

Amount of contingency fee:

Robinson approved 25% of class recovery, but the approved percentage has been higher in recent case law too. For example, in ***Travassos v Tattoo*** [2011] ONSC 2290, [29]–[34], a contingency fee of 30% in the class action was also held to be 'fair and reasonable', on the basis of the 10 factors noted `above.

Issue #2	**Can the claimant's lawyer, who is charging the contingency fee, be liable for adverse costs personally, should the claimant lose?**

Yes. The liability of solicitors for the adverse costs which may be incurred by their client, where their client has embarked upon a contingency fee, does not seem to have drawn adverse comment — at least in the class actions context. In such cases, the class lawyers, and the representative claimant, have agreed that the class lawyers will bear adverse costs, should the representative claimant lose on the common issues.

In ***Robinson v Rochester Financial Ltd*** [2012] ONSC 911, the fact that the claimant's lawyers gave an undertaking to cover adverse costs, in the event that the representative claimant lost, was a factor in

© Rachael Mulheron 2012

finding that the contingency fee was 'fair and reasonable' in that class action. Further, in ***Sutts, Strosberg LLP v Atlas Cold Storage Holdings Inc*** [2009] ONCA 690, where objections to a class actions settlement occurred, the court fixed the costs of the objectors in the sum of $10,000, to be paid by the class lawyers.

Just to note, I could **not** find references in other Ontario case law, to do with unitary actions, that the claimant's lawyer undertook to pay adverse costs if the claimant lost. I understand, from anecdotal information provided an Ontario lawyer, that while an indemnity against adverse costs is commonly given to the representative claimant by the class lawyers, such an indemnity is rare, in the case of unitary (i.e., non-class) litigation.

Issue #3	**Reg 195/04 prescribes certain content for the contingency fee agreement between client and solicitor. Is this content mandatory, or recommended?**

It is mandatory. The Ontario Contingency Fee Retainer Agreement has to contain 10 'ingredients' – and the language of Reg 195/04 is mandatory, that the solicitor 'shall' prepare the contingency fee agreement in accordance with the Reg. **All** the ingredients must be mentioned, in order to comply with Reg 195/04.

In ***Miller v Bender*** [2011] ONSC 4379, the contingency fee agreement contravened several provisions of Reg 195/04 – the court said that '[s]ome of the deficiencies are minor and others are significant', but that all of the breaches disobeyed the mandatory language of the Reg, as to what the contingency fee agreement should contain (at [11]). For example, the contingency fee agreement did **not** include the following requirements:

(a) a title that says 'Contingency Fee Retainer Agreement'
(b) signatures verified by a witness;
(c) the name, address and telephone number of the solicitor and of the client;
(d) a statement that indicated, eg, that the client and the solicitor had discussed options for retaining the solicitor other than by way of a contingency fee agreement, including retaining the solicitor by way of an hourly-rate retainer;
(e) a statement that explained the contingency upon which the fee is to be paid to the solicitor;
(f) a statement that set out the method by which the fee is to be determined and, if the method of determination is as a percentage of the amount recovered, a statement that explains that for the purpose of calculating the fee, the amount of recovery excludes any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements;
(g) a simple example that shows how the contingency fee is calculated;
(h) a statement that informs the client of their right to ask the Superior Court of Justice to review and

approve of the solicitor's bill;

(i) a statement that outlined when and how the client or the solicitor may terminate the contingency fee agreement, etc;

(j) a statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter;

(k) a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement; and

(l) a statement dealing with the fact that the client was disabled, and the legal ramifications of that.

There was an equally long list of deficiencies in the contingency fee agreement in the case of ***Laushway Law Office v Simpson*** [2011] ONSC 4155, and a wide range of missing matters in ***Du Vernet v 1017682 Ontario Ltd*** [2009] OJ No 2373, [18] too.

In ***Cotugno v Kingsway General Insurance Co*** [2011] ONSC 1904, Ms Cotugno retained Mr Romano to assist her to collect spousal and dependent benefits from Kingsway General Insurance Company, following the death of her common law spouse. Mr Romano's retainer was a contingency fee agreement of 30%. That agreement was confirmed in a letter and email that the solicitor sent to the client. Nothing was signed by the client. That did not comply with Reg 195/04 either.

Issue #4 If the contingency fee agreement does not comply with Reg 195/04, does that automatically make the agreement void?

No, it does not. This point was specifically dealt with in ***Laushway Law Office v Simpson*** [2011] ONSC 4155, where the following points were made:

- in other jurisdictions (i.e. Alberta), there is a specific Rule stating that if the requirements for a contingency fee agreement are not met, the solicitor is only entitled to those legal fees that would have been payable in the absence of a contingency agreement — but such a rule is absent in Ontario, so it must be a matter of judicial decision as to what is the effect of non-compliance (at [120]);

- as at the date of ***Laushway***, there had been 'little case law regarding the remedy, if the requirements of Reg 195/04 were not met' in Ontario (at [121]);

- some breaches of Reg 195/04 will inevitably be more serious than others. In ***Du Vernet v 1017682***

Ontario Ltd [2009] OJ No 2373, where the agreement did not comply with Reg 195/04, Aston J thought that '[s]ome of the defects are of a minor or technical nature, but others are significant' — and that the more serious ones, in that case, were that the contingency fee agreement did not contain a statement informing the client that they retained the right to make all critical decisions regarding the conduct of the matter, and that it did not contain a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement. However, Aston J considered that an agreement *could* be enforced, even if it contained deficiencies (although this one was not);

- in ***Laushway***, having reviewed the scant preceding case law, Beaudoin J concluded (at [126]) that a contingency fee agreement which does not meet the technical requirements of Reg 195/04 may still be enforced as a reasonable and fair agreement. The agreement is not inherently void or voidable. The terms of the contingency fee agreement, and also the actual non–compliance which occurred, must be examined to determine whether the breaches were 'minor' or 'significant', by 'balancing the competing claims and their legitimate perspectives and expectations'. Under s 24 of the Solicitors' Act, a court is permitted to enforce a contingency fee agreement if it is 'fair and reasonable' — so that, whenever an application is made to challenge a contingency fee agreement, that is the touchstone for the court to consider. Beaudoin J concluded that '[i]t would not make sense for the Legislature to go to the trouble of including CFAs in the definition of s 24 if it did not intend to give the court the discretion to enforce a contingency fee agreement if it was fair and reasonable';

- just because the contingency fee agreement does not contain the mandatory terms required by both the Solicitors' Act, s 28.1(12) and Reg 195/04 does not mean that it cannot possibly be fair or reasonable — in fact, in ***Laushway***, the contingency fee agreement was held to be fair and reasonable, despite its very considerable non-compliance with Reg 195/04.

Issue #5	**If the contingency fee agreement is challenged as being void, because it is not 'fair and reasonable', what factors does a court have regard to, in deciding whether it is void?**

Pursuant to s 24 of the Solicitors' Act, and upon application being made to it, '*if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may*

© Rachael Mulheron 2012

be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner'.

The factors to determine if an agreement is fair and reasonable were outlined in ***Giusti (Litigation guardian of) v Scarborough Hospital*** [2008] OJ No 1899, [81]:

(a) The time spent by the solicitor,
(b) The difficulty and complexity of the case,
(c) The responsibility assumed by the solicitor,
(d) The amount in issue,
(e) The importance of the case to the client,
(f) The degree of skill and competence demonstrated by the solicitor,
(g) The results achieved,
(h) The client's ability to pay,
(i) The client's expectation of the amount of the fee; and
(j) The financial risk assumed by the solicitor of pursuing the action, including the risk of non-payment, the likelihood of success and the amount of the expected recovery.

Earlier, in ***Re Cogan*** (2007), 88 OR (3d) 38, Smith J had regard to the following factors (at [42]):

> 'when a contingency fee agreement is being presented for approval by the court, the following factors must be considered:
>
> (a) the financial risk assumed by the lawyer, which is included under likelihood of success, the nature and complexity of the claim, and the expense and risk of pursuing it;
> (b) the results achieved and the amount recovered;
> (c) the expectations of the party;
> (d) who is to receive an award of costs; and
> (e) achievement of the social objective of providing access to justice for injured parties, including injured children and parties under disability.
>
> I find that these factors must be accorded much greater weight than the time spent by the lawyer.'

Issue #6 On what basis, if any, can a contingency fee agreement be held to be void at common law, as offending public policy?

Contingency fees are not inherently objectionable, as being champertous, given their endorsement in the Solicitors' Act (amended in 2002).

However, Ontario courts have acknowledged that there is the potential for abuse in contingency fee agreements (***McIntyre Estate v Ontario (A-G)*** [2002] OJ No 3417 (CA), and that a contingency fee agreement can be held to be contrary to public policy at common law, quite independently of the 'fair and reasonable' check which the court can apply under s 24 of the Solicitors' Act **(*Laushway Legal Office v Simpson*** [2011] ONSC 4155, [143]–[145].

In ***Laushway***, Beaudoin J held that a court is permitted to hold a contingency fee agreement to be against public policy, because the Solicitors' Act '*is consumer protection legislation, and in my opinion, a contingency fee agreement will be against public policy when the consumer has been taken advantage of. ... this will likely be when the client did not know their rights, or did not understand the nature of the agreement before signing*' (at [145]). It was also part of the court's inherent jurisdiction to supervise officers of the court

In that case, however, there was no question of the contingency fee agreement having been against public policy. The client had admitted that, even if the missing data (required by Reg 195/04) had been incorporated in the contingency fee agreement, it would not have affected his decision to enter into the agreement or accept the settlement. He was a lawyer and a sophisticated client, who understood the nature of the agreement. He had signed a contingency fee agreement previously, so this was not his first. He sought clarifications about disbursements. He challenged the account, as he was entitled to do under the provisions of the Solicitors' Act. The agreement was held to be fair and reasonable, and not offending public policy.

However, in ***Du Vernet v 1017682 Ontario Ltd*** [2009] CanLII 29191, the contingency fee agreement **was** set aside, and declared void and unenforceable under s 24 of the Solicitors Act. There appeared to be several factors which lead to that result. First, the signed contingency fee agreement did not comply with the requirements of the Solicitors Act or of Reg 195/04 (although, of itelf, that would not have been sufficient). Secondly, the agreement did 'not reflect a true consensus on its terms', because that agreement was inconsistent with an earlier contingency fee agreement, and essentially transformed a 'contingency fee' arrangement into a 'premium' arrangement (i.e.,. an hourly rate, plus a contingency fee on top of that). The court said that 'there was no meeting of the minds in that regard', because the client never understood that

the new retainer arrangement was intended to oblige the clients to pay both fees of up to $450 per hour and a further 40% of any recovery as additional fees. Thirdly, the agreement was void and unenforceable because it was oppressive and unreasonable to assess the solicitors' compensation entitlement based only upon that agreement, when there was a '*clear inequality of bargaining position when the clients executed the May 2006 Retainer Agreement. If the solicitors wished to do more than change the contingency fee percentage from 30% to 40%, they should have spelled that out more clearly. ... 40% might not be unreasonable as a true contingency fee, but it is most unreasonable as a premium on top of hourly rated services*' (at [23]).

Issue #7	**If the contingency fee agreement between law firm and client is 'unjustified' or 'invalid' or 'void', on what basis are the fees to be assessed?**

A *quantum meruit* assessment is countenanced by s 24 of the Solicitors' Act (reproduced above). This is what has occurred, whenever a contingency fee agreement has fallen by the wayside.

According to ***Dryden v Oatley Vigmond LLP*** [2011] ONSC 7303, once the costs assessments officer had decided that the contingency fee agreement was not valid, she assessed the account on a *quantum meruit* basis. In ***Du Vernet v 1017682 Ontario Ltd*** [2009] CanLII 29191, where the contingency fee agreement was also declared to be void and unenforceable, the lawyers' fees were calculated on a *quantum meruit* basis too.

In ***Laushway*** (where the contingency fee agreement *was* held to be valid, fair and reasonable), it was also held in dicta that, even if the agreement had been void for public policy reasons, the fees would have been assessed on a *quantum meruit* basis (at [149]).

Issue #8	**What happens if the contingency fee agreement provides that, as part of the remuneration, the solicitor will recover part of the *costs* awarded to the claimant?**

Recovery of costs by the solicitor, under a contingency fee agreement—whereby those costs are additional to the contingency 'success' fee itself—is not permitted in Ontario, unless the court approves, and also that 'exceptional circumstances' apply.

Quite apart from Reg 195/04, it is provided in the Ontario Solicitors' Act that '*A contingency fee agreement shall not include in the fee payable to the solicitor,* ***in addition to the fee payable under the agreement,*** *any amount arising as a result of an award of costs or costs obtained as part of a settlement*',

© Rachael Mulheron 2012

unless a court approves and exceptional circumstances apply (s 28.1(8)). In other words, the provision requires that court approval is required if a contingency fee agreement provides that lawyers receive, in addition to the contingency fee, a part of a costs award, as part of a settlement arrangement.

In ***Miller v Bender*** [2011] ONSC 4379, the contingency fee agreement provided that the fees would be comprised of the partial indemnity costs recovered by the claimants, plus 15-25% of the total recovery made by the claimants. Therefore, the fees were contingent on the amount of the recovery, but the fees also included an additional element of costs obtained as part of the settlement. The matter was referred to another hearing, for a judge to determine whether this was an 'exceptional case' so as to justify that.

In ***Farkas v Sunnybrook & Women's College Health Sciences Centre*** [2009] CanLII 44271, a class action, the representative claimant had signed a contingency fee agreement with class counsel, which provided that legal fees should only be paid in the event of a successful judgment or a successful settlement, calculated in one of two ways: (1) compute a base fee, using the usual hourly rate of legal professionals working on a file, and then apply a 'multiplier', or (2) 25% of class recovery after certification plus the fee portion of any party and party costs. However, a new retainer agreement was later signed between class counsel and client, to modify the agreement to reflect s 28.1(8) of the Solicitors' Act, The new contingency fee agreement did not provide for any 'multiplier' approach or costs recovery, but provided, instead, for a contingency fee of 30% of class recovery after certification but before a trial of the action.

In ***Giusti v Scarborough Hospital*** [2008] CanLII 22555, the client was a disabled child (6 years old, injured by medical negligence during his birth), and, according to s 5 of Reg 195/04, a lawyer for a person under disability represented by a litigation guardian with whom the lawyer is entering into a contingency fee agreement shall either apply to a judge for approval of the agreement before it is finalized or include the agreement as part of the motion for approval of a settlement, requiring the court consider whether or not the contingency fee agreement was enforceable as a contingency agreement. The court held that it was not — partly because the contingency agreement provides for both the payment to the solicitors of costs received from the defendants and a percentage based on damages recovered — and the recovery of costs is prohibited by s 28.1 of the Solicitors' Act, unless the court is satisfied that there are exceptional circumstances and approves the inclusion of the costs (which did not apply in this case).

However, occasionally the 'exceptional circumstances' **do** apply, whereby the law firm can recover the costs awarded to the client, on top of, and as part of, its contingency fee. That occurred in ***Treyes v Ontario Lottery and Gaming Corp*** [2007] CanLII 27587, a case in which the claimant sued the defendant to recover his gambling losses, incurred at the defendant's gaming facilities. The claimant had been diagnosed both with Parkinson's Disease, and with the disorder of pathological gambling. The case ultimately settled. The contingency fee agreement in the case required that a costs 'premium' be paid to the

law firm, Fancy Barristers, of 14.5% of the claimant's damages, and so the court was asked to award a costs premium as a part of the contingency fee agreement, on consent of the claimant, pursuant to s 28.1(8) of the Solicitors' Act. The court was prepared to do so. Macdonald J held: '*I allow the 14.5% premium. Mr Fancy and his colleagues did exemplary work at enormous risk to their firm as detailed above. This was a novel action. For it to succeed, as it did, it required great temerity and commitment to a difficult case by Fancy Barristers. This is a case of exceptional circumstances ... The Plaintiff consented to the premium as part of the contingency fee arrangement*' (at [15]–[16]).

Issue #9	**What happens if the costs incurred by the successful claimant's solicitor are out of all proportion to the amount of the agreed contingency fee?**

It will be recalled (from the provisions from the Solicitors Act 1990, reproduced under 'Ontario Model', p 4 above) that s 20(2) of the Solicitors Act provides:

> the client who has entered into the agreement is not entitled to recover from any other person under any order for the payment of costs that are the subject of the agreement more than the amount payable by the client to the clients own solicitor under the agreement.

This provision comes into play when the costs incurred by the claimant's solicitor are far in excess of any contingency fee amount agreed between client and solicitor. The problem of disproportionate costs, together with contingency fee agreements, recently arose in ***Giuliani v Region of Halton*** [2011] ONSC 5119 (and the author thanks the Chairman of the Contingency Fee Working Group, Mr Mike Napier QC, for drawing her attention to this decision):

Facts: a driver, Ms Giuliani, was seriously injured in a car accident. She lost control of her vehicle when it skidded on a road which was covered with snow and ice, and struck an oncoming car. Ms Giuliani sued the local authority, claiming they failed to keep the road in a condition that was reasonable in the circumstances. The trial judge found the local authority liable, but awarded 50% contributory negligence against Ms Giuliani. (An appeal was dismissed: [2011] ONCA 812). The trial judge awarded the respondent $375,000 in damages, after taking into account the deduction for contributory negligence.

The problem: Claimant's counsel claimed costs in the amount of (minimum: partial indemnity basis) $383,246, or (maximum: substantial indemnity basis) $558, 327. The court (Murray J) said that '[t]he total legal costs claimed, either on a partial or substantial indemnity basis, together with the costs of disbursements, dwarf the judgment' (at [5]).

© Rachael Mulheron 2012

There was an additional sum of $229,984 claimed for disbursements; plus a claim for $92,734.26 for interest on a loan that had been taken out by the client from a funder, both of which caused additional problems.

The contingency fee agreement: The retainer between Ms Giuliani and her lawyer provided, in para 6, that: 'In addition to the fees charged in interim accounts, there will be a final account in which the complexity of the issues and the result obtained will also be taken into consideration in fixing the amount of the final fee. In the case of a personal injury action, a medical malpractice, or a motor vehicle accident, the legal fee will be 35% of the total settlement achieved in the action.'

Outcome: According to Murray J, the retainer agreement clearly provided that, in a car accident case, 35% of the total settlement was 'the legal fee' — and that '[t]he phrase "the legal fee" means the entire legal fee. With damages being calculated at $375,000 by the trial judge, para. 6 of the retainer agreement provides for "the legal fee" in the amount of $131,250.'

That meant that, according to Murray J (at [23]):

> *the maximum legal fee that counsel could render to her client is fixed by the retainer agreement and I am therefore inclined to award costs in the amount of $131,250, plus applicable taxes—provided that this amount is fair and reasonable after considering what recoverable costs would be on a partial indemnity basis without regard to para. 6 of the retainer agreement. In other words, the amount of $131,250 cannot be assessed in a vacuum. This conclusion is not only consistent with s 20(2) of the Solicitors Act, but also is designed to ensure that the plaintiff does not pass on the whole of her costs to the defendants, unless the amount of $131,250 is a fair and reasonable amount on a partial indemnity basis keeping in mind the circumstances of the case, other relevant provisions of the retainer agreements and the applicable legal principles.*

Ultimately, Murray J considered that, pursuant to the contingency fee agreement, the **maximum** legal fee that the lawyer was entitled to render to her client was $131,250 — but that such a sum was '*too high, after considering what recoverable costs might be on a partial indemnity basis (without regard to para. 6 of the retainer agreement). Since the calculation of costs on a partial indemnity basis is not a science, there will be a range of costs which could be viewed as reasonable. ... I conclude that the amount of $131,250, plus tax, is outside the range of reasonableness*' (at [42]). The recoverable costs were fixed at $104,000. Disbursements were fixed at $120,000; and no interest was payable by the client on the loan, given that the annual rate of interest on the loan (42%) was termed 'unconscionable', and that '[t]he concept of reasonableness governs the Court's treatment of disbursements' (at [56]–[57]).

Issue #10	**What particular circumstances apply, if the claimant who had entered into a contingency fee agreement is disabled?**

Particular provisions apply in Ontario, where the client is disabled, which appear sensible and desirable for any damages-based agreement which may be implemented in England. In Ontario, where the client who entered into the contingency fee is disabled (and, for Ontario's purposes, that means that the person is a minor, an absentee, or mentally incapable), then there are **extra** criteria which must be satisfied, for the protection of the client — which apply, both at the outset, and at conclusion, of the case.

These include (per Reg 195/04) that the contingency fee agreement either must be reviewed by a judge before the agreement is finalised or a settlement is approved; that the amount of the legal fees, costs, taxes and disbursements are subject to the approval of a judge when the judge reviews a settlement agreement; and that any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise.

These provisions have been the subject of application and litigation since the contingency fees were introduced in Ontario.

In ***Miller v Bender*** [2011] ONSC 4379, the client (claimant) was a severely brain-damaged child, who had been injured in a car accident caused by the defendant's negligence. The claim was settled, and the solicitors acting for the claimant had entered into a contingency fee agreement with the claimant (via his litigation guardian). The settlement judge expressed concern that the fees sought by the solicitors were excessive, and she invited submissions as to those fees.

One of the many problems with the contingency fee retainer in ***Miller*** was that it did not state (as Reg 195/04 requires) that the contingency fee agreement either must be reviewed by a judge before the agreement is finalised or a settlement is approved, etc (as noted above). As the agreement was silent on these issues, the court concluded that the contingency fee agreement may violate the Regulations, and invited counsel to submit records of hours spent/hourly rates/personnel who worked on the file, for a *quantum meruit* assessment of costs.

In ***Marcoccia v Ford Credit Canada Ltd*** [2008] CanLII 27817, the provisions protecting clients with disability were also at issue. The client, Robert, was a person under a disability (who was litigating via his litigation guardian, Angela Marcoccia). The court invited submissions from the office of the Public Guardian and Trustee, regarding the interpretation of the contingency fee agreement between Robert and his solicitors, and its application in Robert's best interests. The court stated that it was '*grateful for the objective and*

© Rachael Mulheron 2012

helpful views willingly provided at various stages of the proceedings by the PGT and particularly upon this application. It is trite to say that Robert's own guardian and solicitor, no matter how well-meaning they may be, simply cannot approach this matter with the experience and balance that an observer impartial to the outcome can bring to bear' (at [2]). In this case, the Public Trustee produced a report, which stated: '*Most clients lack experience in legal retainers, lawyers, fees and legal costs. Most clients have no independent method by which to become informed of the likely amount of assessed damages, just as they are unlikely to understand the concept of partial indemnity or substantial indemnity costs payable by defendants ... Mrs Marcoccia is not a sophisticated business person and has no experience in the negotiation of legal retainer agreements. A solicitor, as the informed contracting party, holds the trust of a client. In retainer agreement is a contract. It is this unbalanced contracting power which obliges the solicitor to engage in full and frank disclosure to the client, including realistic examples of the possible recovery, percentage fee calculations and the impact of costs awards against the plaintiff and recovered by the plaintiff.*'

Moore J himself noted that, '*whether Angela understood the terms of the agreement or not and her support for the contingency fee/premium notwithstanding, I am concerned. The parties to this agreement contemplated a 15% fee would be payable on Robert's best case at trial, that being complete success on both liability and damages issues. That approach is entirely in keeping with traditional thinking supporting contingency fees. The lawyer and the client share, upon a predetermined basis, in the 'thrill of victory and the agony of defeat*'. However, in this case, Moore J did not think that such a philosophy was being applied, given how the contingency fee agreement was drafted: '*whether Angela appreciates it or not, the proposal here provides the thrill solely to NRA while the agony is borne only by Robert, a person under a disability who faces a lifetime of supervision and care needs with insufficient funds to meet those needs*' (at [43]). Ultimately, the court would not approve of the application of contingency fee process called for by the terms of the agreement, but varied its terms, in Robert's favour.

In ***Giusti v Scarborough Hospital*** [2008] CanLII 22555 too (mentioned above), the contingency fee agreement, entered into between disabled client (a minor suffering from severe cerebral palsy) and law firm, was held to be unenforceable — partly because it included recovery of costs, which was prohibited under s 28.1(8) of the Solicitors' Act 1990.

Issue #11 What termination-of-agreement issues have been litigated so far in Ontario?

In ***Ledroit v Rooplall*** [2011] ONSC 2751, the solicitor and client entered into a contingency fee agreement (re an action against a doctor, alleging sexual abuse; 25% contingency fee agreed). The solicitor formed the view that, upon reviewing the defence medical report, his client had not been honest in recounting her own

and her family's history regarding mental illness. The solicitor met with the client and her husband at the courthouse on the morning of the date scheduled for trial, and he confronted the client with certain discrepancies in the medical report regarding the client's true medical history. The solicitor advised the client that he was terminating the CFRA, and gave the client two options: (a) to retain a new lawyer, or (b) to retain him on different terms, namely, that the solicitor would be paid for all work done to date and thereafter on an hourly rate basis regardless of success.

Whether the solicitor was justified in unilaterally imposing new retainer terms upon the client on the day scheduled for the trial; and whether the client was under duress in agreeing to option (b), was deferred, to be considered in a trial at a later date. However, in considering the right of a solicitor to terminate a contingency fee agreement, the court stated (at [43]–[47], internal citations omitted) that:

> *In my view, the circumstances giving rise to this new agreement were clearly a high-pressure situation. The new retainer terms were proposed to the client at the court on the day the trial was scheduled to commence. The solicitor-client relationship is a fiduciary one, obliging the solicitor to act with strict fairness and openness towards the client. These duties overlay the entire relationship, giving rise to a comprehensive duty of loyalty that ensures the relationship is one of trust and confidence from which flow obligations of loyalty and transparency. The source of the fiduciary duty is not the retainer itself but rather all the circumstances, including a retainer, which creates the relationship of trust and confidence: ... The assessment officer did not conclude that the solicitor was justified in unilaterally imposing new retainer terms upon the client on the day scheduled for the trial. The rendering of legal services is not simply a matter of contract. A retainer is not a purely commercial engagement; it is a contract of a special character governed by equitable considerations tempering the application of strict contract law'.*

Issue #12	**Is the contingency fee amount recovered to be a percentage of the entire amount recovered excluding disbursements recovered, or a percentage of the entire amount recovered which includes the disbursements recovered?**

Under Ontario's rules, the answer to this is clear. It is the first option. Reg 195/04, s 2.5, provides that:

> *2. A solicitor who is a party to a contingency fee agreement shall ensure that the agreement includes the following:*
>
> *5. A statement that sets out the method by which the fee is to be determined and, if the method of*

determination is as a percentage of the amount recovered, a statement that explains that for the purpose of calculating the fee the amount of recovery excludes any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.

The rules also provide that disbursements have to be deducted before any contingency fee multiplier is applied.

As a result, it was said in ***Hamilton v Nerbas*** [2008] ABQB 674 that '*[w]hat distinguishes Ontario's rule from Alberta's is an explicit, fleshed out statement noting that disbursements are to be excluded when the method of determination is a percentage of the amount recovered.*' That explicit wording was not present in Alberta's rule, so that, in ***Hamilton***, the client had to pay the solicitor a maximum fee payable of 35% of gross proceeds, including disbursements. The Alberta court suggested that the Alberta rules governing contingency fees may warrant re-drafting, in light of this decision in ***Hamilton*** (at [31]).

Issue #13	**Can a solicitor obtain a charging order over settlement proceedings, if a contingency fee agreement is entered into but which does not comply with the requirements of Reg 195/04?**

A charging order can be obtained in Ontario by a solicitor, if three criteria are met: (a) the fund, or property, is in existence at the time the order is granted; (b) the property was 'recovered or preserved' through the instrumentality of the solicitor; and (c) there must be some evidence that the client cannot or will not pay the lawyer's fees (per ***Adams v 1275658 Ontario Ltd*** [2010] OJ No 182 (SCJ).

Furthermore, a charging order can be granted for fees owed pursuant to a contingency fee agreement (per ***Mpampas v Steamatic Toronto Inc*** [2010] OJ No 2099 (Ont CA).

However, while normally a solicitor will have a first charge over funds obtained through the efforts of that solicitor, the court retains the discretion to order otherwise. A solicitor who fails to comply with the requirements in Reg 195/04 or in the Solicitors' Act, relevant to the contingency fee agreement, is not entitled to the 'extraordinary privilege' of a charging order, according to ***Cotugno v Kingsway General Ins Co*** [2011] ONSC 1904, [13]. This is because both s 28.1 of the Solicitors Act, and Reg 195/04, are designed to protect clients who enter into contingency fee agreements with their lawyers. Disobeying them will expose the solicitor to the 'punishment' of losing the right to a charging order.

***