

## **Pre-Approved Retainer Agreements for the Disabled and Minors**

Written by Allen Wynperele and Laura McCracken, April 24, 2012

Contingency Fee Retainer Agreements were not permitted prior to the amendments to the *Solicitor's Act* in 2004

In October 2004, s. 28.1 was added to the *Solicitor's Act* which provides that a solicitor and client may enter into a contingency fee retainer agreement. The agreement must comply with s. 28.1, namely that payment of the solicitor's fees are contingent and are payable at the resolution of the claim. The section expressly prohibits these agreements in criminal and family matters.

S. 28.1 of the *Solicitor's Act* enables the *Contingency Fee Agreements Regulation*. This Regulation prescribes required and prohibited content. In addition, the Regulation prescribes when a retainer agreement should be approved by the court prior to enforcement.

### **Court Approval of a Contingency Fee Agreement**

S. 5(1)(a) of the *Contingency Fee Retainer Agreement Regulation* provides

**“Contingency fee agreement, person under disability**

5. (1) A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,

- (a) apply to a judge for approval of the agreement before the agreement is finalized; **or**
- (b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (1).

(2) In this section,

“person under disability” means a person under disability for the purposes of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (2).”

This section of the *Regulation* allows the parties to apply for approval of the agreement *either* (a) before the agreement is finalized *or* (b) when seeking approval of a settlement pursuant to Rule 7.08.

In the past, people had been seeking court approval of contingency fee agreements involving parties under a disability at the conclusion of the case when they were getting approval of the settlement pursuant to part (b) of s. 5 (1).

On February 26, 2012, Allen Wynperle Professional Corporation applied to the court under part (a) of s. 5 (1) for approval of a contingency free agreement prior to finalizing the agreement. The case involves three minor children, parties under a disability within the meaning of the *Rules of Civil Procedure*, who had lost both parents in a motor vehicle accident. The minor children, by litigation guardian were named as the respondents in the application.

### **Process for Approval under s. 5 (1)(a)**

In order to seek approval, a notice of application was commenced pursuant to *Rule* 14.05 (3) (h). In addition, after the notice of application was issued and prior to the return of the application, a motion was brought under *Rule* 7.03 to appoint the litigation guardians for the minor respondents. According to *Rule* 7.03 the court must approve of litigation guardians for a defendant or respondent.

In support of the application, Affidavits of the Applicant and Respondents were included as part of the application record along with the proposed retainer agreements. The respondents retained independent counsel and filed a notice of appearance pursuant to *Rule* 39 in order to eliminate the probable question of coercion, which is a significant issue in retainer approval cases.

Justice Turnbull heard the Application on February 26, 2012 and granted the Order approving the contingency fee retainer agreements as proposed.

### **How is a particular percentage approved?**

There are 5 factors the court must review prior to awarding a particular percentage.

These are;<sup>1</sup>

- 1) the likelihood of success,
- 2) the nature and complexity of the claim,
- 3) the expense and risk of pursuing it,
- 4) the amount of the expected recovery and

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<sup>1</sup> In *Re Cogan* 2010 ONSC 915, *Choi v Choi* 2010 ONSC 4800, *Kerns v Charland* 2011 ONSC 2961

5) who is to receive an award of costs.

Although the case law deals with approval of fees at the end of the relationship, these 5 factors must be addressed in an application brought at under s.5 (1)(a).

### **Case Law Application of the 5 Factors**

*In Re Cogan*<sup>2</sup>, the court assessed a solicitor's contingency fee stemming from a medical negligence case pertaining to a birth injury. In the original agreement, the fee was 33.3% of the settlement awarded. The court assessed the solicitor's fees to be 25% based on the finding that this was a moderately risky case which settled after examinations for discovery. The resulting settlement was excellent.

*Choi v Choi*<sup>3</sup>, resulted from a catastrophic motor vehicle accident involving a minor. The court assessed the 5 factors from *Re Cogan*. In this action the court found the lawyers assumed risk minimal risk. Unlike *In Re Cogan* this was not a complex case and the action settled before trial expenses incurred. Damages of over \$13 million were recovered (very good quantum) and the court awarded fees which amounted to 14.35% plus the partial indemnity costs and disbursements.

Lastly, in *Kerns v Charland*<sup>4</sup>, a case involving a motor vehicle accident resulting in catastrophic injuries for a minor, the court did not find that this was either an overly complicated or risky case for the law firm. On the tort claim, the court awarded 15 %

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<sup>2</sup> *In Re Cogan* 2010 ONSC 915

<sup>3</sup> *Choi v Choi* 2010 ONSC 4800

<sup>4</sup> *Kerns v Charland* 2011 ONSC 2961

plus partial indemnity costs and disbursements, which had settled for approximately \$1 million.

**Why seek approval at the start of the relationship?**

Firstly, s.5 (1) of the Regulation is written so that both options are available. Bringing such an application is part of what the legislature intended when implementing the *Contingency Fee Agreement Regulation*.

Secondly, approval of the agreement does not interfere with the respondent's legal right to have the solicitor's account, rendered at the conclusion of the relationship and reviewed by the court pursuant to the rights to assess a solicitor's bill under the *Solicitor's Act*.

Bringing an application under s.5.(1) (a) does not do anything which will later inhibit the court from acting in the best interests of the party under a disability. The provisions under *Rule 7.08* must still be followed.

However, by bringing this application, the parties eliminate questions about the conditions which caused the litigation guardian to sign the agreement. Furthermore, the litigation guardian cannot later allege that they did not understand the effect of the agreement.

Lastly, the solicitor has confirmation that the terms, including the fee percentage to be applied at the end of the relationship, is fair and reasonable in relation to the nature of the case.

Only once the court has an opportunity to hear the particular facts of the case will a judge then determine if in the circumstances the fee is fair and reasonable.

The only apparent downside of bringing such an application is the processing costs and the time undertaken by the parties for the motion. However, by approving the retainer at the outset, all parties have a secure understanding and confirmation of the exact terms and conditions of the relationship.

In approving the order on February 26, 2012, Justice Turnbull not only recommended but encouraged such application's at the beginning of the solicitor-client relationship in order to eliminate the typical fairness and coercion issues raised when seeking approval of a settlement at the end of an action involving parties under a disability.

### **What happens next?**

We are not aware of prior court approval being granted pursuant to s. 5(1) (a) of the *Contingency Fee Agreement Regulation*. Therefore, it is not yet known how the court will utilize the order of Justice Turnbull in approving the settlement documentation under *Rule 7.08*. It is anticipated that this preliminary decision will satisfy the court in making

its decision that this particular agreement was entered into fairly and without coercion and will be upheld as a valid agreement. Therefore, the approval process under *Rule 7.08* will be less complex and adversarial for all parties.

### **Precedent Materials**

For precedent materials please download here:

1. [Application Record](#) and [Factum](#) for the approval of a contingency fee agreement
2. [Motion](#) to appoint a Litigation Guardian for the Respondent
3. [Order](#) approving Retainer Agreement